Resolving Trade Disputes in Africa: Choosing Between Multilateralism and Regionalism: The Case of COMESA and the WTO

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I. INTRODUCTION

Motivated by the desire to maximize their trade interactions, states have tended to take advantage of the frameworks provided by both multilateral and regional trading entities. The result is a complex web of relations in which states owe multiple allegiance to the trading regimes created at both of these levels. This allegiance extends to both substantive and procedural obligations, the latter of which dictates that in the event of a dispute, states should utilize the agreed upon mechanism to pursue resolution. In the absence of rules of exclusivity of one dispute resolution system over the other, states have the opportunity to decide which of the available mechanisms will suit their needs in any given scenario.[1]

This Article addresses the trade dispute resolution regime at the regional level in Africa and how it compares with the trade dispute resolution regime on an international level. Specifically, this Article compares the trade dispute resolution system under the Common Market

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1. *See* Kyung Kwak & Gabrielle Marceau, *Overlaps and Conflicts of Jurisdiction Between the WTO and RTAs*, Executive Summary of the Conference on Regional Trade Agreements para. 6 (Apr. 26, 2002), *available at* http://www.wto.org/english/tratop_e/region_e/sem_april02_e/marceau.pdf. The authors state:

> Many RTAs [regional trade agreements] have (substantive) rights and obligations that are parallel to those of the WTO Agreement. Generally, these RTAs may provide for their own dispute settlement mechanism, making it possible for the States to resort to different but parallel dispute settlement mechanisms for parallel or even similar obligations. This is not a unique situation as States are often bound by multiple treaties and the dispute settlement mechanisms of those treaties operate in a parallel manner.

Id. Perhaps the Arbitral Tribunal in the *Southern Bluefin Tuna (Austl. & N.Z. v. Japan)* case discusses this commonality of international obligations best in its statement by which it recognized that there

> is a commonplace of international law and State practice for more than one treaty to bear upon a particular dispute. There is no reason why a given act of a State may not violate its obligations under more than one treaty. There is frequently a parallelism of treaties, both in their substantive content and in their provisions for settlement of disputes arising thereunder.

S. Bluefin Tuna (Austl. & N.Z. v. Japan) (Award on Jurisdiction and Admissibility) (Arbitral Tribunal Constituted Under Annex VII of the United Nations Convention on the Law of the Sea) n.5 (Aug. 4, 2000), *available at* http://www.worldbank.org/icsid/bluefintuna/award080400.pdf.

for Eastern and Southern Africa (COMESA)[2] with that of the World Trade Organization (WTO).[3] Since each system provides its own dispute settlement mechanism (DSM), member states have the ability to choose which of the two they will invoke at any given time. How a country

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2. The Common Market for Eastern and Southern Africa was created when the following countries signed the Treaty Establishing the Common Market for Eastern and Southern Africa: Angola, Burundi, Comoros, Congo, Djibouti, Eritrea, Ethiopia, Kenya, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Rwanda, Seychelles, Somalia, Sudan, Swaziland, Tanzania, Uganda, Zambia, and Zimbabwe. *See The Treaty Establishing the Common Market for Eastern and Southern Africa* (Dec. 1994), *available at* http://www.comesa.int/about/treaty/treaty_pdf/view [hereinafter COMESA Treaty]. The COMESA Web site provides the following background information about the organization:

> COMESA's Priorities and Objectives
>
> The history of COMESA began in December 1994 when it was formed to replace the former Preferential Trade Area (PTA) which had existed from the earlier days of 1981. COMESA (as defined by its Treaty) was established 'as an organisation of free independent sovereign states which have agreed to co-operate in developing their natural and human resources for the good of all their people' and as such it has a wide-ranging series of objectives which necessarily include in its priorities the promotion of peace and security in the region.
>
> However, due to COMESA's economic history and background its main focus is on the formation of a large economic and trading unit that is capable of overcoming some of the barriers that are faced by individual states..[sic]
>
> COMESA's current strategy can thus be summed up in the phrase 'economic prosperity through regional integration'. With its 21 member states, population of over 385 million and annual import bill of around US$32 billion COMESA forms a major market place for both internal and external trading. Its area is impressive on the map of the African Continent and its achievements to date have been significant. . . .
>
> A Free Trade Area
>
> The COMESA states, in implementing a free trade area, are well on their way to achieving their target of removing all internal trade tariffs and barriers, an exercise which is to be completed by the year 2000. Within 4 years after that COMESA will have introduced a common external tariff structure to deal with all third party trade and will have considerably simplified all procedures.
>
> Trade Promotion
>
> Other objectives which will be met to assist in the achievement of trade promotion include:
>
> - Trade liberalisation and Customs co-operation, including the introduction of a unified computerised Customs network across the region.
> - Improving the administration of transport and communications to ease the movement of goods services and people between the countries.
> - Creating an enabling environment and legal framework which will encourage the growth of the private sector, the establishment of a secure investment environment, and the adoption of common sets of standards.
> - The harmonisation of macro-economic and monetary policies throughout the region.

Overview of COMESA, *at* http://www.comesa.int/about/Overview/view (last visited Oct. 11, 2004).

3. *See generally* WORLD TRADE: TOWARD FAIR AND FREE TRADE IN THE TWENTY-FIRST CENTURY (Marie Griesgraber et al. eds., 1997) (providing the history of the WTO).

decides where to take its complaint, and the factors that would likely influence that choice, are the principal issues addressed in this Article.

II. BACKGROUND

The general thrust of the WTO, as negotiated and concluded during the Uruguay Round, was to establish a broad membership-based, multilateral trading system to rein in protectionist, trade-distorting unilateralism in international trade.[4] Despite the avowed multilateralism of the current world trading system,[5] it is recognized that states may pursue less than global trading arrangements that would enable them to take advantage of more regional trading opportunities.[6] For this reason,

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4. *See* Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, Apr. 15, 1994, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 1 (1994), 33 I.L.M. 1125, 1140 (1994), *available at* http://www.wto.org/english/docs_e/legal_e/03-fa.pdf [hereinafter Final Act]. This Final Act is the document that ties in all the constituent agreements concluded during the Uruguay Round negotiations. It encompasses the Agreement Establishing the World Trade Organization, the umbrella agreement which in its annexes lists all the agreements that are embodied in the WTO. *See id.* at 1144-53. *See generally* JEFFREY J. SCHOTT, THE URUGUAY ROUND: AN ASSESSMENT (1994) (discussing the perceived benefits of a multilateral trading regime that was to be ushered in by the Uruguay Round framework).

5. *See, e.g.*, Ernst-Ulrich Petersmann, *International Trade Law and the GATT/WTO Dispute Settlement System 1948-1996: An Introduction*, *in* 11 STUDIES IN INTERNATIONAL ECONOMIC LAW, INTERNATIONAL TRADE LAW AND THE GATT/WTO DISPUTE SETTLEMENT SYSTEM 11 (Ernst-Ulrich Petersmann ed., 1997).

6. Article XXIV of the General Agreement on Tariffs and Trade (GATT) creates an exception to the general principle of nondiscrimination in international trade and allows states to enter into regional agreements for trade provided that certain conditions are met. Article XXIV(5) provides:

> [T]he provisions of this Agreement shall not prevent, as between the territories of the contracting parties, the formation of a customs union or of a free-trade area or the adoption of an interim agreement necessary for the formation of a customs union or of a free-trade area; *Provided* that:
>
> (a) with respect to a customs union, or an interim agreement leading to the formation of a customs union, the duties and other regulations of commerce imposed at the institution of any such union or interim agreement in respect of trade with contracting parties not parties to such union or agreement shall not on the whole be higher or more restrictive than the general incidence of the duties and regulations of commerce applicable in the constituent territories prior to the formation of such union or the adoption of such interim agreement, as the case may be;
>
> (b) with respect to a free-trade area, or an interim agreement leading to the formation of a free-trade area, the duties and other regulations of commerce maintained in each of the constituent territories and applicable at the formation of such free–trade area or the adoption of such interim agreement to the trade of contracting parties not included in such area or not parties to such agreement shall not be higher or more restrictive than the corresponding duties and other regulations of commerce existing in the same constituent territories prior to the formation of the free-trade area, or interim agreement as the case may be; and

the framework created under the WTO allows states to enter into customs unions and free trade agreements subject to compliance with certain conditions.[7] This regionalism exception that the WTO has granted to its members results in a situation where states seek to make the best of both worlds by belonging to both the WTO and to other agreements.[8] In the case of COMESA, for instance, member countries are obligated to one another, not just as COMESA parties, but also as parties under the wider scheme of the WTO.[9] Thus, a breach by one country under either of

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> (c) any interim agreement referred to in subparagraphs (a) and (b) shall include a plan and schedule for the formation of such a customs union or of such a free-trade area within a reasonable length of time.

General Agreement on Tariffs and Trade, Oct. 30, 1947, art. XXIV(5), 61 Stat. A-11, T.I.A.S. 1700, 55 U.N.T.S. 194, *available at* http://www.wto.org/english/docs_e/legal_e/gatt47_e.doc [hereinafter GATT]. *See generally* JAMES H. MATHIS, REGIONAL TRADE AGREEMENTS IN THE GATT/WTO: ARTICLE XXIV AND THE INTERNAL TRADE REQUIREMENT (2002) (providing a comprehensive treatment of the relationship between RTAs and the multilateral framework of the WTO).

7. *See* GATT, *supra* note 6, art. XXIV.

8. In a seminar on regional trade agreements and the WTO, the WTO Secretariat, perhaps concerned at the rate at which countries were pursuing the RTA option, aptly summarized the situation:

> The drive towards the conclusion of regional trade agreements (RTAs) which gathered pace in the 1990s continues unabated. As of October 2003, all 146 WTO Members, with the exception of Mongolia, currently participate in or are actively negotiating RTAs. The period following the launch of the Doha Development Agenda (DDA) in November 2001 has been one of the most prolific in terms of notifications of RTAs: during this two year period a total of 33 RTAs have been notified to the WTO, of which 21 cover trade in goods, and 12 cover trade in services. In 2003 alone, 12 RTAs have been signed, negotiations have started on 9 new RTAs, and 13 have been proposed.
>
> Over the past five years many WTO Members traditionally favouring MFN liberalization—among them Australia; New Zealand; Japan; Singapore; Korea; Hong Kong, China; China; and Chinese Taipei—have added the regional card to their trade policy repertoire and appear to be making up for lost time by energetically seeking RTA partners. While the greatest concentration of RTAs is in the Euro Mediterranean region where over 100 RTAs are currently in force, the main focus of RTA activity has shifted away from Europe towards Asia-Pacific, where APEC countries, in particular, are engaged in negotiating RTAs either between themselves or with other cross-regional partners. Increasingly, the conclusion of RTAs is connected to countries' broader policy aims, and include political and security considerations as well as economics.

WTO Secretariat, *The Changing Landscape of RTAs*, paras. 1-2 (Nov. 14, 2003) (prepared for the Seminar on Regional Trade Agreements and the WTO), *available at* http://www.wto.org/english/tratop_e/region_e/sem_nov03_e/boonekamp_paper_e.doc [hereinafter *Changing Landscape*].

9. For COMESA countries, the situation is even more complex than it may seem, since, in addition to being members of the WTO, some also participate in other RTAs. For instance, Kenya and Uganda, in addition to being members of COMESA, are also constituent members of the East African Community, a trading bloc that includes Tanzania. Tanzania is both a member of the East African Community and the South African Development Community, and it would have been in an even more complicated situation if it had never pulled out of COMESA. *See, e.g.*,

these trade regimes is likely to produce consequences with respect to its obligations under the other regime.[10] Where each regime provides a dispute settlement mechanism, a complaining country will most likely be in the unique position of having to choose which DSM to employ to vindicate its rights.[11] This is true especially in the case of COMESA, where there is no clear provision regarding the relationship between its dispute resolution mechanism and that of the WTO.[12]

While regional trade agreements (RTAs) have always provided an alluring supplement to the multilateral trading framework, the establishment of the WTO saw a significant increase in the number of countries opting to channel their trade through regional initiatives.[13] Ranging from free trade agreements to customs unions, RTAs have become the vehicle through which an increasing volume of world trade is being conducted.[14] African countries have also kept up with this RTA vogue by concluding similar agreements with each other, or with other non-African countries or entities such as the European Union.[15]

This Article addresses only those agreements that are exclusively intra-African. Of these agreements, there are several examples. In West Africa, there exists the West African Economic and Monetary Union

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COMESA, *Discussion Paper on Trade Policy Compatibility and Impact Assessment of Economic Partnership Agreements and Preliminary Adjustment Scenarios* (2002) (providing a discussion of the extent of such multiple memberships in the case of African RTAs), *available at* http://www.comesa.int/trade/multilateral/epa/Trade_policy/Discussion%20Paper%20on%20Trade%20Pol icy%20/view.

