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The African Awakening in *United States—Upland Cotton*

Hilton E. ZUNCKEL*

I. CONTEXT

> "The voices of least-developed countries are rarely heard in WTO dispute settlement. Unfortunately, in the nearly ten years of WTO Panel and Appellate Body proceedings, least-developed countries have been virtually absent. There are many obstacles that deter least-developed countries from participating in WTO disputes. This appeal is different. The extraordinarily damaging impact of US subsidies in Africa has compelled Benin and Chad to participate in this case. For Benin and Chad—and indeed for many of the least-developed countries of Africa - this appeal is unquestionably the most important dispute ever brought to the WTO." (Third Party Submission of Benin and Chad to the WTO Appellate Body 16 November 2004.)

II. INTRODUCTION

Since 1995 when the WTO Dispute Settlement Body commenced its functioning, no sub-Saharan African WTO Member has ever taken the lead, either as a complainant or defendant, in any case brought before this body. Some African countries have participated in a small number of cases, mainly as third parties, but this participation under the WTO Dispute Settlement Understanding (DSU) has been very limited. Why Africa is not fully utilizing the opportunities presented by this mechanism to advance its trade agenda is intuitively understandable but practically mystifying. This is particularly so in the sphere of the WTO Agreement on Agriculture where numerous authors have decried the impact of agricultural subsidies on the ability of a largely agrarian African continent to fully engage the multilateral trading system in a way that fosters sustainable development, or fosters anything at all in some instances.[1] The African continent is home to some of the world's lowest cost cotton producers who

* The author is a senior trade advisor with the South African law firm Floor Incorporated. He holds a masters degree in international law and economics (M.I.L.E) from the World Trade Institute (Switzerland). Formerly an executive in the grain milling industry, and having been a senior researcher with the Trade Law Centre for Southern Africa; he has worked on agricultural trade issues for the past 15 years. An earlier draft of this paper was presented at a conference titled "WTO Dispute Settlement—An African View" presented in Cape Town South Africa on 31 March 2005. The author would like to pertinently acknowledge the contributions of Dr Nicholas Minot (IFPRI) and Mr Brendan McGivern (White & Case). The views and concomitant responsibility remain those of the author.

[1] For pertinent examples of this see H.E. Zunckel, *The rationale behind the reform of agricultural subsidies* (2004), at <http://www.tralac.org/scripts/content.php?id=2860> and M.G. Desta, *The law of international trade in agricultural products: from GATT 1947 to the WTO Agreement on Agriculture* (2002), The Hague: Kluwer Law International.

certainly have a vested interest in the pursuit and impact of reform in this sector. This is evidenced by the West African led political activity that has surrounded cotton in the WTO since June 2003, culminating in the prominence of the Sectoral Initiative on Cotton[2] (the Cotton Initiative) in the text of the 2004 WTO "July Package".[3] This text couches the now famous terms describing the future work on cotton which is to be dealt with "ambitiously, expeditiously and specifically".[4] While this structural reform process continues at a laborious pace,[5] the most immediate solution for a WTO Member aggrieved by agricultural subsidies is to tackle the subsidies head on via dispute settlement under the WTO DSU. Dispute settlement gives Members the option of taking ownership of agricultural reform in the sense that a dispute can be initiated and pursued unilaterally without the necessary, but time consuming, consensus building process required by the wider milieu of the Doha Development Agenda negotiations. While a case tackles the offending subsidies immediately, this action also has the strategic advantage of bringing pressure to bear on the pace and extent of the negotiation process itself.

This dynamic was not missed by two cotton producing African least developed countries, Benin and Chad. They were attuned to the interwoven logic of the action brought by Brazil against the United States on cotton. Thus, already being the front runners in the Cotton Initiative, they took up third-party rights in the *Upland Cotton* dispute.[6] *Upland Cotton* is a landmark judgment that is sure to attract a wealth of writing and will certainly be one of the most definitive pieces of jurisprudence in WTO law in the arena of agricultural trade. From the perspective of African participation in WTO dispute settlement this case is an "African Awakening" in coming to grips with the practical know-how as what is required to engage the DSU.

The analysis at hand will examine what resources were available to assist Benin and Chad to participate as third parties, how Benin and Chad went about mobilizing the resources and relay some sense of the overall experience. This will be based on the *Upland Cotton* Panel and Appellate Body reports, and some the insights provided by practitioners both directly and indirectly involved in the dispute. While taking some of the legal issues and argument on board to reflect upon the methods employed in the African's participation, the paper does not aim to be a legal analysis of the dispute or a detailed explanation of the findings. The key findings are however summarized in section IV below.[7] The analysis will then draw some specific observations dealing with

[2] WTO document WT/L/579, 2 August 2004, paragraph 1b.
[3] WTO document WT/L/579, 2 August 2004. Hereafter referred to as the July Package.
[4] See the July Package—WTO document WT/L/579, 2 August 2004, Annex A, paragraph 4.
[5] See <http://www.wto.org/english/tratop_e/agric_e/cotton_subcommittee_e.htm> (17 July 2005).
[6] *Upland Cotton*: Report of the Panel United States Upland Cotton WT/DS 267/R 8 September 2004; *Upland Cotton*: Report of the Appellate Body United States Upland Cotton WT/DS 267/AB/R 3 March 2005. Hereafter these are collectively referred to as *Upland Cotton* for ease of reference.
[7] The author contends that the *Upland Cotton* reports hold many lessons to the interpretation of WTO law in agriculture by addressing elements of the Agreement on Agriculture in relation to the so-called Peace Clause, export subsidies and domestic support. In this regard see H.E. Zunckel, *Cottoning on to United States Upland Cotton in Africa* (September 2004) at <http://www.tralac.org/scripts/content.php?id=2972>.

the implications of *Upland Cotton* for African countries in an attempt to encourage the future participation of Africans in WTO Dispute Settlement.