10. *See generally* Kwak & Marceau, *supra* note 1.

11. *Id.*

12. The North American Free Trade Agreement (NAFTA) provides a good example of a regional framework that attempts to make a clear delineation between the role of its dispute settlement provision and that of the WTO. NAFTA's stated goal is to establish a free trade zone between Canada, Mexico, and the United States. NAFTA allows parties the discretion to choose the forum in the case of "disputes regarding any matter arising under both this Agreement and the *General Agreement on Tariffs and Trade*, any agreement negotiated thereunder, or any successor agreement." North American Free Trade Agreement, Dec. 8-17, 1992, Can.-Mex.-U.S., art. 2005, 32 I.L.M. 605, 694 [hereinafter NAFTA]. Certain types of disputes must nevertheless be settled under NAFTA instead of the GATT mechanism, such as disputes on sanitary and phytosanitary measures which are subject to the exclusive jurisdiction for standards-related measures of the NAFTA mechanism. See David A. Gantz, *Dispute Settlement Under the NAFTA and the WTO: Choice of Forum Opportunities and Risks for the NAFTA Parties*, 14 AM. U. INT'L L. REV. 1025 (1999), for a detailed discussion on the NAFTA/WTO relationship.

13. *See Changing Landscape*, *supra* note 8, para. 1.

14. *Id.*

15. *See generally* OECD, REGIONAL INTEGRATION IN AFRICA (2002) (providing a general treatment of the various economic integration initiatives in Africa).

(WAEMU)[16] and the Economic Community of West African States (ECOWAS).[17] Central African countries have congregated into the Central African Economic and Monetary Community (CEMAC).[18] East Africa has established the East Africa Community (EAC),[19] while Southern African countries created the Southern African Development Community (SADC).[20] COMESA, which is the basis of this inquiry, is composed of countries from the eastern and southern parts of Africa.[21]

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16. Composed of eight nations (Benin, Burkina Faso, Côte d'Ivoire, Guinea Bissau, Mali, Niger, Senegal, and Togo), WAEMU was formed in 1994 with the prime objective of strengthening the competitive capacity of the economies of its member states; stimulating a convergence of the states' economic policies; setting up a "common market based on the free movement of persons, goods and services, and capital," with a common external tariff; and harmonizing the fiscal policies of the member states. *See* Naceur Bourenane, *Regional Integration in Africa: Situation and Prospects*, *in* OECD, *supra* note 15, at 24-25.

17. ECOWAS was set up by the Treaty of the Economic Community of West African States (ECOWAS Treaty) which was signed by sixteen West African States: Benin, Burkina Faso, Cape Verde, Côte d'Ivoire, Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, and Togo. Article 2 of the Treaty provides that the ECOWAS shall be the "*sole economic community in the region for the purpose of economic integration*." *See* Treaty of the Economic Community of West African States, May 28, 1975, art. 2 (revised), *available at* http://www.iss.co.za/AF/RegOrg/unity_to_union/pdfs/ecowas/3ECOWASTreaty.pdf [hereinafter ECOWAS Treaty].

18. CEMAC is made up of six countries: Cameroon, the Central African Republic, Congo, Equatorial Guinea, Gabon, and Chad. At its inception in 1998, its aim was "to further economic development through the setting up of a customs union to guarantee the free movement of persons, goods and services, and capital." Its structure is said to resemble that of WAEMU. *See* OECD, *supra* note 15, at 26.

19. The Treaty establishing the East African Community (EAC Treaty) was signed by heads of government of the partner states on November 30, 1999, in Arusha, Tanzania, and came into force on July 7, 2000. EAST AFRICAN COMMUNITY, *About EAC. . .*, *available at* http://www.eac.int/about_eac.htm (last visited Feb. 15, 2005); EAST AFRICAN COMMUNITY, *History . . .*, *available at* http://www.eac.int/history.htm (last visited Feb. 15, 2005). The East African Community was formally launched on January 15, 2001. EAST AFRICAN COMMUNITY, *History . . .*, *supra*. The broad goal of the EAC is to enhance cooperation in all areas for the mutual benefit of the partner states. In order to reach this goal, a Customs Union will be established as the entry point of the Community followed by a Common Market, a Monetary Union, and ultimately a Political Federation of the East Africa States. *See* East Africa Community Treaty, Jan. 5, 2001, art. 5, *available at* http://66.110.17.178/documents/EAC%20Treaty.pdf.

20. The Southern African Development Community (SADC) was established by a treaty signed at the Summit of Heads of State and/or Government on August 17, 1992, in Windhoek, Namibia. SADC has fourteen Member States: Angola, Botswana, the Democratic Republic of Congo (DRC), Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, the Republic of South Africa, Swaziland, Tanzania, Zambia, and Zimbabwe. The overall objective of SADC is "to build a Region in which there will be a high degree of harmonisation and rationalisation to enable the pooling of resources to achieve collective self-reliance in order to improve the living standards of the people of the region." *See* S. African Dev. Cmty., *History, Evolution and Current Status*, *at* http://www.sadc.int/index.php?lang=english&path=about/background&page=history (last visited Oct. 10, 2004).

21. *See* discussion *infra* Part IV.

While one primary objective of these arrangements is to facilitate trade among the members, issues such as security, resource utilization, political development, and other nontrade matters are important goals as well.[22] Usually these agreements start as broad frameworks for cooperation on legal, economic, social, and political issues. These agreements, however, lead to further negotiations that culminate into more specific agreements focusing on more specific issues, such as establishing free trade areas and customs unions.[23] Trade is nevertheless a major motivating factor.[24] There are also cross-regional agreements, conducted mainly between African states and the European Union, including the African, Caribbean, and Pacific Countries and the European Union Partnership (ACP-EU),[25] and the European Union and South African Development Community Partnership (EU-SADC).[26] There are also pan-Africa integration efforts. An example of this is the African Economic Community (AEC), which is intended to result in an African Economic and Monetary Union (AEMU) in the future.[27] Just as these agreements create a framework for the negotiation of rules for trade, so too do they provide frameworks for the resolution of conflicts that arise amongst their constituent members.[28] However, the fact that these countries are simultaneously members of the WTO means that they

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22. *See, e.g.*, OECD, *supra* note 15, R. 1.2(a). The objectives of African integration efforts are usually varied and will encompass the legal, social, political, and economic fields.

23. Generally, the main treaty establishes the basic framework of cooperation. The details on economic and trade policies are usually expressed in a progressive manner with specific time tables. For example, the COMESA customs union was not established until later in the life of the institution. EAC countries are currently finalizing details about their customs union. *See, e.g.*, Joseph Mwamunyange, *EAC Ministers to Meet over Customs Protocol*, E. AFR., Feb. 23, 2004, *available at* http://www.nationaudio.com/News/EastAfrican/current/Regional/Regional2302200427.html.

24. *See* OECD, *supra* note 15.

25. The European Community and the Group of African, Caribbean, and Pacific States entered into the Cotonou Agreement with a view to "promote and expedite the economic, cultural and social development of the ACP States" and to accelerate the integration of the ACP countries into the global economy "with a view to contributing to peace and security and to promoting a stable and democratic political environment." Partnership Agreement Between the Members of the African, Caribbean, and Pacific Group of States on the One Part, and the European Community and its Member States on the Other Part, art. 1, *available at* http://europa.eu.int/comm/development/body/cotonou/agreement_en.htm (last visited Oct. 10, 2004) [hereinafter The Cotonou Agreement].

26. *See* SADC-EU, *Regional Strategy Paper and Regional Indicative Programme for the Period 2002-2007 (Draft)*, *available at* http://europa.eu.int/comm/development/body/csp_rsp/print/r7_rsp_en.pdf (last visited Feb. 15, 2005). SADC-EU is a cooperative initiative of the countries that make up the European Union and the members of the SADC.

27. *See Changing Landscape*, *supra* note 8, para. 20.

28. *See* Kwak & Marceau, *supra* note 1, para. 6.

are likely to be subjected to the multilateral regime for the resolution of intra-regional disputes.[29]

This Article will focus only on the relationship of the COMESA dispute resolution mechanism with that of the WTO. It will also address how either framework will affect the choice of which forum is appropriate for the resolution of disputes for the countries that belong to both institutions. COMESA is being used here as a point of departure for various reasons. First, the COMESA and African RTAs are similar in structure and principles, so that the choice of one over the other will result in almost the same analytical conclusions.[30] Second, the COMESA trade regime is now widely integrated into the trading regime of its member states to the extent that it has a clear, direct influence on the trade policies of its constituent members.[31] Third, with a wide membership and a large volume of trade conducted under its auspices, COMESA seems to provide a forum where trade disputes are more likely to occur.[32]

III. THE GATT ARTICLE XXIV EXCEPTION TO MULTILATERALISM: ITS INFLUENCE ON DISPUTE RESOLUTION

The general rule under the General Agreement on Tariffs and Trade (GATT) is to prohibit trade policies that grant favor to only some of the WTO members.[33] However, the GATT recognizes as an exception to this

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29. *See id.*

30. *See generally* OECD, *supra* note 15. Some of the African RTAs replicate each other, not only in terms of their structure, but also as regards the principles which inform them.

31. With a membership of almost half of the African countries, the combined population of people falling within the COMESA bloc is estimated at 400 million with a combined GDP of over US$170 billion. There is a fairly high level of intra-regional integration among its member states. *See* COMESA, *Annual Report for COMESA for the Year Ending December 31, 2002* (Dec. 31, 2002), *available at* http://www.comesa.int/about/an_rep/view.

32. The long-running trade conflicts between Egypt and Kenya seemingly called for a deeper understanding. *See generally News from the Regions: Africa*, 4 ICTSD BRIDGES WKLY. TRADE NEWS DIG. No. 28, *available at* http://www.ictsd.org/html/weekly/story5.18-07-00.htm; Otsieno Namwaya, *Kenya-Egypt Trade Dispute 'Due to Pressure by Tycoons'*, E. AFR., Feb. 7-13, 2000, *available at* http://www.nationaudio.com/News/EastAfrican/07022000/Business/Business2.html; Vitalis Omondi, *Yes, Egypt Can Do Without Kenyan Tea, but . . .*, E. AFR., July 17, 2000, *available at* http://www.nationaudio.com/News/EastAfrican/17072000/Opinion/Interview.html; *Egypt Filters out Kenya Tea*, MIDDLE E. TIMES, July 21, 2000, *available at* http://metimes.com/2K/issue2000-29/bus/egypt_filters_out.htm; *Egypt Flouts COMESA's Rules, Says Minister*, DAILY NATION, June 28, 2002, *available at* http://63.110.589/News/DailyNation/28062002/Business/Business47.htm; Isaac Esipisu, *Ban on Tea Cost Kenya Sh25m in Lost Exports*, DAILY NATION, Nov. 4, 2003, *available at* http://www.nationaudio.com/News/DailyNation/Supplements/bw/04112003/story04117.htm. *Accord infra* note 200 and accompanying text.