III. The Extent of the Dispute

The intellectual and time resources required to master *Upland Cotton* are considerable, and evident just from examining the legal texts. The text of the Panel and Appellate reports with all their annexed documents, are in excess of 3,000 pages of text. The complaint was initiated by a request for consultations from Brazil on 27 September 2002 and the report of the Appellate Body was made publicly available on 3 March 2005. The official process thus ran for two and a half years.

Brazil essentially complained that various subsidies granted to cotton farmers and processors by the US government were adversely affecting Brazil's potential to exploit the global cotton market by negatively impacting international cotton[8] prices. Brazil contended that these subsidies were provided contrary to the limits and conditions provided for in the Agreement on Agriculture. As such were subject to discipline under the Agreement on Subsidies and Countervailing Measures and not shielded by the protection of the Peace Clause in the Agreement on Agriculture. A host of Members joined the Panel as third parties. It is in this capacity that the two African countries, Benin and Chad, chose to participate on the side of Brazil.[9] It is notable that a Southern African country, Zimbabwe, showed an interest in the initial stages by officially requesting to join in the consultations between Brazil and the United States by claiming a substantial trade interest in the matter as a ''producer, supplier and exporter of cotton''. Zimbabwe did not take this further by reserving third party rights.[10]

The basis for the United States measures that formed the basis of the complaint are found in the Agricultural Act of 1949 and the Agricultural Adjustment Act of 1938 which make up what is known as the ''permanent law'' that provides for income and commodity price support. Congress enacts recurring farm bills that expire after four to six years. These farm bills amend provisions of the permanent law to make changes to agricultural support programmes. The last farm bill was the Farm Security and Rural Investment Act of 2002 (FSRI Act). This Act follows on from the Federal Agricultural Improvement and Reform Act (FAIR Act of 1996). The FSRI Act authorizes payments for the 2002 to 2007 crop years for agricultural crops which include upland cotton. Congress can also provide supplementary assistance under separate legislation.

The overall result of the decision in *Upland Cotton* is a rather firm indictment of this suite of US agricultural support law.

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[8] *Upland Cotton*, para. 7.197: The product is described as *Gossypium hirsutum*—planted and stub cotton that is produced from other than pure strain varieties of the Barbadense species, any hybrid thereof, or any other variety of cotton in which one or more of these varieties predominate.

[9] The 13 third-party participants are Argentina, Australia, Benin, Canada, Chad, China, the European Communities, India, New Zealand, Pakistan, Paraguay, Chinese Taipei and Venezuela.

[10] WTO Document WT/DS267/2, 15 October 2002.

What is evident here from examining the extent of the dispute, is that participating in the dispute required a commitment by Benin and Chad to the proceedings for over two years. This participation was not limited to the countries' own interventions but required continued attention in following the arguments of the plaintiff and defending Members, as well as the other 11 third-party participants to the dispute. This indicates that a principle commitment is needed *a priori*, backed by a strong resolve to keep pace during the term of the case, even for a third party.

IV The Essential Findings

In March 2005 the WTO Appellate Body essentially upheld all the critical elements of Brazil's challenge to US cotton subsidies as found by the initial Panel on 8 September 2004. The ruling indicates that the United States exceeded its negotiated limit on cotton subsidies, that as a result it had lost protection under the so-called Agreement on Agriculture (AoA) Peace Clause that urges countries to practise due restraint in challenging agricultural subsidies, and that these subsidies had injured Brazilian producers by suppressing world market prices. The dispute addressed all three major subsidy categories under the Agreement on Agriculture, the so-called red, amber and green boxes representing prohibited, distorting and acceptable support categories respectively.[11] The findings of the Panel and the Appellate Body in *Upland Cotton* are informative in redefining what were thought to be acceptable classifications of subsidies, finding certain Green Box measures to be Amber Box measures and certain Amber Box and "exempt" measures to be Red Box (prohibited measures). The findings thus call for the withdrawal or amendment to certain subsidy categories, *inter alia*.

The Appellate Body agreed with the Panel that US export credit guarantees on cotton met the definition of an export subsidy as defined in WTO rules, and were prohibited since the United States had not scheduled to provide them in its Agreement on Agriculture Uruguay Round commitments. It rejected US arguments that the Agreement on Agriculture serves as an exception for export credits from export subsidy commitments.[12]

The Appellate Body agreed with the earlier Panel that the United States should eliminate export credits for other commodities that receive this support but were not scheduled to get export subsidies under the US Uruguay Round commitments.

The Appellate Body agreed with the Panel that the US "Step 2 program" violated WTO rules when the United States pays producers the difference between the US price and the world market price in order to ensure that US cotton can be sold in global

[11] For a discussion of these support mechanisms from an African perspective see H.E. Zunckel. *Adequately Boxing Africa in the Debate on Domestic Support and Export Subsidies* (2004) at <http://www.tralac.org/scripts/content.php?id=1394>.

[12] Agreement on Agriculture, Article 10.2.

markets at a profit. Also, when US textile producers receive a subsidy under Step 2 for using US cotton in the production of apparel and textiles, the United States is in violation of the Agreement on Subsidies and Countervailing Measures, which prohibits subsidies contingent on the use of domestic over imported goods.

Regarding Agreement on Agriculture Amber Box (domestic support) payments, the Appellate Body upheld the Panel's finding that the United States had exceeded its allowable domestic support to upland cotton from 1999–2002. It ruled that the United States did this by providing more support in those years than it had during the 1992 marketing year. This prevented the United States from relying on the protection of the Agreement on Agriculture Peace Clause.[13]

The United States argued that domestic support by way of production flexibility contract payments and direct payments constituted allowable green box support that is considered non-trade-distorting.[14] If the United States had been able to prove that these payments where in the nature of the Green Box, then the payments would not have had to be added towards the Agreement on Agriculture limitation on trade-distorting Amber Box support and would have meant that the United States was within the required limits on support provided to a specific commodity. The United States argued that because farmers could plant other crops besides cotton and still receive these payments, the payments were not specific, hence non-trade-distorting, thus meeting the requirements to be Green Box. The ruling however indicates that by preventing fruit and vegetable producers from receiving these payments, the support violates the definition of decoupled income support that is considered Green Box in the Agreement on Agriculture.[15]

The Appellate Body also upheld the Panel's decision that various United States payments (including direct payments, counter-cyclical payments, market loss assistance payments and production flexibility payments) granted support specific to cotton. The US argued unsuccessfully that the support was not specific because the payments were based on historic acreage and farmers could receive the support for producing other crops, or for refraining from production altogether.

It is in view of this that the standard wording that one expects to find in a ruling from the Appellate Body appears at the end of the *Upland Cotton* Appellate Body report:

> "The Appellate Body recommends that the Dispute Settlement Body request the United States to bring its measures, found in this Report and in the Panel Report as modified by this Report to be inconsistent with the Agreement on Agriculture and the SCM Agreement,[16] into conformity with its obligations under those Agreements".[17]

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[13] Article 13(b)(ii) of the Agreement on Agriculture states that payments are exempt from actions provided they do not grant support to a specific commodity in excess of that decided during the 1992 marketing year.

[14] Agreement on Agriculture, Annex 2.

[15] Ibid., para. 6.

[16] The notation "SCM" used by the Appellate Body, refers to the WTO the Agreement on Subsidies and Countervailing Measures.

[17] Appellate Body Report, *Upland Cotton,* WT/DS267/AB/R 3, para. 764.

V. Why Does Africa Care?

With specific reference to upland cotton, the subsidies of almost US$4 billion paid by the United States to a group of 25,000 wealthy cotton farmers exceed the respective gross national incomes of Benin and Chad, and their West African neighbours, Burkina Faso, the Central African Republic, Mali and Togo. The top 1 percent of these 25,000 US farmers receive about a billion dollars (25 percent of the total support).[18] The extent of these US subsidies has undermined the subsistence cotton sectors of west and central Africa.

The Panel found that the US share of world cotton exports increased from 23.5 percent in 1999 to 39.9 percent in 2002. At the same time West African cotton producers decreased exports from 10.2 percent in 1998 to 8.1 percent in 2002. This loss of 2.1 percent of world market share translates into a 20 percent drop in exports for the West African cotton exporters. This is a highly disproportionate (ten fold) loss of market share for these West African countries.

According to Oxfam (2002), sub-Saharan cotton exporters lost US$ 302 million as a direct consequence of USt cotton subsidies in 2001. Oxfam shows that Benin's cotton export earnings in 2001 were US$ 124 million. However, had the US subsidies been withdrawn, Benin's estimated export earnings would have been US$ 157 million. This is a loss of US$ 33 million and means that earnings could have been 26.6 percent higher. Similarly, cotton export earnings for Chad in 2001 were US$ 63 million, and in the absence of US subsidies Chad would have earned $ 79 million. This is a loss of US$ 16 million and means that earnings could have been 25.3 percent higher. The cumulative loss of export earnings from 1999–2001 was US$ 61 million for Benin and $ 28 million for Chad. The research paper states that "The small size of several West African economies and their high levels of dependence on cotton inevitably magnifies the adverse effects of US subsidies. For several countries, US policy has generated what can only be described as a major economic shock."[19] It is noted that this type of effect was also experienced in varying degrees by other African countries—Nigeria, Tanzania and Zambia.

This serves to answer the question as to why African countries would be concerned about participating in the *Upland Cotton* dispute and indicates their direct interest in a positive outcome for the plaintiffs, Brazil.

VI. Lessons from Africa's Third Party Participation

Having examined the context surrounding the participation of Benin and Chad in *Upland Cotton*, we proceed to examine the nature of their participation in greater detail.

[18] K. Watkins, *The impact of United States Cotton Subsidies on Africa*, Oxfam Briefing Paper 30 (2002), p. 23.

[19] Ibid., footnote 18, p. 17. These figures are often quoted throughout the ensuing legal texts. See for instance footnote 1330 of the *Upland Cotton* Panel Report and para. 25 of the third-party submission of Benin and Chad to the Appellate Body. Also see note 31.

Firstly the participation in the proceedings by Benin and Chad, two of Africa's least-developed countries (LDCs), is most encouraging in view of the fact that a Sub-Saharan African country has never been a leading party to a WTO dispute either as a plaintiff or as a defendant. This action goes some way in breaking through the perception that it is technically not possible or is undesirable for African countries to participate in dispute settlement. It is useful to examine the manner in which these countries approached the case.[20]

Benin and Chad were involved in the proceedings as "third parties". The WTO dispute settlement understanding (DSU)[21] indicates that third parties have the right to have their interests fully taken into account if they have an interest in the matter to hand. A third party can make a written submission to the Panel and Appellate Body, be heard orally by the Panel and Appellate Body, have its submission given to the other parties and receive the initial submissions of the other parties. Benin and Chad made use of all these opportunities.

Benin provided a written submission and presented a statement at the first meeting of the Panel and followed this up with written responses to the Panel's questions. The written submission is short, being seven pages in length. The submission essentially provides some insight into the plight of Benin in the face of a distorted world market and then provides some legal argument. The economic descriptive part of the submission is short but makes its point forcefully by providing pertinent facts and figures which have the effect of raising a sense of alarm with the reader. For instance, one of the conclusions is that "the shock of such subsidies, and their attendant effect on prices, threatens the very existence of the cotton sector in Benin".[22] The credibility of the data presented is given credence by anchoring it to accepted and credible sources such as papers by the International Monetary Fund (IMF), United Nations Development Programme (UNDP), Oxfam and the International Food Policy Research Institute (IFPRI). The sense of prejudice to Benin is aptly conveyed without losing the reader in a rambling and unnecessary overload of economic analysis.