33. See, for example, MATHIS, *supra* note 6, at 1, which states:

rule "the desirability of increasing freedom of trade by the development, through voluntary agreements, of closer integration between the economies of the countries parties to such agreements."[34] In this regard, it provides that the formation of customs unions and free trade areas, or agreements leading to the establishment of either of these, "shall not [be] prevent[ed]."[35] The language of article XXIV, though not necessarily creating a right in a strict sense, nevertheless raises a legitimate expectation that the formation of regional trade agreements will not be prohibited.[36] However, the GATT article sets forth what may be considered a validation mechanism whereby RTAs are approved subject to compliance with certain requirements.[37] Thus, while RTAs should generally be intended to facilitate trade between members, the RTAs should not be used to raise barriers against nonmembers in a manner that is clearly meant to deny them the advantages that they enjoyed prior to the formation of the RTA.[38] Placing restrictions on nonmembers that are more burdensome than they were prior to the RTA will clearly flout this requirement.[39] The GATT requires that RTAs, or plans to form them, be communicated to the contracting parties for validation purposes through the Committee on Regional Trade Agreements.[40]

> [T]he legal principle of non-discrimination is fundamental to the multilateral trading system. Discrimination is "bad" and non-discrimination is "good" . . . . In GATT law the granting of a favour is not a good thing if it is discriminatory. . . .
>
> However, when it comes to permitting regional trade agreements in the WTO, the non-discrimination rule appears to be turned on its head. GATT Article XXIV is supposed to grant an exception from the rule for free-trade areas or customs unions when the regional members exchange a most extensive set of positive preferences. This infers lots of positive discrimination for them and lots of potentially negative discrimination for everyone else.

34. GATT, *supra* note 6, art. XXIV(4).
35. *Id.*
36. Nevertheless, some commentators have characterized it as a right. *See, e.g.*, Kwak & Marceau, *supra* note 1, para. 4 ("The WTO jurisprudence has made it clear that Members have a 'right' to form preferential trade agreements, but this right is conditional.").
37. *See* GATT, *supra* note 6, art. XXIV(5)(a)-(c).
38. *See id.*
39. *See id.*
40. *See* GATT, *supra* note 6, art. XXIV(7):

> (a) Any contracting party deciding to enter into a customs union or free-trade area, or an interim agreement leading to the formation of such a union or area, shall promptly notify the CONTRACTING PARTIES and shall make available to them such information regarding the proposed union or area as will enable them to make such reports and recommendations to contracting parties as they may deem appropriate.
>
> (b) If, after having studied the plan and schedule included in an interim agreement referred to in paragraph 5 in consultation with the parties to that agreement and

When validated, a regional trade agreement establishes a regime of trade that exists side by side with that of the GATT/WTO. Its terms bind those of the WTO members that are also its members. But how do the two regimes relate? Does the requirement of notification and subsequent validation under the auspices of the WTO mean that the WTO mechanism supersedes that of the RTA and that, in the event of conflict, the latter must give way to the former? Regarding obligations owed to third parties, it appears that the WTO rules take precedence over those of the RTA. Not as clear, however, is the extent to which the WTO will police the obligations of the members of the RTA, and also the level of competence the WTO will have over the internal (rather than external) RTA regime. Issues of choice of forum would be easy to resolve if the agreements set out a hierarchy which specifically stated which forum would determine what issues and which forum would prevail in case of conflict.[41] With regard to the WTO and the various RTAs, where a violation is of an obligation unique to either the WTO or the RTA, then the relevant mechanism would be easily invoked without a problem. Where this delineation is hazy, issues of choice of forum become important because it would now be possible for a country to seek to redress a violation under either of the available mechanisms.[42]

When a member claims a violation within the auspices of the RTA, should the WTO mechanism be available to resolve the dispute? Logically, since the RTA seems to create a regime relatively autonomous from that of the WTO (at least insofar as its constituent members are concerned), then any matter arising under the RTA must be resolved

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> taking due account of the information made available in accordance with the provisions of subparagraph (a), the CONTRACTING PARTIES find that such agreement is not likely to result in the formation of a customs union or of a free-trade area within the period contemplated by the parties to the agreement or that such period is not a reasonable one, the CONTRACTING PARTIES shall make recommendations to the parties to the agreement. The parties shall not maintain or put into force, as the case may be, such agreement if they are not prepared to modify it in accordance with these recommendations.

The body that receives the notifications on behalf of the contracting parties is the Council for Trade in Goods. The examination for validity, however, is done by the Committee on Regional Trade Agreements, a body established by the WTO General Council on February 6, 1996, with the mandate of, inter alia, examining all RTAs notified to the Council for Trade in Goods under article XXIV GATT. *See* WTO, Committee On Regional Trade Agreements: Decision of February 1996, WT/L/127 (Feb. 7, 1996).

41. Gantz, *supra* note 12, at 1034 (noting the specificity with which NAFTA reserves jurisdiction for matters arising under it, though jurisdiction might also fall under the WTO DSM).

42. *See* Kwak & Marceau, *supra* note 1, para. 54.

within its framework.[43] However, because a violation may be interpreted as falling under either the WTO or the relevant RTA, it is possible that the WTO mechanism may be brought to bear over the dispute in question.[44] This all depends on where a country chooses to have its conflicts resolved.

According to James Mathis, these questions are no longer theoretical.[45] It has been shown in at least one WTO case that it is possible that choice of forum questions will arise in cases where a country alleges a violation that can be read to fall under either the WTO or the relevant RTA.[46] The *Turkey-Restrictions on Imports of Textile and Clothing Products* case (*Turkey-Textiles*), while affirming the rule that violations of third-party rights will invoke the WTO DSM, suggests that internal violations, such as those between the constituent members of a particular RTA, might be subjected to the same sort of scrutiny.[47] This case, brought by India, alleged that Turkey violated the GATT and WTO Agreement on Textiles and Clothing by imposing quantitative restrictions on India.[48] Turkey raised an objection to the case on the ground that the quotas had been imposed pursuant to a customs union arrangement it had with the European Community.[49] Turkey further argued that, since the customs union had not undergone the WTO validation process, the panel, in examining the measures, would be engaging in a role that was not its own.[50] In asserting its jurisdiction, the panel ruled that such measures could be scrutinized through the WTO DSM regardless of the status of compatibility of the proposed customs union.[51] The panel held, however,

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43. *See id.* paras. 12-16. The authors point out that, technically, an RTA regime is different from the regime of law established under the WTO, so that in all probability, a state may perfectly bring its complaint simultaneously under both systems since the "matter" under consideration will be different in both situations, with the RTA mechanism examining a violation under the RTA, and the WTO panel examining a violation under the WTO. *But see* MATHIS, *supra* note 6, at 218.

44. *See generally* Kwak & Marceau, *supra* note 1 ("[I]t is unlikely that a WTO panel would give any consideration to the defendant's request to halt the procedures just because similar or related procedures are being pursued under a regional arrangement.").

45. *Id.*

46. *See generally* MATHIS, *supra* note 6, ch. 10 (discussing the application of GATT Article XXIV in WTO jurisprudence).

47. GATT Dispute Panel Report on Turkey-Restrictions on Imports of Textile and Clothing Products, WT/DS34/R, 5 Int'l Trade Rep., No. 4, at 639 (May 31, 1999) [hereinafter Panel Report].

48. *Id.* ¶ 2.39.

49. *Id.* ¶ 6.31.

50. *Id.* ¶ 6.35.

51. *Id.* ¶ 9.207.

that it could not usurp the function of the Committee on Regional Trade Agreements in looking at the compatibility of the entire customs union.[52]

Though this dispute involved a restriction affecting a third party, the panel indicated that WTO intervention would be possible in some cases (for example, against a constituent member of the customs union), even when the infringement was internal.[53] The panel sought its authority from the Vienna Convention on the Law of Treaties, article 41 of which determined the circumstances where parties to a multilateral agreement could modify the obligations between themselves.[54] Accordingly, two parties would not have this right if modification was prohibited by the multilateral agreement covering the subject matter.[55] Thus, Turkey's adoption of quotas to discriminate against India was a violation of articles XI and XIII of the GATT.[56] By analogy, if a bilateral modification was not allowed if it infringed on the rights of a third party and thus violated article XI, regional members likewise may not modify the obligations imposed by the same article XI regarding intra-regional trade.[57] The point is that, notwithstanding the absence of any authoritative pronouncement, the WTO DSM is not foreclosed as a possible forum even in cases of internal violations in RTAs.[58]

IV. COMESA AND THE WTO: THE CONFLUENCE OF OBLIGATIONS

A. *The Basic Framework*

The Treaty Establishing the Common Market for Eastern and Southern Africa (COMESA Treaty) was signed on November 5, 1993, in Kampala, Uganda, and was later ratified in Lilongwe, Malawi, on December 5, 1994.[59] It introduced the Common Market to a previously existing trade arrangement, the Preferential Trade Area, that had been in

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52. *See id.* ¶ 9.208 ("[W]e decided that we had jurisdiction to examine any specific measure adopted by a WTO Member in the context of a customs union but that, in this case, we did not need, and indeed we were asked by the parties not to assess the overall WTO compatibility of the Turkey-EC customs union.").

53. *See* MATHIS, *supra* note 6, at 218.

54. *Id.*

55. *Id.*

56. Panel Report, *supra* note 47, ¶ 10.1.

57. *But see* MATHIS, *supra* note 6, at 218. Mathis shows that this argument might easily be dismissed on the basis that there might not be complainants in the case of intra-regional violations that impinge the WTO agreements as well.

58. *Id.*

59. A detailed history of COMESA can be found on the COMESA Web site, *at* http://www.comesa.int/about/Overview/view (last visited Oct. 11, 2004).

operation since 1981.[60] A fundamental principle behind COMESA is that there be "equality and inter-dependence of the Member States."[61] COMESA's main focus is on the formation of a large economic trading unit capable of overcoming the barriers faced by individual states, a similar goal to that of the WTO.[62] Just as the multilateral trading regime is guided by the principle of reducing all tariff-based impediments to trade, so too is COMESA.[63] At the time that COMESA was established certain goals were set forth.[64] The year 2000, for instance, was targeted for the removal of all internal trade tariffs through the creation of a free trade area.[65] The year 2004 should have marked the introduction of a common external tariff structure relating to all third-party trade.[66] However, the 2000 goal has only been partially attained.[67] While the projected target had been a reduction of up to eighty percent, today only a handful of countries have attained that level, with many of them hovering around the seventy percent mark.[68] With regard to the introduction of a common external tariff, problems still persist emanating from the fear that some countries have of losing their revenue.[69]

B. Trade Liberalization: Nondiscrimination and Most Favored Nation Status

To attain these and other trade objectives, the COMESA Treaty has set out obligations to be fulfilled by member states. The focus of these obligations is to broaden the integration process through the adoption of comprehensive trade liberalization measures, such as the complete elimination of all tariff and nontariff barriers and the elimination of customs duties.[70] Member states have accordingly bound themselves to a

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60. *Id.*
61. COMESA Treaty, *supra* note 2, art. 6(a).
62. *See id.* art. 3; *see, e.g.*, WTO, UNDERSTANDING THE WTO 11 (3d ed. 2003) ("Lowering trade barriers is one of the most obvious means of encouraging trade. The barriers concerned include customs duties (or tariffs) and measures such as import bans or quotas that restrict quantities selectively.").
63. *See generally* COMESA Treaty, *supra* note 2.
64. *Id.* arts. 3-5; *see also* Bourenane, *supra* note 16.
65. COMESA Treaty, *supra* note 2, art. 46; *see also* Bourenane, *supra* note 16, at 20.
66. COMESA Treaty, *supra* note 2, art. 47; *see also* Bourenane, *supra* note 16, at 20.
67. Bourenane, *supra* note 16, at 20.
68. *Id.*
69. *See id.* ("Three years before coming into effect, major problems are still pending with no ready answer in sight. These concern the levels and sources of financing of compensation for loss of tax revenue, the *modus operandi* of the common external tariff (CET) and the categories of goods concerned.").
70. *See* COMESA Treaty, *supra* note 2, arts. 3-5.

range of obligations under the agreement. According to the COMESA Treaty, in the area of trade liberalization, member states shall do the following:

> (a) establish a customs union, abolish all non-tariff barriers to trade among themselves; establish a common external tariff; co-operate in customs procedures and activities;
> (b) adopt a common customs bond guarantee scheme;
> (c) simplify and harmonize their trade documents and procedures;
> (d) establish conditions regulating the re-export of goods from third countries within the Common Market;
> (e) establish rules of origin with respect to products originating in the Member States.[71]

Two fundamental principles guide the trade liberalization objectives: first, the most favored nation principle, as articulated in article 56(1) of the COMESA Treaty, and second, the principle of nondiscrimination, as set out in article 57.[72] In language that resonates closely with language found in the GATT, the first provision obligates member states to "accord to one another the most favoured nation treatment."[73] The second provision, on the other hand, calls on member states to "refrain from enacting legislation or applying administrative measures which directly or indirectly discriminate against the same or like products of other Member States."[74] This language is similar to that which is found in GATT articles I and III.[75] Thus, at this basic level,

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71. *Id.* art. 4(1)(a)-(e).
72. *See id.* arts. 56(1), 57.
73. *Id.* art. 56 (1).
74. *Id.* art. 57.
75. See GATT article I(1) which states:

> With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.