The legal argument is very short, two and a half pages, and is focused almost entirely on the issue of "affirmative defence", the issue that determines which party bears the burden of proof. At this stage of the proceedings this was an important matter as a win for Brazil on this point would have meant that it could compel the United States to prepare a detailed defence in face of a *prima facie* case, instead of itself having to build a case against a *prima facie* defendable position. The submission states directly that Benin was siding with Brazil. The legal argument is not lengthy, but nonetheless indicates an insight into the previous case law of the WTO and indicates an insight into the submission of Brazil. The text and argument is clearly pertinent and lucid. The

[20] Following loosely from the Panel Report in *Upland Cotton* paragraph 7.54.
[21] Understanding on rules and procedures governing the settlement of disputes. Article 10.
[22] *Upland Cotton* Panel Report, Annex B-5, para. 19. Also see footnote 6.

parallel with the submission on the same subject-matter by Brazil is clearly visible, as is the hand of a trade law initiate.

Thereafter Benin and Chad jointly made a written submission, and presented oral statements at the resumed session of the first meeting of the Panel. The written submission mirrors the earlier submission from Benin, and then brings on board similar statistics for Chad. On the legal argument the submission focuses on the issue of "serious prejudice" and also aligns with the case presented by Brazil. Serious prejudice to the interest of Benin and Chad is defined as having occurred by US subsidies having caused significant price suppression and/or price depression for cotton in the same market (an individual country, a region, or the world market for cotton) and that a causal link between US subsidies and suppressed prices in the world market had been established by Brazil. The submission then states that it would rely on the legal argument of Brazil, and as such no in-depth legal argument is provided.[23] The combined analysis of world cotton price suppression relies heavily on a study conducted by IFPRI for the World Bank in 2002 entitled "Impact of global cotton markets on rural poverty in Benin". This work was done by Dr Nicholas Minot and Ms Lisa Daniels. It is interesting to note that Brazil also refers to this work in its submission.[24] Benin actually included Dr Minot as part of its official delegation. This representation is fully discussed later in section VII.

It is noticeable as the proceedings moved along, that the legal argument presented by Benin and Chad seemed to step up in voracity with each subsequent intervention. After Benin and Chad make their written and oral submissions, the Panel puts written questions to them, to which they must respond. These questions cover not only matters raised directly by Benin and Chad but also probe their views on matters raised by other parties. This implies that the Benin and Chad legal team had to keep abreast of the full scope of the proceedings despite their limited involvement as third parties. The culmination of this gearing up progression is the joint third party submission of Benin and Chad to the Appellate Body, dated 16 November 2004. In this 40 page legal brief Benin and Chad spend some considerable effort in delving into the technical details of matters relating to the subject of serious prejudice. The brief is detailed, well complied and shows a first-rate understanding of the issues to hand. This seeming progression is confirmed and explained in section VII of this paper.

The joint Benin and Chad submission makes reference to the wider cotton initiative launched on a diplomatic level by the president of Burkina Faso in June 2003.[25] The submission is however sensitive to the fact that the Panel was unlikely to be swayed by political posturing in proceedings under the DSU. The political element is thus not over-played, but sufficiently raised to ensure that the Panel was indeed aware of the wider negotiating context at play in parallel with the Panel proceedings. The

[23] *Upland Cotton* Panel Report, Annex E-4, paras 5–7.
[24] See *Upland Cotton* Panel Report, footnote 119.
[25] *Upland Cotton* Panel Report, Annex E-4, referring to WTO document WT/MIN(03)/W/2.

submission states that "In this dispute, Benin and Chad are not seeking charity or preferential treatment. Similarly, Benin and Chad do not wish to make political appeals."[26] In the author's opinion this was a shrewd and well-thought-out manner of dealing with this issue. The effect of the ruse is that the LDCs did in fact achieve the impact of a political appeal without being seen to have done so.

The matter of the Cotton Initiative bears comment. The manner of the West African approach to launch the Cotton Initiative was novel in that it is not usual to have the president of a WTO Member address the General Council. This is ordinarily in the realm of a senior official. The appearance by President Blaise Compaorè (Burkina Faso) thus succeeded in elevating cotton to a fully fledged negotiating item in the Doha negotiations. This is notable as, outside of the wider agriculture negotiations, cotton was not part of the Doha Ministerial Declaration[27] from whence the current negotiation draws its mandate. Currently we find that cotton is firmly established within the text of the 2004 WTO July Package.[28] The parallel process, in terms of which proceedings under the DSU influence the wider negotiation dynamic, are clearly evident in the interplay between *Upland Cotton* and the WTO July Package. This consideration certainly did not escape Brazil in filing the complaint, and likewise did not escape Benin and Chad in taking up third-party participation. This having been said, one should note that *Upland Cotton* shows the difference in impact of the two approaches. The current agriculture negotiations predated the Doha Development Agenda having commenced in 2000 under the mandate of Article 20 of the Agreement on Agriculture. Given the current state of the negotiation process, it is highly unlikely that any actual further reductions in agricultural subsidies will take effect before 2007 at best. Contrast this with the more immediate and thus satisfying result obtained via dispute settlement in *Upland Cotton* where the Panel (not amended by the Appellate Body) instructs, *inter alia*, that a remedy can be foreseen "at the latest within six months of the date of adoption of the report by the Dispute Settlement Body or 1 July 2005 (whichever is earlier)".[29] Within the actual time-frames this equated to 1 July 2005. The more direct and immediate impact of dispute settlement under a defined procedure must surely hold some attraction over the Doha negotiations whose conclusion is open-ended as part of an evolving process. This is further supported by the fact that progressing the matter via the cotton subcommittee under the wider agriculture negotiations of the special sessions of the WTO Committee on Agriculture, has proven to be at a modest pace at best.[30] The synergistic interaction of trade negotiations and dispute settlement is clearly evident here. Benin and Chad used the *Upland Cotton* dispute to bolster their existing work on cotton reform within the Doha Round

[26] *Upland Cotton* Panel Report, Annex E-4, para. 35.
[27] WTO document WT/MIN(01)/DEC/1 20 November 2001.
[28] WTO document WT/L/579 2 August 2004. Para. 1b and Annex A, para. 4.
[29] *Upland Cotton* Panel Report, para. 8.3(b).
[30] To follow this progress see: <http://www.wto.org/english/tratop_e/agric_e/cotton_subcommittee_e.htm> (visited 22 August 2005).

negotiations, an action showing some maturity in their ability to pursue their trade interests in the WTO.

VII The Use of Experts

We turn then to the manner of resources used by Benin and Chad. Benin has a permanent mission in Geneva and was represented by a delegation headed by its Ambassador. Chad does not have a permanent mission in Geneva, and was represented by a delegation headed by its Brussels Ambassador. As noted in section IV the Benin delegation included a researcher from the International Food Policy Research Institute (IFPRI), who presented the results of a study showing the effects of depressed world cotton prices on poverty in Benin. The written submissions also draw heavily on the work of Oxfam.[31] Both countries also used legal counsel from a private law firm with expertise in WTO law, White and Case. This blend of resources is interesting and indicates that one needs to bring a combination of technical expertise from different disciplines to maximize resources within tight budgetary constraints. The analysis will proceed to examine the legal and economic assistance enlisted by Benin and Chad in some detail.

A. Legal assistance

The text of the Benin and Chad oral submission to the Appellate Body states that "Benin and Chad wish to convey our strong appreciation to the law firm of White & Case for the *pro bono* assistance they have provided to us in this case".[32] The text of the submission indicates that at this time they were accompanied by Mr Brendan McGivern and Mr Daniel Crosby from the law firm White & Case.[33]

The first textual indication that is provided to inform us that Benin and Chad were assisted by outside counsel in *Upland Cotton* is in the report of the Panel which indicates simply that "Benin and Chad had legal advisors from a private law firm".[34] The Panel does not comment any further on this matter. This is not that surprising as the participation of counsel on behalf of governments before the structures of the DSU is now a well-established practice that came to the fore in *EC—Bananas III*.[35] In this case the Appellate Body actually itself mooted that the use of private counsel was a possible facilitator to the full participation of developing countries in dispute settlement

[31] K. Watkins, *The impact of United States Cotton Subsidies on Africa*, Oxfam Briefing Paper 30 (2002).
[32] Oral submission of Benin and Chad to the Appellate Body, para. 29.
[33] The following section is based on an interview conducted with Mr Brendan McGivern (White & Case—counsel to Benin and Chad) between 1 and 17 March 2005. White & Case is a New York headquartered law firm operating in 25 countries, <www.whitecase.com>. The White & Case International Trade Group is based in Washington D.C. and has an office in Geneva.
[34] *Upland Cotton* Panel Report, para. 7.54.
[35] Appellate Body Report, *EC—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, 25 September 1997, DSR 1997:II, p. 591.

proceedings.[36] In the author's view then, so much more is the applicability of this practice to LDCs, as is the position with Benin and Chad in the current dispute.

How did Benin approach the question of legal advice to enable its effective third-party participation both from a procedural aspect in engaging the process and also in providing substantive inputs? The first approach that was made was done via the Advisory Centre on WTO Law (ACWL), a Geneva-based technical assistance initiative providing WTO legal assistance at discounted rates to developing countries.[37] The ACWL provided Benin and Chad with initial advice prior to and then leading up to their initial reservation of third-party rights. Private counsel then became involved in the process after Benin and Chad had already joined the proceedings as third parties. This only occurred three weeks before their third-party submissions were due in the Panel proceedings. The ACWL approached White and Case only three weeks before the submissions were due, requesting White and Case to represent Benin and Chad on a *pro bono* basis, which was agreed. This would explain the earlier observation in section IV that the depth of legal delivery in the Benin and Chad submissions increased progressively between the first written submission to the Panel and the written submission to the Appellate Body.

For African countries contemplating DSU participation, cost is certainly a primary consideration, and raises the general question as to why any large international law firm would readily provide free or discounted fees to an African country.

In the current specific instance the legal assistance was obtained free of charge. According to White and Case, the firm has a corporate ethos of *pro bono* work, providing this facility on a wide range of issues, mainly in the United States. From the perspective of the firm's WTO practice it was thought that within the context of *Upland Cotton* they could make a worthy contribution in strengthening the WTO dispute settlement system, believing that the African countries had a critically important story that was deserving enough to be told. Other considerations that a firm may entertain in these circumstances are the idea of taking on the work as a loss leader as part of the firm's advertising budget to establish their prowess in dispute settlement in the hope that their performance attracts future paying clients to the firm. This would be particularly pertinent in a high profile case. The other consideration is that litigators traditionally learn their trade from their experience gained in court. In the WTO these opportunities are decidedly more rarely found than in a domestic jurisdiction, and engaging a dispute proceeding is certainly an advantage in making and keeping the firm's WTO lawyers in tune with engagement of the DSU.[38]

[36] UNCTAD Course on Dispute Settlement 3.2 Panels, p. 21.

[37] For information on the ACWL, see <www.acwl.ch>. The ACWL was unable to proceed with the representation directly due to their full workload at the time.

[38] Note that in the present case the principal lawyer for Benin and Chad, already a seasoned practitioner before Panels and the Appellate Body, was acting to ensure that the voices of the African countries were heard in a dispute that was of critical importance.

In looking further afield, it is worth noting that as a point of first contact similar to the role played by the ACWL in the current case, UNCTAD also has a facility whereby it has secured the limited services of a group of law firms who are prepared to provide some *pro bono* assistance for dispute settlement matters to deserving candidates.[39]

The question arises as to whether it is necessary to engage outside counsel, or conversely, given the amount of training being conducted by the WTO itself and ancillary trainers such as UNCTAD, in the African context, could the likes of Benin and Chad have tackled this venture from their own resources? The complexity of *Upland Cotton* was explored in section III of this paper. This complexity is attested to by the Appellate Body themselves, in stating that "the issues arising in this appeal were particularly numerous and complex compared to prior appeals, which increased the burden on the Appellate Body".[40] The author concurs with the Appellate Body assessment of complexity and concurrently with White and Case, that given the complexity of *Upland Cotton*, especially the voluminous amount of evidence and technical argument, it would have been somewhere between extremely difficult and impossible for Benin or Chad to have participated in the dispute without legal assistance. In the author's experience this would hold true for any other potential African participants contemplating a similar action in the near to medium term.