GATT, *supra* note 6, art. I(1). Article III, entitled *National Treatment on Internal Taxation and Regulation*, provides:

> 1. The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in

similar obligations were created for countries that are both members of the WTO and the COMESA. The fact that they operate at different levels does not deviate from the point that their content is the same, and thus a breach at one level may be considered to produce consequences at another level.

The overlap of obligations is also apparent with respect to certain specific provisions. The COMESA Treaty framework relating to trade liberalization appears to have been taken word for word from the GATT.[76] The concept of trade liberalization itself is one that might be considered since it is central to both the GATT process and the COMESA Treaty framework.[77] The language in article 45 of the COMESA Treaty says that "customs duties and other charges of equivalent effect imposed on imports shall be eliminated" and "[n]on-tariff barriers including quantitative or like restrictions or prohibitions and administrative obstacles to trade among the Member States shall also be removed."[78] These provisions, coupled with article 56's most favored nation principle and article 57's nondiscrimination principle, indicate a confluence of objectives and obligations under the COMESA and the GATT/WTO. Under the GATT, the most favored nation principle requires that a contracting state shall not discriminate against trading with one contracting party in favor of another.[79] In other words, similar treatment for all contracting parties is required. The nondiscrimination principle requires that the laws and regulations of a contracting party apply equally to both domestic and other competing foreign goods.[80] Like the COMESA Treaty, the GATT contemplates the complete removal of all nontariff barriers to trade, coupled with concessional tariff reduction obligations aimed at facilitating trade.[81] The corresponding provision

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> specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.
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> 2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.

GATT, *supra* note 6, art. III(1)-(2).

76. *See* COMESA Treaty, *supra* note 2, ch. 6.
77. *See id.*; *see generally* GATT, *supra* note 6.
78. COMESA Treaty, *supra* note 2, art. 45.
79. GATT, *supra* note 6, art. I.
80. *See id.* arts. I(1), III(1)-(2).
81. *See id.* arts. I(1), II, III(1)-(2).

regarding nondiscrimination is article III of the GATT, which requires equality in the application of internal laws to both domestic and foreign goods.[82]

C. Subsidies and Antidumping and Countervailing Duties

There are other ways in which the COMESA framework seems to be interwoven with that of the GATT/WTO. While this interplay may not be as neat as one would want it to be, any ambiguities that exist in the determination of whether a measure complies with either or both merely creates the opportunity for the exercise of choice of forum by member states. The obligations of states regarding market access, subsidies, and antidumping and countervailing duties seem to be related, at least with respect to the basic principles.[83] This does not mean that the interpretation of the obligations under both regimes will be the same. Rather, the fact that one forum may read a provision differently from the other forum creates the possibility that one of those interpretations may just turn out to be the forum hoped for by a party to a dispute. This possibility, however remote, may guide a country's choice as to the forum it employs in resolving a trade dispute.

The COMESA provisions relating to subsidies and antidumping and countervailing duties are identical to those of the WTO agreements. Article 51(1) and (2) of the COMESA Treaty, for example, seem to have been cut and pasted from GATT article VI(1) with respect to the definition of dumping and the condemnation of it as an undesirable trade practice.[84] Additionally, article VI(2) of the GATT and article 51(3) of

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82. *Id.* art. III.

83. A detailed analysis of this kind of relationship is probably out of this Article's purview. In principle, the obligations are similar, and in some cases identical, creating the opportunity for choice of forum by states in instances of violations.

84. See GATT, *supra* note 6, art. VI, which states:

> 1. The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry. For the purposes of this Article, a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another
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> (a) is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country, or,
>
> (b) in the absence of such domestic price, is less than either
>
> (i) the highest comparable price for the like product for export to any third country in the ordinary course of trade, or

(ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit.

Due allowances shall be made in each case for differences in conditions and terms of sale, for differences in taxation, and for other differences affecting price comparability.

2. In order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product. For the purposes of this Article, the margin of dumping is the price difference determined in accordance with the provisions of paragraph 1.

. . . .

6. (a) No contracting party shall levy any anti-dumping or countervailing duty on the importation of any product of the territory of another contracting party unless it determines that the effect of the dumping or subsidization, as the case may be, is such as to cause or threaten material injury to an established domestic industry, or is such as to retard materially the establishment of a domestic industry.

Compare with the COMESA Treaty, *supra* note 2, art. 51:

1. The Member States recognise that dumping, by which products of a Member State are introduced into the commerce of another Member State at less than the normal value of the products, is to be prohibited if it causes or threatens material injury to an established industry in the territory of the other Member State or materially retards the establishment of a domestic industry.
2. For the purposes of this Article, a product is to be considered as being introduced into the commerce of an importing Member State at less than its normal value, if the price of the product exported from one Member State to another:
   (a) is less than the comparable price in the ordinary course of trade, for the like product when destined for consumption in the exporting Member State; or
   (b) in the absence of such domestic prices, is less than either:
      (i) the highest comparable price for the like product for export to any third country in the ordinary course of trade; or
      (ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit:

   Provided that due allowance shall be made in each case for differences in conditions and terms of sale, for differences in taxation and for other differences affecting price comparability.
3. A Member State may, for the purposes of offsetting or preventing dumping, and subject to the provision of paragraph 4 of this Article, levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product. For the purposes of this Article, the margin of dumping is the price difference determined in accordance with the provisions of paragraph 2 (b) (ii) of this Article.
4. No Member State shall levy any anti-dumping duty on the importation of any product of another Member State unless it is determined that the effect of the alleged dumping is such as to cause or threaten material injury to an established domestic industry or such as to retard materially the establishment of a domestic industry.

the COMESA Treaty use the same language to allow member states to levy an antidumping duty to offset the effects of dumping or eliminate it altogether.[85] The material injury test is identical for both trading arrangements, as is the obligation to levy only duties that are proportional to the loss suffered.[86] It appears that the substantive obligations relating to subsidies and antidumping and countervailing duties are the same, regardless of how these objectives are intended to be achieved.[87]

Under COMESA, however, subsidies are not differentiated into export and nonexport subsidies as is the case under article XXVI of the GATT.[88] No distinction is created in terms of primary or manufactured products. Article 52 of the COMESA Treaty provides that "any subsidy

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> 5. Dumping from a third country into a Member State shall be prohibited and any affected Member State may, pursuant to the provisions of paragraph 3 of this Article, levy an anti-dumping duty on any dumped products.

Further elaboration of these provisions can be found in the Regulations on Trade Remedy Measures for COMESA, and the Agreement on Subsidies and Countervailing Measures for the WTO.

85. *See* GATT, *supra* note 6, art. VI(1), (2), (6), at 430-31; COMESA Treaty, *supra* note 2, art. 51(1)-(5).

86. *See* GATT, *supra* note 6, art. VI(1), (2), (6), at 430-31; COMESA Treaty, *supra* note 2, art. 51(1)-(5).

87. *See* GATT, *supra* note 6, art. VI(1), (2), (6), at 430-31; COMESA Treaty, *supra* note 2, art. 51(1)-(5).

88. GATT article XVI provides:

> Section A — Subsidies in General
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> 1. If any contracting party grants or maintains any subsidy, including any form of income or price support, which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into, its territory, it shall notify the CONTRACTING PARTIES in writing of the extent and nature of the subsidization, of the estimated effect of the subsidization on the quantity of the affected product or products imported into or exported from its territory and of the circumstances making the subsidization necessary. In any case in which it is determined that serious prejudice to the interests of any other contracting party is caused or threatened by any such subsidization, the contracting party granting the subsidy shall, upon request, discuss with the other contracting party or parties concerned, or with the CONTRACTING PARTIES, the possibility of limiting the subsidization.
>
> Section B — Additional Provisions on *Export Subsidies*
>
> 2. The contracting parties recognize that the granting by a contracting party of *a subsidy on the export* of any product may have harmful effects for other contracting parties, both importing and exporting, may cause undue disturbance to their normal commercial interests, and may hinder the achievement of the objectives of this Agreement.
> 3. Accordingly, contracting parties should seek to avoid the use of *subsidies on the export of primary products*.

GATT, *supra* note 6, art. XVI(1)-(3) (emphasis added).

granted by a Member State or through state resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall . . . be incompatible with the Common Market."[89] The possibility of claims for simultaneous violations is not far removed. The GATT regime, in recognition of the potency of nontariff restrictions to distort trade, sets out to bar quantitative limitations, whether based on quotas or restrictive entry requirements on exports and imports.[90] In a similar vein, though perhaps with less specificity, the COMESA regime imposes a global ban on all nontariff barriers to imports, calls for their removal where they exist, and bans their introduction where they do not exist.[91]

V. OVERVIEW OF DISPUTE RESOLUTION UNDER COMESA AND THE WTO

A. *The WTO DSM*

1. Understanding on Rules and Procedures Governing the Settlement of Disputes

Settlement of trade disputes under the WTO's predecessor, the GATT, was blamed for many weaknesses, including the lack of an institutional framework and procedure for the resolution of disputes as well as questions of delay, uncertainty, and ineffectiveness.[92] The need to improve the dispute settlement system led WTO members to adopt the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) which established the Dispute Settlement Body (DSB),

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89. *See* COMESA Treaty, *supra* note 2, art. 52.
90. *See* GATT, *supra* note 6, art. XI.
91. *See* COMESA Treaty, *supra* note 2, art. 45.
92. Vast literature exists which discusses the many failures of the pre-WTO dispute settlement process. *See generally* DISPUTE RESOLUTION IN THE WORLD TRADE ORGANIZATION (James Cameron & Karen Campbell eds., 1998); INTERNATIONAL LAW AND THE GATT/WTO DISPUTE SETTLEMENT SYSTEM (Ernst-Ulrich Petersmann ed., 1997); JOHN H. JACKSON, THE WORLD TRADE ORGANIZATION: CONSTITUTION AND JURISPRUDENCE (1998); Claudio Cocuzza & Andrea Forabosco, *Are States Relinquishing Their Sovereign Rights? The GATT Dispute Settlement Process in a Globalized Economy*, 4 TUL. J. INT'L & COMP. LAW 161 (1996); Robert E. Hudec, *The New WTO Dispute Settlement Procedure: An Overview of the First Three Years*, 8 MINN. J. GLOBAL TRADE 1 (1999); Kim Van der Borght, *The Review of the WTO Understanding on Dispute Settlement: Some Reflections on the Current Debate*, 14 AM. U. INT'L. L. REV. 1223 (1999); Azar M. Khansari, *Searching for the Perfect Solution: International Dispute Resolution and the New World Trade Organization*, 29 HASTINGS INT'L & COMP. L. REV. 183 (1996).

an institution charged with the function of administering the dispute resolution system under the WTO.[93]

The DSU has been named as one of the significant outcomes of the Uruguay Round of negotiations.[94] It established an institutional framework for trade dispute settlement, containing specific rules of procedure through which it attempted to address the complaints relating to uncertainties and the lack of structured process for dispute resolution.[95] The DSU also introduced a two-tier process in which disputes are initially referred to a panel and then to an appellate body.[96] In doing so, the DSU sought to address the issue of errors arising out of a misinterpretation of the law.[97] Previously, decisions of the panel could only be enforced if all members of the relevant GATT body (that is, the GATT Council), including the losing party, agreed to adopt the panel report.[98] An objection by the losing party, or any other party whose interests were to be adversely affected, thwarted the panel's effort, thus impugning the effectiveness of the dispute settlement process.[99] Under the DSU, the panel's report is automatically adopted unless all members of the DSB agree by consensus not to adopt it.[100] Further, strict time schedules are intended to enhance timely compliance with procedural requirements, and thus, address the question of unnecessary delays and deadlocks in the resolution of trade disputes.[101]

2. The Procedure

The WTO DSM emphasizes party-controlled settlement at the initial stages of the dispute. In the first instance, parties are required to attempt a mutually negotiated solution through consultation.[102] The

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93. Understanding on Rules and Procedure Governing the Settlement of Disputes, Ann. 2, WTO, THE LEGAL TEXTS—RESULTS OF THE URUGUAY ROUND OF MULTILATERAL TRADE NEGOTIATIONS, 354-75 (1999) [hereinafter DSU]. *Accord* Khansari, *supra* note 92, at 190 (describing improvements the DSU has made on the system). *See generally* Hudec, *supra* note 92, at 16-18 (extolling the virtues of the new WTO DSM).