It is necessary to bear in mind that a third-party participant is not taking a lead in the dispute but is informed to a large degree by the direction taken by the principal plaintiff and defendant. This was certainly true for Benin and Chad in *Upland Cotton*, where we have noted that Benin and Chad saw their interest as coinciding with that of Brazil, hence their reservation of third-party rights taken from Brazil's lead. This raises the question as to whether the impact of a third-party intervention could be further leveraged by some level of coordination with the principal litigant. Based on the present experience of Benin and Chad, this is certainly the case. White and Case confirm that they worked very closely with the outside counsel employed by Brazil, Sidley Austen.[41] It appears that there was a close personal working relationship between lead counsel from the two firms. It is interesting to note that there is a definite benefit to the principal plaintiff in having third parties align themselves with the argument that is being punted. This was particularly clear in the written submission to the Panel by Benin, which focused exclusively on the burden of proof (affirmative defence) issue as raised by Brazil. Note that it is not uncommon in WTO dispute settlement for WTO Members to endorse the arguments of other Members with whom they agree. In addition it was at the suggestion of Sidley Austen that the Benin and Chad legal team enlisted the services of the IFPRI technical expert, Dr Nicholas Minot. The two lead counsel in fact worked together in preparing Dr Minot for the oral hearing before the

[39] For further information on this facility see <www.unctad.org/disputesettlement/lawyerslist.htm>.
[40] *Upland Cotton* Appellate Body Report, para. 8.
[41] See <www.sidley.com>.

Panel. The contribution of Dr Minot to the proceedings is examined in greater detail later in this section.

The author recalls from his own appearances in civil court that the experience of having to present or provide testimony before a court can be rather daunting and officious. In the context of Africans appearing before the DSU it would be useful to know the extent to which this plays a role, and to what extent the African third party is made to feel welcome as it where. In *Upland Cotton* the Panel did make Benin feel welcome.[42] By way of example, during the first meeting of the Panel, the European Communities, before making its substantive arguments, made an unusual statement, along the lines that as a preliminary matter, the EC wanted to say that it welcomed the participation of Benin in the Panel proceedings as the EC considered the involvement of least-developed countries in WTO dispute settlement to be extremely important, and hoped that this was a trend that would continue in the future. The Chairman of the Panel, Mr Dariusz Rosati,[43] concurred with the EC stating that the voice of least-developed countries was important, and should thus be listened to with great care. The statement by the EC is significant considering that Benin disagreed with the EC on many of the substantive points at issue in the proceedings.

By way of providing a concrete example of the benefit of having sound legal advice when participating in the DSU, let us proceed to examine just one element of the Benin and Chad engagement in the appeal process. Recall that on appeal the Benin and Chad submission to the Appellate Body took an assertive approach to the interpretation of "serious prejudice" as was argued in the context of the Agreement on Subsidies and Countervailing Measures (the SCM Agreement).

Benin and Chad asked the Appellate Body to make a specific determination that Benin and Chad had suffered serious prejudice by way of significant price suppression following their loss of cotton market share as a result of the US subsidies.[44] The reasoning here has both an explicit and an implicit element, where the implicit element at least would probably not have been exploited in the absence of an experienced WTO law initiate. The explicit reason was that a finding of serious prejudice would trigger a concomitant obligation on the United States to remove the adverse effects and the more nuanced, unstated and implicit element was that such a finding could assist Benin and Chad in any compensation negotiations with the United States later on.

This line of reasoning gave rise to the significant fact that this led to the only question that the Appellate Body addressed to any third party during the oral hearing. Recall that there were 13 third-party participants in *Upland Cotton*. The question required Benin and Chad to explain the legal basis upon which the Appellate Body could make a determination of serious prejudice with respect to Benin and Chad.

[42] Note that for the first oral hearing before the Panel only Benin was present, as Chad had not yet become active in the proceedings.

[43] The other two Panel members were Mr Mario Matus and Mr Daniel Moulis.

[44] *Upland Cotton* Appellate Body Report, paras 209–214.

Counsel explained that if the Appellate Body were to find that the United States increased its world market share of exports then a logical corollary of that must be that the United States had increased its market share at the expense of other WTO Members. There were undisputed facts on the record (i.e. facts never challenged by the United States), that Francophone Africa (including Benin and Chad) had suffered a 20 percent drop in exports over the same period in which the US world export share for cotton had increased sharply. Therefore, there was a sufficient factual basis for the Appellate Body to conclude that, at a minimum, Benin and Chad had indeed lost market share to the United States, and had therefore suffered serious prejudice. The United States argued that third parties had no right to seek such a ruling, as third parties had no right to appeal any rulings of the Panel. Benin and Chad indicated that they fully recognized that as third parties, they had no appeal rights, and were not asserting any such rights. However, counsel argued that the determination sought would flow logically from a finding that the United States had increased its market share at the expense of other Members. The US increase in market share did not take place in the abstract, but had to be assessed in context of a concomitant loss sustained by other Members, and the undisputed facts showed that Benin and Chad had lost market share.

Counsel for Benin and Chad also invoked Article 24.1 of the DSU, which provides that ''at all stages'' of a dispute, ''particular consideration'' must be given to least-developed countries. The United States argued that Article 24.1 was purely procedural, not substantive in nature. Counsel for Benin and Chad argued in response that there was nothing in Article 24.1 to limit the provision only to procedural matters, and that the term ''special consideration'' would be rendered meaningless if the Appellate Body did not give consideration to the highly damaging effects of massive US cotton subsidies on the fragile economies in Africa.