94. Khansari, *supra* note 92, at 190.

95. *Id.*

96. DSU, *supra* note 93, art. 2(1).

97. *Id.*; *see also* Cocuzza & Forabosco, *supra* note 92, at 167-174; Van der Borght, *supra* note 92, at 1225.

98. Khansari, *supra* note 92, at 190.

99. *Id.* at 190-91.

100. DSU, *supra* note 93, art. 16.

101. *Id.* art. 4(3) (reply to request for consultations to be within ten days); *id.* art. 4(7) (sixty days for the successful completion of consultations); *id.* art. 20 (time frame for DSB decisions).

102. *See id.* art. 3(7).

WTO's desired goal is the prompt settlement of disputes.[103] In tandem with articles XXII and XXIII of the GATT, each member is under an obligation to give a "sympathetic consideration to and afford adequate opportunity for consultation regarding any representations made by another Member concerning measures affecting the operation of any covered agreement taken within the territory of the former."[104] Other nonlitigious methods that can be employed include good offices, conciliation, and mediation, which may be presided over by the Director-General acting in an ex officio capacity.[105]

The next significant stage in the resolution of a dispute is the establishment of a panel. If a member to whom a request is made: fails to respond to the panel within ten days; or, if within thirty days of its receipt, fails to enter into good faith negotiations with the requesting party; or, if despite consultation, cannot reach a settlement within sixty days of receipt of the request, the complaining party may request the formation of a panel.[106] Where such a request has been made, a panel shall be established at the meeting of the DSB which follows the meeting where the request first appeared on the agenda of the DSB.[107] The decision to establish a panel is almost automatic, since one must be formed unless all the members of the DSB agree by consensus not to do so.[108]

The near automatic establishment of the panel, the strict procedural time limits, and the adversarial hearing procedures all point out the increased judicialization of the dispute resolution process in international trade.[109] Panelists are drawn from a list of well-qualified governmental or nongovernmental individuals.[110] It is the Secretariat's role to assist in maintaining this list of possible panelists and to propose to the parties to a dispute a possible panel, which ordinarily should be accepted except for

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103. *See id.* art. 3(3).
104. *Id.* art. 4(2).
105. *Id.* art. 5(1), (6).
106. *Id.* art. 4(3), (7).
107. *Id.* art. 6(1).
108. *Id.*
109. *See, e.g.*, Van der Borght, *supra* note 92, at 1224 ("The DSU changed the nature of the dispute settlement process from a diplomatic to a legalized process and from a power-based to a rule-based procedure."). *But cf.* Hudec, *supra* note 92, at 4 (arguing that it is a mistake to attribute this change to the WTO regime. Though the GATT dispute settlement mechanism started out as a diplomatic process, this has changed during the last fifteen years of GATT's existence. This is because after 1980, the "GATT dispute settlement procedure transformed itself into an institution based primarily on the authority of legal obligation," thus laying a foundation for even stronger legal powers that followed under the WTO.).
110. DSU, *supra* note 93, art. 8(1), (4), (5).

compelling reasons.[111] In any event, the Director-General of the WTO (in consultation with the chairman of the DSB and the chairman of the relevant committee or council) might exercise authority to choose a panel in the event of a deadlock, though it is the parties who request that intervention.[112]

Throughout the DSM, including the panel process, it is clear that strict observance of time limits is the norm. However, the role of panels is to assist the DSB, as the main decision-making organ in the DSU.[113] Thus, panel decisions do not come into force unless adopted by the DSB.[114] Nevertheless, the reverse consensus rule operates, which ensures that panel reports are automatically adopted unless all the members of the DSB vote to reject the report.[115]

The appellate review process introduced by the DSU is described as a feature that is unique to the WTO, especially when compared to other international trade dispute settlement mechanisms.[116] When a party is dissatisfied with the outcome of the panel process, it has the right to refer the matter for further consideration by the Appellate Body (AB).[117] A party is under the duty to inform the DSB of its intention to appeal.[118] Then, the panel report will not be considered for adoption until after the completion of the appeal process.[119] An appeal can only be instituted based on matters of law.[120]

There are precise time limits that apply during the appellate process. Generally, the appeal process must be complete within sixty days from the date that the appealing party informs the DSB of its intention to appeal.[121] If this time limit cannot be observed, the AB is required to inform the DSB.[122] In any case the entire period should not exceed ninety days.[123] Following submissions by parties, the AB considers their

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111. *Id.* art. 8(4).
112. *Id.* art. 8(7).
113. *Id.* art. 11.
114. *See id.* art. 16.
115. *See id.*
116. *See, e.g.*, Patrick Specht, *The Dispute Settlement Systems of GATT and NAFTA—Analysis and Comparison*, 27 GA. J. INT'L & COMP. L. 80, 80 (1998) (noting that the standing Appellate Body was a "unique and unprecedented institution in international trade"); DSU, *supra* note 93, art. 17.
117. DSU, *supra* note 93, art. 16(4).
118. *Id.*
119. *Id.*
120. *Id.* art. 17(6).
121. *Id.* art. 17(5).
122. *Id.*
123. *Id.*

arguments, after which it makes its recommendations which are rendered in a report that it submits to the DSB for adoption.[124] The reverse consensus rule is again put into play to ensure that the report is almost automatically adopted.[125]

When a panel finds that the complaints have been proven, it can order the offending country to withdraw the offensive measures.[126] If the offending country fails to comply, or is not capable of doing so immediately, the complaining country may initiate negotiations for compensation.[127] It is only when parties cannot agree on the compensation scheme that the complaining country may initiate proceedings for instituting retaliatory measures against the defaulting country.[128] If there is a dispute over the implementation of adopted recommendations, the parties may seek recourse in the DSB, which initiates an arbitration process.[129]

B. Dispute Resolution Under COMESA

1. COMESA Court of Justice

Unlike the WTO DSM, settlement of disputes under COMESA is an expressly judicial process. A permanent court, the COMESA Court of Justice, established under the COMESA Treaty, deals with disputes arising under the Treaty and its various constituent agreements.[130] The Court is made up of seven judges appointed for a renewable five-year term.[131] The judges must be "persons of impartiality and independence who fulfill the conditions required for the holding of high judicial office in their respective countries of domicile or who are jurists of recognised competence."[132] Generally, they need not be citizens of COMESA member countries. The Court's mandate is to "ensure the adherence to law in the interpretation and application of this Treaty."[133] The Court has jurisdiction to entertain all disputes referred to it under the Treaty.[134]

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124. *Id.* art. 17(14).
125. *Id.*
126. *Id.* art. 19(1).
127. *Id.* art. 22(2).
128. *Id.* art. 3(7).
129. *Id.* art. 21(5).
130. *See* COMESA Treaty, *supra* note 2, art. 7(1)(c).
131. *Id.* arts. 20(1), 21(1).
132. *Id.* art. 20(2).
133. *Id.* art. 19.
134. *Id.* art. 23 (providing the general jurisdiction of the Court).

Also, unlike the two-tiered WTO DSB, the Court provides a one-stop-shop dispute resolution mechanism. No right of appeal exists.[135] Though it is possible for a party to seek a review of the Court's decision, review is limited to those cases in which a party can show that new, decisively influential evidence has been discovered that did not exist at the time of the decision.[136]

The COMESA rules of standing are fairly broad when compared to the WTO DSB, since the COMESA Treaty allows suits by both state parties and private persons.[137] While a private party has no cause of action under the WTO, this rule is eliminated under COMESA. Member states can challenge the acts or other measures taken by other member states where such acts or measures are deemed to be a violation of the

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135. *Id.* art. 31(1).

136. *Id.* art. 31(3).

137. The rules of standing are stated in the following COMESA Treaty articles:

ARTICLE 24: Reference by Member States

1. A Member State which considers that another Member State or the Council has failed to fulfill an obligation under this Treaty or has infringed a provision of this Treaty, may refer the matter to the Court.
2. A Member State may refer for determination by the Court, the legality of any act, regulation, directive or decision of the Council on the grounds that such act, regulation, directive or decision is ultra vires or unlawful or an infringement of the provisions of this Treaty or any rule of law relating to its application or amounts to a misuse or abuse of power.

ARTICLE 25: Reference by the Secretary-General

1. Where the Secretary-General considers that a Member State has failed to fulfill an obligation under this Treaty or has infringed a provision of this Treaty, he shall submit his findings to the Member State concerned to enable that Member State to submit its observations on the findings.
2. If the Member State concerned does not submit its observations to the Secretary-General within two months, or if the observations submitted are unsatisfactory, the Secretary-General shall refer the matter to the Bureau of the Council which shall decide whether the matter shall be referred by the Secretary-General to the Court immediately or be referred to the Council.
3. Where a matter has been referred to the Council under the provisions of paragraph 2 of this Article and the Council fails to resolve the matter, the Council shall direct the Secretary-General to refer the matter to the Court.

ARTICLE 26: Reference by Legal and Natural Persons

Any person who is resident in a Member State may refer for determination by the Court the legality of any act, regulation, directive, or decision of the Council or of a Member State on the grounds that such act, directive, decision or regulation is unlawful or an infringement of the provisions of this Treaty:

Provided that where the matter for determination relates to any act, regulation, directive or decision by a Member State, such person shall not refer the matter for determination under this Article unless he has first exhausted local remedies in the national courts or tribunals of the Member State.

COMESA Treaty, *supra* note 2, arts. 24-26.

Treaty.[138] Moreover, COMESA as a legal entity, acting through the Secretary General, can sue and be sued under the Treaty for the breach of a term.[139] With respect to legal and natural persons, the Treaty allows "[a]ny person who is a resident in a Member State" to seek the Court's determination on the "legality of any act, regulation, directive, or decision of . . . a Member State on the grounds that such act, directive, decision or regulation is unlawful or an infringement of the provisions of this Treaty."[140] The Court also exercises preemptive jurisdiction, such that parties can seek an advisory opinion on any matter arising under the Treaty, even if there is no concrete dispute between the parties.[141] The "dynamic legalism"[142] of the COMESA dispute settlement system not only differentiates it from the WTO, but also puts it in a distinct position of being a transnational system that gives both substantive and procedural rights to private, nonstate actors, both natural and corporate.[143]

2. The Procedure

Proceedings under COMESA are commenced by a reference[144] that sets out a detailed account of the complaint, including the points of law involved in summary form.[145] The party is also required to specify the remedy it seeks from the Court.[146] Neither the Treaty nor the Rules of the Court set out the range of remedies that the Court has power to grant. Thus, it appears that the Court has the discretion to choose an appropriate remedy depending on the type of dispute and the specific prayers made by the winning party. This means that parties can claim any remedy that

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138. *Id.* art. 24.

139. *Id.* art. 25.

140. *Id.* art. 26.

141. *See id.* art. 32 ("The Authority, the Council or a Member State may request the Court to give an advisory opinion regarding questions of law arising from the provisions of this Treaty affecting the Common Market.").

142. I owe this term to Professor Ronald A. Brand, Professor of Law, University of Pittsburgh, and Director, Center for International Legal Education.

143. International treaties, being the product of state-to-state negotiation, largely disregard the direct input of private individuals, such that even when they create rights for private citizens, the mandate for enforcement is generally left to states due to concerns about comity and international relations. No state wants to allow its citizens to sue another state and probably aggravate relations between them. COMESA turns this rule around. *See, e.g.*, Roberto Bruno, *Access of Private Parties to International Dispute Settlement: A Comparative Analysis* (May 16, 1997), *available at* http://www.jeanmonnetprogram.org/papers/97/97-3.html.

144. Rules of the Court of Justice of the Common Market for Eastern and Southern Africa, May 1, 2003, R. 30, *available at* http://www.comesa.int/institutions/court_of_justice/rules/Rules%20of%20Court/en [hereinafter Rules].

145. *Id.* R. 31(1).

146. *See id.* R. 31(2)(d).

would be available in ordinary domestic courts, such as damages, as well as those that may be specific to their trading interests, such as withdrawal of trade-impairing measures.[147] This is unlike the WTO process, where the measures that can be taken following the finding of a violation are specific and can only be applied under specified circumstances.[148]

A filed reference must then be served upon the defending party who is, in turn, required to file a defense within one month of that service.[149] Other procedures contemplated include the filing of replies, evidentiary documents, and the amendment of pleadings—procedures

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147. While the COMESA Treaty does not specify the remedies that the Court will grant, article 40, dealing with execution of judgments, provides a pointer. It states that the "execution of a judgment of the Court which imposes a pecuniary obligation on a person shall be governed by the rules of civil procedure in force in the Member State in which execution is to take place." COMESA Treaty, *supra* note 2, art. 40. This means that damages as a remedy are already contemplated under the framework. No doubt this raises the issue whether a state can be a "person" within the meaning of the article. However, the few disputes that have so far been litigated in the Court show that parties have claimed damages as part of the remedies sought, even when the defendant was a member state. In *Ethiopia v. Eritrea*, the Government of Ethiopia, by a reference filed in the Court, sought, inter alia, the release of goods belonging to Ethiopians, which had been detained at the Eritrean Ports of Assab and Massawa, contrary to the provisions of the Treaty. Ethiopia also sought damages resulting from this detention. *See* Ethiopia v. Eritrea, COMESA C. J., Lusaka, Zambia, Ref. No. 1/99 (Mar. 21, 2001) *available at* http://www.comesa.int/institutions/court_of_justice/precedents/Judgements/Ethiopia%20vs%20Eritrea.%20%20/en. That the above appears to be contemplated under the COMESA Treaty is illustrated by the requirement under the Rules of the Court, that a claiming party must specify the form of the "order" it seeks from the Court. Rules, *supra* note 144, R. 31. This makes it possible to claim the kind of orders that are available under a domestic legal system. Furthermore, the function of the Court entails the application of a special kind of law referred to as "Common Market law" in a "Common Market legal system" which "[l]ike any true legal system . . . needs an effective system of judicial safeguards when the law is challenged or must be applied. The Court of Justice, as the judicial organ of the Common Market is the backbone of that system of safeguards." Introduction to the COMESA Court of Justice, ¶ 8, *at* http://www.comesa.int/institutions/court_of_justice/Multi-language_content.2003-08-21.2608/en/view (last visited Oct. 6, 2004). It is implicit that, as the judicial institution of COMESA, the Court must afford all necessary remedies to the parties before it, especially since the Common Market law is said to preempt contrary domestic law.

148. The DSU describes the measures in the following way:

> A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred. In the absence of a mutually agreed solution, *the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned* if these are found to be inconsistent with the provisions of any of the covered agreements. *The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement. The last resort* which this Understanding provides to the Member invoking the dispute settlement procedures *is the possibility of suspending the application of concessions or other obligations under the covered agreements.*

DSU, *supra* note 93, art. 3(7) (emphasis added).

149. Rules, *supra* note 144, Rs. 32-33.

that are typical of domestic courts.[150] Following oral hearings including witness testimony and oral arguments by the parties or their legal representatives, the Court considers the various positions raised and then renders a judgment that is delivered in open court in the presence of the parties or their representatives.[151] Since the dispute settlement process is a court procedure, it is usually open to the public, unless the court rules otherwise.[152] This is unlike the WTO process, where litigants are exclusively States and the process is not open to those who are not parties to the dispute.[153]

3. Procedure Under the Regulations on Trade Remedy Measures

Though the COMESA Court is the main organ for dispute resolution, it certainly is not the only one, since a special procedure exists relating to disputes involving dumping, subsidies, and countervailing duties. This process, available under the Regulations on Trade Remedy Measures (Regulations), is nevertheless linked to the Court, though only for purposes of review.[154] The Regulations provide guidelines as to the circumstances under which member countries may take measures to protect their industries against dumping and subsidies.[155] They set up a framework for investigating complaints relating to dumping and subsidies, and they define the manner and circumstances under which member countries can impose measures to safeguard their industries under threat from dumping and subsidization by other member countries. The Regulations create their own dispute settlement mechanism that operates in a similar way to the DSM under the WTO.[156] Thus, parties are required initially to attempt amicable settlement of disputes arising in regard to the implementation of the Regulations.[157] In an arrangement

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150. *Id.* Rs. 34-38.
151. *Id.* R. 57.
152. COMESA Treaty, *supra* note 2, art. 31(1).
153. DSU, *supra* note 93, art. 14(1).
154. The Regulations on Trade Remedy Measures were adopted under the COMESA Treaty "to ensure that there is uniformity among COMESA member states in the conduct of trade remedy investigations and to ensure, to the extent possible, that such investigations are undertaken in harmony and within the framework of WTO Safeguard Agreement." COMESA Regulations on Trade Remedy Measures, Regulation 2, *available at* http://www.comesa.int/trade/remedies/Regulations%20on%20Trade%20Remedy%20Measures/en (last visited Oct. 6, 2004) [hereinafter COMESA Regulations].
155. *See id.* Regulation 3.
156. *Id.* pt. V: Dispute Settlement. Part V initiates a process that is akin to the WTO process by requiring a consultation, and if not done, a panel may form along with the subsequent right to appeal to the COMESA Court.
157. COMESA Regulations, *supra* note 154, Regulation 42.1.

that closely mirrors that of the WTO DSM, the Regulations allow either party to the dispute to request the use of good offices of the Secretary General to facilitate the resolution of the issue.[158] After a party requests consultations, the requested party is obliged to respond to the request within fourteen days of its receipt and then to enter negotiations within twenty-one days of such receipt.[159]

Like in the WTO process, the aim should be to reach a mutually satisfactory resolution.[160] Failure to enter into negotiations, or to reach a solution, will earn the complaining party the right to request the establishment of a panel of trade experts.[161] Aside from the fact that it is the Secretary General who establishes the panel,[162] the system seems to work like the WTO panel process. The panel must be established within specific time limits and, when established, it shall be composed of "three Trade Experts who shall be neutral and with sufficient background and experience in trade remedies."[163] Each party elects one expert, and then both mutually agree on the third expert.[164] The panel process does not include a hearing of oral testimony, as only documents supplied by the parties are reviewed.[165] However, if the parties wish, oral hearing and witness testimony can be used.[166] Following the parties' submissions, the panel makes its finding and then issues recommendations to the parties to the dispute and the Secretary General within thirty days from the date of its first sitting.[167] The findings are binding on the parties without any further procedure.[168] Nevertheless, a party not satisfied with the result can seek further recourse in the Court, which in this regard may be deemed as performing a role similar to the Appellate Body in the WTO DSB.[169]

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158. *Id.* Regulation 42.3.
159. *Id.* This Regulation requires that consultations be entered into within twenty-one days, or "the member States that requested the holding of consultations may refer the matter to the Secretary General for establishment of a Dispute Panel of Trade Experts." *Id.* Regulation 42.4 ("The Secretary General shall within a period of 21 days from the date of the receipt of a request from a party to the dispute call for the establishment of a panel of trade experts to resolve the issue.").
160. *Id.* Regulation 42.1.
161. *Id.* Regulation 42.3.
162. *Id.*
163. *Id.* Regulation 43.1.
164. *Id.*
165. *Id.* Regulation 44.2.
166. *Id.* Regulation 44.4.
167. *Id.* Regulation 44.6.
168. *Id.*
169. *Id.* Regulation 45.

C. *Concluding Remarks on COMESA and WTO DSM*

The COMESA DSM provides two methods of resolution. One involves the Court of Justice, and the other, a WTO-like panel process that deals only with dumping, subsidies, and countervailing duties. However, the entire COMESA DSM does not attempt to create any linkage to the WTO system and, instead, seems to imply exclusivity even where violations may impinge upon any of the agreements covered under the WTO. However, referring to WTO jurisprudence, in particular the *Turkey-Textiles* case[170] and its mandate under article XXIV of the GATT, it seems that the WTO system is not entirely excluded from resolution of trade disputes involving COMESA members. In the absence of specific rules as to when to invoke either mechanism, the COMESA Treaty allows its parties the freedom to make the choices that will suit their circumstances. This is unlike other treaties, such as NAFTA, where certain disputes are clearly stated to be within the domain of either NAFTA or the WTO, even though at times parties are provided with the luxury of choosing which mechanism to invoke.[171] Even in the latter instance, NAFTA clearly states that it is allowing the parties to make the choice, something that COMESA does not do.[172]

VI. MAKING THE CHOICE: SOME RELEVANT CONSIDERATIONS

A. *Procedural Factors*

In the pre-WTO world, it was possible for a party to delay the process deliberately and even block the eventual adoption of the final decision.[173] The WTO DSM attempts to resolve this issue through procedural requirements designed to expedite the decision-making process and to make it more efficient.[174] The COMESA process likewise seeks to secure similar efficiency.[175] Nevertheless, the fact that the

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170. *See* Panel Report, *supra* note 47.

171. *See* Gantz, *supra* note 12, at 1034 (discussing the various jurisdictional provisions under NAFTA and pointing out that, in certain instances, NAFTA allows a complaining party to select the forum for settlement of a dispute that arises under both NAFTA and GATT). There are certain disputes that NAFTA stipulates must be settled using its mechanism. Some examples are: disputes involving conflict with an environmental treaty; disputes arising under chapter 7 NAFTA (relating to sanitary and phytosanitary measures); and disputes arising under chapter 9 (relating to human, animal or plant life or health, or health, or protection of the environment). NAFTA, *supra* note 12, art. 2005.

172. NAFTA, *supra* note 12, art. 2005.

173. *See* cited sources, *supra* note 92.

174. *Id.*

175. *See* discussion *infra* Part V.

COMESA provides a one-step rather than a two-step system may work either as a deterrent, for a party who wants the chance for reconsideration of its case, or as an attraction, for a party hoping for an expedient settlement of the dispute. For a party intent on dragging the process out and frustrating the settlement, neither the WTO DSM nor the COMESA process might offer much respite in view of the strict time limit requirements.

Article 35 of the COMESA Treaty provides an advantage that might prove decisive in a country's decision on which DSM to invoke. It allows the COMESA Court to "make any interim order or issue any directions which it considers necessary or desirable" while the proceedings are pending.[176] Thus, in cases of urgency, it is possible for the Court to order temporary withdrawal of an offending measure, or even grant an injunction against the implementation of the measure to particular goods, before the determination of its legality in accordance with the Treaty. In the disputes between Kenya and Egypt, there were instances where traders were caught unaware by measures implemented by either country and would transport their goods only to be turned away at the borders.[177] If those goods were of a perishable quality, and private parties had access to the Court, it might have been possible for the trader to obtain temporary orders of the Court to allow the goods to proceed to their destination pending the resolution of the outstanding matters.