This brief glimpse from within the restricted operation of the Appellate Body provides a definite sense of the depth of legal knowledge required to engage at a peer level with the Appellate Body. Sadly, based on a technicality, the Appellate Body chose not to rule on this issue, although upholding the Panel's ruling that serious prejudice had occurred.[45] The gist of the Appellate Body argument is somewhat technical but worth quoting here in order to elucidate the circumstances here described:

> ''Finally we recall that Article 24.1 of the DSU requires that "[a]t all stages of the determination of the causes of a dispute and of dispute settlement procedures involving a least-developed country Member, particular consideration shall be given to the special situation of least-developed country Members". We fully recognize the importance of this provision. However, we recall that Benin and Chad request us to find that their interests have suffered serious prejudice in the sense of Article 5(c) of the SCM Agreement, if we find Brazil has suffered serious prejudice as a result of an increase in the United States' world market share in upland cotton in the sense of Article 6.3(d) of the SCM Agreement. As we do not find it necessary to rule on Brazil's appeal regarding the interpretation of the phrase "world market share" in Article

[45] The reader will find the detailed explanation of the Appellate Body refusal to rule on this point in the *Upland Cotton* Appellate Body Report, paras 504–512.

> 6.3(d), we therefore are not in a position to accede to Benin and Chad's request to complete the analysis and to find that, in addition to Brazil, Benin and Chad also have suffered serious prejudice to their interests in the sense of Articles 6.3(d) and 5(c) of the SCM Agreement. We note that Benin and Chad's request to complete the analysis was predicated upon us reversing the Panel's interpretation of the phrase "world market share" in Article 6.3(d) of the SCM Agreement. This condition is not met."

In summary: examining the form of legal assistance that Benin and Chad received, it becomes clear that it is most unlikely that Benin and Chad would have been able to participate without the help of counsel. This fact was recognised *ab initio* and is indicative of a maturity in approach and a lucid realization of their limitations on the part of Benin and Chad. Benin and Chad recognized that a fledgling support structure has developed in a second tier around the DSU which can serve to support participation in the DSU by WTO Members who would perhaps be loathe to do so in the absence of such support. The Benin and Chad experience indicates that the ACWL was a crucial facilitator, even though the ACWL did not actually take on the case itself. Future African DSU participants would do well to bear this, and the potentially similar role of UNCTAD in mind. The network that the ACWL is able to access proved most valuable in this instance. Once involved, Benin and Chad were well received within the DSU structures and by the other parties and third parties to the dispute. The passing of the acid test of the participation of Benin and Chad is indicated by the fact that both of the principal parties, other third parties, the Panel and the Appellate Body referred to the submissions of Benin and Chad in their own contributions and deliberations.[46] On balance, over and above the novelty of LDC participation, Benin and Chad became important contributors to the legal discourse in the *Upland Cotton* dispute, and undoubtedly made a visible overall impact.

B. Economic assistance

The first textual indication that is provided to inform us that Benin and Chad were assisted by outside expertise on economic argument matters in *Upland Cotton* is in the report of the Panel which indicates simply that the Benin delegation "included a research fellow of the International Food Policy Research Institute, who presented the results of a study entitled: Effect of falling cotton prices on rural poverty in Benin".[47] The Panel then kindly facilitates the work of future research by disclosing in a footnote that the IFPRI expert was Dr Nicholas Minot.[48]

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[46] See as examples the *Upland Cotton* Panel Report, paras 7.267, 7.990, 7.1211, 7.1233 and 7.1400 and paras 209–214 of the Appellate Body Report.

[47] *Upland Cotton* Panel Report, para. 7.54 and footnote 118.

[48] The following section is based on an interview conducted by the author with Dr Nicholas Minot (Research Fellow IFPRI, Washington) on 25 February 2005. IFPRI is one of 15 food and environmental research organizations known as the "Future Harvest" centres. The centres are located around the world and conduct research in partnership with farmers, scientists, and policymakers to help alleviate poverty and increase food security. See <www.ifpri.org>.

The participation of experts as part of a WTO Member's delegation to Panel and Appellate Body sessions is well established. In *Upland Cotton* the Panel indicates that it is open for a Member to determine the composition of its own delegation, with neither the DSU nor the SCM Agreement containing any specific rules as to the qualification of experts. The Panel specifically indicates that in *Upland Cotton*, the participation of experts, as part of the submissions of the parties and third parties, contributed constructively to "our duty to conduct an objective assessment of the matter before us".[49] It is submitted that while the Panel found the contributions "constructive", Benin and Chad more likely found the contribution of their own expert to be critical to their case.

The IFPRI paper was prepared for the World Bank in 2002 and is entitled *Impact of global cotton markets on rural poverty in Benin*.[50] As such it represents pre-existing work and was not compiled specifically for the case. The World Bank official who originally commissioned the paper was a certain Ousmane Badiane, a former IFPRI researcher and Senegalese citizen, who was working on a cotton liberalization programme in Benin. He thus had a particular interest in the West African region. For current purposes this serves to underscore the value of generating ongoing basic research at a regional level by home grown, or at least home inspired talent. For African countries it is necessary to be attuned to the issues in order to be able to address and influence them—this is not least in matters before the WTO DSU.

Benin and Chad used the IFPRI paper to support their contentions on serious prejudice due to the effects of US subsidies on world cotton prices.[51] The legal submissions use the data in the study which indicates that a 40 percent reduction in farm prices of cotton is likely to result in a reduction in rural per capita income of 5-6 percent in the long term. Also, poverty rises to the equivalent of an increase of 334,000 individuals in families that find themselves below the poverty line of US$ 0.33 cents a day, merely a third of the US$ 1 per day poverty line used by the World Bank. For Benin and Chad the results "challenge the stereotype of the rural poor in developing countries as consisting of subsistence farmers that are relatively unconnected to, and thus unaffected, by swings in world commodity markets". In terms of poverty this translates into a society where:

- 85 percent of the cotton farmers in Benin have houses with mud or mud-brick walls.
- 62 percent live in houses with a dirt floor.
- 72 percent have corrugated metal roofs and 28 percent have straw roofs.