This procedural feature is one that is not available under the WTO, even though the DSU mandates that the process should be expedited in the event of urgency, such as in the case of perishable goods.[178] Although the DSU urges parties to exercise good faith in the resolution of disputes,[179] there is nothing that would prevent a party from aggravating the damage that is being complained of between the making of the complaint and its final resolution. The existence of the interim remedy option under COMESA may prove attractive not only to private parties, but also, and perhaps particularly more so, to the States.

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176. *See* COMESA Treaty, *supra* note 2, art. 35.

177. In July 2000, at the height of the trade disputes between Kenya and Egypt, it was common for either country to increase tariffs on the goods of the other country with no notice. Often traders were caught unaware and only learned of the changes when their merchandise reached the ports. *See, e.g.*, Francis Mwaka, *Egypt Fires Tariff Salvo*, DAILY NATION, July 12, 2000 (reporting that Egypt had imposed increased tariffs on Kenyan tea in retaliation to Kenya's tariff increases on Kenyan rice surprising traders whose produce was in transit); *see also infra* note 200 and accompanying text.

178. DSU, *supra* note 93, art. 4(8)-(9).

179. *Id.* art. 3.

A problem with the WTO process is that panels have to rely largely on the parties to bring their entire case.[180] It is up to the parties to decide what to reveal and what to hide. Under the COMESA process, the Court has some discovery-like procedural powers that allow it to either make its own inquiries or to require the parties to produce certain kinds of information. Thus, the Court can take certain "measures of inquiry"[181] that include the personal appearance of parties, request for information and production of documents, oral testimony, the commissioning of an expert's report, and the inspection of the place or thing in question.[182] A party that believes in the strength of its case may wish to capitalize on this, especially when there is reason to believe the other party harbors information that may be of use to their case. Where litigants are States, the confidentiality and the restricted rules of standing under the WTO might be attractive.

Under the WTO, the DSM can be set in motion under three circumstances:[183] first, when a party considers that another country has taken a measure that impairs or nullifies its benefits under any of the covered agreements through a breach or failure to carry out the obligations created (a violation claim);[184] second, when, without a violation of any of the agreements, a measure taken by another country results in such impairment or nullification (a nonviolation claim);[185] and third, when such nullification or impairment occurs for "any other situation" (a situation claim).[186] In the event of a violation claim, the general rule is that it is sufficient for the complaining party to allege that there is a violation, whereupon the burden of proof shifts to the defending party to prove that no such violation has occurred.[187] This

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180. *See, e.g.*, Hudec, *supra* note 92, at 39:

> WTO panel proceedings usually involve a struggle to develop the necessary information and legal understanding to decide the case properly. Each of the parties to a dispute settlement proceeding is quite content to present the panel with all the information favorable to its side, and will want to avoid presenting any information that can help the other side. In ordinary civil litigation the adverse party usually manages to present the contrary side of the case. The same is true in WTO litigation, but the panel process has certain limitations in that regard. Governments do not have powers of discovery to obtain information from opposing parties, and so often they can only offer undocumented surmise.

181. Rules, *supra* note 144, R. 39.
182. *Id.* R. 39(3).
183. GATT, *supra* note 6, art. XXIII(1).
184. *Id.* art. XXIII(1)(a).
185. *Id.* art. XXIII(1)(b).
186. *Id.* art. XXIII(1)(c).
187. Article 3 of the DSU provides:

burden may be difficult to overcome. The COMESA system offers no such advantage. Because it is a court system, the ordinary rules of proof, where the burden is on the party making an allegation, will always apply. If a party has a complaint that raises a violation claim, it might wish to use the WTO process as opposed to the COMESA Court. If the complaint raises a nonviolation or situation claim, the standard of proof is the same under both systems, and a party might be swayed by other factors, which are more appropriately addressed below.[188]

B. Remedies and Enforcement

Under the COMESA system, there is no description of the remedies which the Court may grant. The parties are required to specify the sort of remedy that they seek from the Court.[189] Theoretically, the Court is free to consider the whole gamut of remedies that are available under many domestic systems, as well as under international trade law.[190] This means that, unlike the WTO DSM, parties referring their dispute to the COMESA Court are likely to come out with a more satisfactory remedy, including the much sought after remedy of damages that has remained elusive under the WTO system.[191] This might be the attraction that draws a party away from the WTO and to the COMESA.

Additionally, under the WTO DSM, the remedy to which a party is entitled depends on the whether the claim relates to a violation or a nonviolation measure.[192] Thus, where the impairment or nullification is the result of a violation measure, the complaining party would be entitled to the whole range of remedies available under the DSU: withdrawal of

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> In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge.

DSU, *supra* note 93, art. 3(8).

188. *See* discussion *infra* Part VI.B-E.

189. Rules, *supra* note 144, R. 31(2)(d) (providing that a reference must specify the "order" sought from the Court).

190. *See supra* note 147.

191. *See* Victor Mosoti, *In Our Own Image, Not Theirs: Damages as an Antidote to the Remedial Deficiencies in the WTO Dispute Settlement Process: A View from Sub-Saharan Africa*, 19 B.U. INT'L L.J. 231, 255-56 (2001) (suggesting that the remedies offered under the DSU do not comport with the situations in poor countries, especially when disputes pit them against countries with stronger economies; also suggesting using damages to make the remedy system effective).

192. DSU, *supra* note 93, art. 26.

the offending measure, compensation, or ultimately, retaliation. In the case of a nonviolation measure, the DSU recommends that the parties agree to a compensatory arrangement or to "a mutually satisfactory adjustment as final settlement."[193] In contrast, there is no such distinction in the COMESA system of dispute resolution. The defendant's liability will, in large measure, be based on a breach of the Treaty or other side agreements, but with no implications on the type of remedy available under the Treaty.

The other aspect of the COMESA system that might prove advantageous is that parties may be assured of a remedy that covers violations occurring prior to and after the commencement of the dispute settlement process. The losses caused by a party's trade-impairing measures may be quantified, and damages awarded on that basis. A party that insists on proceeding with activities that violate the system may find itself facing either an injunction or additional damages.[194] For example, the many trade disputes pitting Kenya and Egypt in one case, and Kenya and Sudan in another, have often resulted in losses to the individual traders that could have been quantified and compensated had the traders sued under the COMESA mechanism. The WTO would not provide such an option, as the remedies it offers seek to influence the conduct of states from the time the recommendations made by a panel (or by the AB where there is an appeal) are adopted by the DSB.[195] In any event, the remedy of damages is not available under the WTO.

Theoretically, enforcement of recommendations under the WTO should be easier due to the pressure of many more nations in a multilateral framework than would be presented under the COMESA.[196] Under the WTO, it is possible that a dispute would attract other parties interested in the issue, including those that have significant influence in world trade affairs.[197] This may increase the level of pressure for compliance on the party being sued. It is not really clear just how much this consideration would affect the choices of countries in the COMESA

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193. *Id.* art. 26(1)(b),(d) & (2).

194. *See, e.g.*, *Ethiopia*, COMESA C.J., Lusaka, Zambia, Ref. No. 1/99 (Mar. 21, 2001), *available at* http://www.comesa.int/institutions/court_of_justice/precedents/Judgements/Ethiopia%20vs%20Eritrea%20%20/en. Though no trade dispute has arisen where the Court awarded these remedies, it is clear that the parties contemplate that they should be available.

195. *See, e.g.*, Gavin Goh & Andreas R. Ziegler, *Retrospective Remedies in the WTO After Automotive Leather*, 6 J. INT'L ECON. L. 545, 545-64 (2003) (arguing that retrospective remedies have no basis either in past GATT practice or under the WTO Agreements), *available at* http://www3.oup.co.uk/jielaw/hdb/Volume_06/Issue_03/060545.sgm.abs.html.

196. *See* Gantz, *supra* note 12, at 1103.

197. *See id.*

region other than in a dispute involving other non-COMESA members, where a party may decide to pursue resolution at the multilateral rather than the regional level. In the WTO, the political pressure is also accentuated by the DSU's requirement for prompt compliance with recommendations or rulings of the DSB as an essential aspect in the effective resolution of disputes to the benefit of all members.[198] Since enforcement of the recommendations is essentially in the hands of the parties, albeit with the blessing of the WTO, a complaining party with strong trade connections to the opposing party stands a better chance to secure compliance, especially if retaliation is contemplated. For a complaining party with little influence on the trade regime of the defaulting country, securing compliance is usually difficult and retaliation, when contemplated, is likely to be counterproductive.[199]

The COMESA system does not seem to provide much solace either because the enforcement of remedies, such as damages by an individual against a state, may be very difficult. When retaliation is allowed, for example, in the case of the Trade Remedy Regulations, the problem of limited trade connections may undermine the effect that such a remedy may contemplate. As for countries that trade at about the same level, such as Egypt and Kenya, it may be more beneficial to seek to resolve a dispute under the COMESA framework rather than under the WTO. For instance, with respect to the so-called trade wars between Kenya and Egypt, due to the significant level of trade between the two states, one or both countries has always had the capacity to invoke effective measures in the event of a violation.[200] Kenyan tea exports to Egypt were estimated

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198. DSU, *supra* note 93, art. 21(1).

199. *See* Mosoti, *supra* note 191, at 245.

200. There have been a number of disputes involving members of COMESA; notable among them are disputes between Kenya and Egypt. The trade wars between these countries started as soon as Egypt became a member of COMESA in June 1998. In November 1999, Kenya stopped granting preferential tariff treatment to Egypt's main exports to Kenya (rice, tires, and wheat) due to concerns resulting from a deluge of imports that threatened the domestic wheat growing industry. *Egypt Filters Out Kenya Tea*, *supra* note 32. There was also concern that the rice did not originate in Egypt, and instead that they took advantage of the COMESA trade regime to sell goods that were re-exports sourced from elsewhere, especially the Middle East. Omondi, *supra* note 32. Thus, higher duties were to be charged on imports from Egypt (thirty-five percent up from three percent). *Id.* In retaliation, Egypt raised its tariffs on Kenyan goods; specifically, it raised the duty on tea to thirty-five percent. *Id.* Traders from both ends were unaware, as these measures were imposed while their goods were in transit leading to losses when the goods were held up at points of entry. Other goods targeted included motor vehicle parts and construction hardware, such as cement and roofing sheets. *Egypt Flouts COMESA Rules*, *supra* note 32. Egypt had been, and still is, a major market for Kenyan tea following Pakistan and Britain; therefore, the restrictions caused major losses. *See* Namwaya, *supra* note 32; Esipisu, *supra* note 32.

to make up about ninety-eight percent of the total exported commodities at the time of the disputes. Every time there was an alleged violation by Kenya, Egypt targeted the tea industry and Kenya was always forced to react by either entering into negotiations or taking some other measure.[201] To the extent that a country under COMESA may not invoke certain remedies without deleterious consequences, the COMESA regime may not be any more advantageous than the WTO process.

There is one enforcement measure that is unique to COMESA: the power to impose sanctions.[202] Though this is not expressly within the domain of dispute resolution by the COMESA Court, and in spite of the difficulty of connecting such sanctions to trade issues, it is possible to speculate that in a really aggravated case, sanctions may be an option. In terms of article 171 of the COMESA Treaty, member states are expressed to agree that

> for the attainment of the objectives of the Common Market, full commitment of each Member State to the fulfillment of the obligations contained in this Treaty shall be required. To this end, the Member States

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In July 1999, rising concerns over the effect that cheaply available imported foreign sugar would have on local industries led Kenya to impose a duty over Sudanese imports, at rates well above those contemplated under COMESA. A consignment of about 3000 tons of sugar from Sudan was held up in Kenyan ports. The Sudanese traders, who had sought to sell the sugar in Kenya, were forced to reship the consignment back to their home country. It was reported that the sugar had continued to incur a cost of more than $5000 per day for close to one month while reshipment was being planned. Kenya's contention was that the sugar from Sudan and other countries would have sold cheaply on the market, thus adversely affecting local produce. Such "dumping" had caused the closure of two or more sugar factories, with resulting revenue and job losses. *See* Patrick Mayoyo, *Trade War Looms as Sugar Is Rejected*, E. AFR., July 26, 1999 *available at* http://www.vitrade.com/banking_finance/990726_trade_war_looms_over_sugar_htm; *News from the Regions: Africa and Asia*, 4 ICTSD BRIDGES WKLY. TRADE NEWS DIG. No. 28, *available at* http://www.ictsd.org/html/weekly/story5.15-02-00.htm; *Egypt Filters out Kenya Tea*, *supra* note 32.

Between January and March 2003, Kenyan tea exporters lost approximately 24.6 million Kenya shillings as a result of entry restrictions imposed by Sudan on Kenyan tea. *See* Esipisu, *supra* note 32. The Sudanese government raised health concerns related to the manner in which unpacked tea was being handled and the quality of the packaging material used for packaging the tea. *Id.* Kenyan authorities insisted that the same handling and packaging was being used for tea exported for other destinations with no complaints and that there was no justification in the restrictions imposed by Sudan. *Id.*

201. *See, e.g.*, Vitalis Omondi, *Zero Tariffs Remain a Dream as COMESA Countries Drag Their Feet*, E. AFR., Oct. 1, 2001, *available at* http://www.nationaudio.com/News/EastAfrican/08102001/Business/Business5.html. In one instance an Egyptian official was reported to have justified the targeting of tea by saying that "tea is at the centre of the trade dispute because it happens to be significant in terms of the balance of trade between Kenya and Egypt."

202. *See* COMESA Treaty, *supra* note 2, ch. 31.

> agree that specific sanctions may be imposed by the Authority to secure fulfillment by the Member States of their obligations under this Treaty.[203]

Sanctions may be imposed on a member state "which defaults in performing an obligation under this Treaty"[204] or "whose conduct, in the opinion of the Authority, is prejudicial to the existence or the attainment of the objectives of the Common Market."[205] Sanctions include the suspension of any rights and privileges arising from membership to COMESA, the imposition of a financial penalty, conditional suspension, and finally, expulsion from membership.[206] These, no doubt, are drastic remedies whose imposition for trade violations is difficult to imagine. However, if a country persistently and deliberately defaults on the judgments of the Court, a case may be made for the imposition of the less drastic of these remedies on an act that may be deemed to undermine the authority of the COMESA institutions, amounting to "conduct" that is "prejudicial to the existence . . . of the objectives of the Common Market."[207] Though this might be speculative, it certainly is not unforeseeable.

C. Access Issues

Invoking the multilateral or regional framework for dispute resolution always involves costs.[208] The forum that will not strain the resources of a country, as weighed against the benefits to be derived, will always be alluring. The question of accessing the multilateral framework of dispute resolution has assumed increasing significance lately.[209] Poor countries have charged that the costs involved are way beyond their reach, while the benefits supposedly conferred by the process may end up not serving their needs. In particular, since developing countries, especially those in Africa, have no personnel with significant expertise in

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203. *Id.* art. 171(1).
204. *Id.* art. 171(2)(a).
205. *Id.* art. 171(2)(b).
206. *Id.* art. 171(3)(a)-(d).
207. *Id.* art. 171(2)(b).
208. *See, e.g.*, CHAKRAVARTHI RAGHAVAN, THE WORLD TRADE ORGANIZATION AND ITS DISPUTE SETTLEMENT SYSTEM: TILTING THE BALANCE AGAINST THE SOUTH (2000), *available at* http://www.twnside.org.sg/title/tilting.htm; *see also* Mosoti, *supra* note 191, at 232 ("[T]he process is quite expensive, as it requires experienced and knowledgeable negotiators to represent disputants.").
209. RAGHAVAN, *supra* note 208, at Intro.

dispute resolution at the WTO level, they are forced to hire legal representatives at costs that are prohibitive.[210]

At the regional level, the expertise needed would, more often than not, be available locally at significantly lower costs. For a country concerned about resources, it might be easier to seek recourse under the COMESA rather than the WTO. Developing countries, especially those in Africa, have not had a particularly pleasant relationship with the multilateral trading regime.[211] The current deadlock in negotiations within the WTO may be attributed to the dissatisfaction that poor countries have with the trade regime that is not advancing their interests in many ways. It is possible that a country may be swayed by this consideration in choosing the forum to resolve a trade dispute. A dispute between Ethiopia and Eritrea, two of the world's poorest countries, would more likely be resolved in Khartoum, Sudan (where the COMESA Court sits), rather than in Geneva, Switzerland.

D. The Role of Private Parties

Availability of private party right of action under COMESA also raises interesting issues. Access by private parties is more certain in the COMESA framework than it is under the WTO DSM.[212] When a dispute involves private parties, it will certainly be brought under the COMESA regime and not under the WTO regime which does not recognize private party access. Issues of confidentiality with respect to government information may be paramount in the decision to exclude non-State actors from the WTO process. If a country is overly concerned about the risk posed to it in terms of leakage of important government information, it may well stay clear of the COMESA process that both allows non-State litigants and is conducted in public. Additionally, the COMESA Treaty provides very liberal rules for intervention by any person who is not a party to the treaty. Article 36 allows the filing of the amicus briefs that have been a big issue under the WTO DSM.[213] If a country were to raise

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210. *Id.* at Preface.

211. *See, e.g.*, Mosoti, *supra* note 191.

212. *See* discussion *supra* Part V.B.1. See also Bruno, *supra* note 143, for an excellent article on the debate about private party participation in international dispute settlement.

213. The issue of direct participation by non-State actors, particularly nongovernmental organizations (NGOs), in the WTO dispute settlement process has been raging for some time now. The argument is that panels may not have the necessary technical information to enable them to make decisions that take into account the many interests affected by disputes before them. The basis for this argument has been that the DSU allows a panel the "right to seek information and technical advice from any individual or body which it deems appropriate." DSU, *supra* note

the same concerns as were raised within the WTO regarding briefs by non-State actors, then it would be wise to commence an action within the WTO rather than the COMESA framework.

E. Political Considerations

The extent to which a process of dispute settlement is open to the machinations of a more influential litigant may be a factor in the ultimate forum choice. A state may trust a system where the decision-making institution is relatively impervious to underhanded political manipulation. Whether the WTO system is such a system is arguable, though it can be said that the panel selection process is likely to be political, seeing as states can only agree to panelists that appeal to

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93, art. 13(1). A panel is allowed to "seek information from any relevant source and . . . [to] consult experts to obtain their opinion on certain aspects of the matter." *Id.* art 13(2).

In the *Shrimp-Turtle* dispute, a number of environmental NGOs filed an amicus brief seeking to present their support for the measures taken by the United States as being justified on environmental bases. Ctr. for Int'l Envtl. Law et al., *Motion to Submit Amicus Brief to the Panel on United States—Import Prohibition of Certain Shrimp and Shrimp Products*, *at* http://ciel.org/Tae/second.html (last visited Oct. 8, 2004). In their application, the NGOs sought to justify their participation by pointing to the "significant additional technical, scientific and legal information critical to the Panel's deliberations" which drew from their expertise in the area in question. *Id.*; *see also* Ctr. for Int'l Envtl. Law et al., *Amicus Brief to the Appellate Body on United States—Import Prohibition of Certain Shrimp and Shrimp Products*, *at* http://ciel.org/Publications/shrimpturtlebrief.pdf (last visited Oct. 8, 2004). While the panel in this dispute declined to accept the briefs since it never requested them, the Appellate Body ruled that such briefs could be filed, but that it was up to the panel to decide whether to accept or reject them. Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, paras. 107-108 (Oct. 12, 1998) *available at* http://www.wto.org/english/tratop_e/dispu_e/58abr.doc.

In a subsequent dispute, the Appellate Body, having ruled that it had the authority to request amici curiae briefs, circulated a request for submissions in which it set down the steps to be followed by interested parties. *See* Appellate Body Report, *European Communities-Measures Affecting Asbestos and Products Containing Asbestos*, DS135/AB/R, para. 52 (Mar. 12, 2001), *available at* http://www.wto.org/english/tratop_e/dispu_e/135abr_e.pdf. In an extraordinary meeting of the WTO General Council, member states opposed the decision allowing direct participation of NGOs arguing that the WTO dispute resolution system was an intergovernmental process in which NGOs or other non-State actors had no stake. *Id.* The Appellate Body then declined to consider the briefs filed, arguing that they did not meet the criteria it set out in its request. *See id.* para. 53. Others have argued that the Appellate Body acted this way after having sensed the hostility with which member states received its initiative. *See, e.g.*, Petros C. Mavroidis, *Amicus Curiae Briefs Before the WTO: Much Ado About Nothing, Act Two*, *available at* http://www.worldtradelaw.net/articles/mavroidisamicus.pdf ("Following this meeting and having now clearly established that the majority of WTO Members are hostile to its initiative, the Appellate Body went ahead and issued an un-motivated communication whereby it rejected all *amicus curiae* submitted to it.").

them.[214] The same can also be said of the COMESA panel procedure relating to trade remedies, where the litigants must choose the first two panelists and then agree on a third. What is certain, though, is that the requirement for consultation under the WTO thrusts parties into a political trajectory right at the start of the dispute resolution process.[215] Though consultation is done under the supervision of the WTO, it is a process that is controlled by the parties to the dispute.[216] At this stage, a party in a vulnerable position may not be able to stand up to the influence of its more powerful counterpart. Under COMESA, however, the dispute is channeled directly into the Court. As such, a situation where a party is allowed to take advantage of its strong negotiating position is less likely to arise.

Moreover, the permanence of the COMESA Court ensures that the litigants have no input in the composition of the tribunal that is charged with the function of determining their rights. For a country that does not see itself as capable of exerting such an influence, the Court might be the preferred choice. For example, Eritrea may see itself as better off when suing Egypt in the Court, rather than in the WTO panel process.

VII. CONCLUSION

If RTAs are seen as attempts to localize the advantages provided by the multilateral trading regime, it is not surprising that many of their provisions are either informed by the principles espoused by the latter, or even based on the same principles expressed in identical wording. As seen in the case of COMESA and the WTO, even though the trade regimes established at the regional and multilateral levels may technically be different, it is not possible to divorce one from the other due to the similarities in the rights and obligations of their respective provisions. A violation of a term of the COMESA Treaty might easily be deemed a violation of a term of any of the WTO Agreements. Since the multiple obligations and rights extend to procedures of dispute settlement, and both these regimes provide for dispute settlement mechanisms, member countries have some choice with respect to the forum in which they wish to have their disputes resolved. In the absence of forum selection rules, as is the case between COMESA and the WTO, members are free to

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214. *See, e.g.*, RAGHAVAN, *supra* note 208 (decrying the structuring of the DSU that seems to favor countries with greater economic power and thus more political influence).

215. *See* DSU, *supra* note 93, art. 3(7).

216. *Id.* art. 4(4) (requiring all requests for consultations to "be notified to the DSB and the relevant Councils and Committees by the Member which requests consultations").

weigh their options before settling on either dispute settlement mechanism. The procedural advantages provided by one over the other, the type of remedies and the ease of enforcement, the extent to which the system balances the interests of both parties, and the accessibility of the mechanism are some of the issues that may be significant in a decision as to the appropriate forum.

The purpose of this Article is to determine the factors that may influence a COMESA state when choosing between the COMESA Court of Justice and the WTO DSM for the resolution of its trade disputes. It does seem that COMESA members are making little use of either system despite the abundance of trade disputes among them. While the question as to why or why not is certainly not premature, this does not preempt the conclusions reached in this Article, despite the tentativeness of such an endeavor. COMESA and its institutions are relatively new. As the degree of integration increases, so too does the volume of trade among members, and hence the possibility of more complex disputes that will require some form of judicial intervention, either at the multilateral or regional level. As COMESA continues to widen its membership and institutional mandate, many other issues are brought within its jurisdiction, thus increasing potential areas of conflict. Sooner or later, COMESA countries will find themselves having to confront the issues raised in this Article.