[49] *Upland Cotton* Panel Report, para. 1323. Also see UNCTAD Course on Dispute Settlement 3.2 Panels, pp. 25–27.

[50] N. Minot, and L. Daniels, *Effect of Falling Cotton Prices on Rural Poverty in Benin,* MSSD Discussion Paper No. 48 (November 2002) on <www.ifpri.org>. For the legal reader pp. 49–51 contain a non-technical summary of the economic results.

[51] See Oral submission of Benin and Chad to the Appellate Body at para. 6 and *Upland Cotton* Panel Report, Annex E-4 paras 22–24.

- 53 percent of the cotton farmer households get drinking water from a public well, while another 18 percent use water from a river or lake.
- Less than 2 percent have electric lights, and 98 percent use oil or kerosene lamps.
- On average, the nearest source of potable water is 430 m away, and the nearest paved road is 36 km away.
- About 34 percent of the cotton farmers do not own a chair, 38 percent do not own a table, and 34 percent do not own a bed.[52]

These numbers make a forceful impression in support of the legal arguments in relation to serious prejudice.

Dr Minot was identified and contacted by the legal counsel of Brazil and then referred on to the legal counsel of Benin and Chad. Brazil had in turn been made aware of the study by Oxfam (Mr Kevin Watkins) who knew the legal team and whose work was also extensively quoted by the plaintiffs in the case.[53] This indicates the value to African researchers of getting "out and about" as it were, and publishing their research in the public domain where credible trade practitioners have access to the material. Good research that is potentially useful evidence in DSU proceedings may be ignored as it may not be widely publicized.

IFPRI provided their professional services *pro bono*, travel costs (economy) were covered by the Brazilian cotton growers' association, at the suggestion of the counsel representing Brazil and accommodation was arranged by having Dr Minot stay with friends for his time in Geneva. Briefing prior to his appearance before the Panel was done by telephone and e-mail. The lesson here is clearly that there are benefits to remaining in touch with the case of the primary party with whom you are aligning your case. In the present instance it was useful for Benin and Chad to tap into the knowledge and financial resources available to Brazil, which was to the mutual benefit of the three countries.

As an expert representing Benin and Chad at the oral hearing for third parties before the Panel, Dr Minot provides the reader with a rare first-hand impression of what transpires behind closed doors in the DSU Panel hearings. This may be of particular value to African DSU participants and their potential specialists who engage the DSU for the first time in future.

The venue was filled with about 30 representatives from the different participating Members. The atmosphere was relaxed and free of tension. This being said there was some understandable sense of formality to the proceedings evidenced by the fact that the lawyers and the expert for Benin and Chad would not be allowed into the venue without Benin and Chad first faxing their names to the WTO Secretariat, and these delegates then wearing "Expert" badges. Each delegation in turn made a statement of

[52] See Oral submission of Benin and Chad to the Appellate Body referring to Minot at footnote 19.
[53] See K. Watkins, *The impact of United States Cotton Subsidies on Africa*, Oxfam Briefing Paper 30 (2002) supra, footnotes 18 and 19.

their position in 5–10 minutes. All of the statements were in support of the Brazilian position, except in the instance of the EU who, while generally supporting the Brazilian case, did not agree with the broad definition of export subsidies proposed by Brazil's lawyers as they seemed systemically concerned that a broad definition could be used against the EU in later disputes. Most of the presentations were framed in legal language, which was sometimes difficult for non-lawyers to follow, while some statements were simple statements of support for one of the principal parties. On the day, the expert submission by Benin and Chad (lasting 20 minutes) was the only research-based presentation made.[54] There was no discussion, rebuttal, or debate, which for an academic, was surprising. However, as the presentation focused directly on Benin there was probably no real need for the US delegation to respond to the presentation. The real debate and argument was not in the third-party Panel hearing, but in the main Panel hearing. Dr Minot was however fully appraised of the central economic modelling testimony provided by Brazil as he had met Brazil's leading expert, Professor Daniel Sumner, from the University of California Davis.[55]

It is worth pausing to consider the experience of Professor Sumner as his treatment may influence the willingness of so-called first world specialists to support Africans in the future. Professor Sumner is a former USDA chief economist who later became Undersecretary in the Agriculture Department. At the time of *Upland Cotton*, Sumner was director of the University of California Agricultural Issues Centre. He was hired by the Brazilian government to perform the economic modelling analysis in support of the Brazilian challenge. In doing this in an even-handed and academically sound fashion, Sumner attracted a proverbial firestorm of abuse in the United States. Don Cameron, vice chairman of the California Cotton Growers Association was quoted as saying "He [Sumner] joined forces with the enemy to cut the heart out of our farm program" and "There are research projects that he's been involved with in the past that we'll direct elsewhere". It was also said that he was a "traitor" and that the assistance he gave Brazil was unethical because Sumner was paid from funds in the public university system.[56] Sumner's employers subsequently said that his actions were ill-advised, in an attempt to appease the Californian agricultural sector, who had indeed contributed substantially to the University. Sumner himself indicated that in his opinion the WTO was incredibly important, for the world as a whole and for global agriculture. Sumner said "I think it helped the decision-making to have someone familiar with US farm programs, and who had analyzed them for a while, to be involved in the case." In his opinion the only way to do that was to work for one side or the other. Although he would gladly have

[54] Note that *viva voce* evidence in WTO DSU proceedings, while not unprecedented, is somewhat rare, especially by a third party.

[55] The use of econometric modelling in the *Upland Cotton* dispute is worthy of a paper on its own. See *Upland Cotton* Panel Report, para 7.14–7.19 where the respective modelling experts for Brazil and the United States, Professor Daniel Sumner and Dr Joseph Glauber cross swords. The passage makes for an entertaining, albeit concern-raising read.

[56] *In US, Cotton cries betrayal*, Washington Post, 14 May 2004, <www.washingtonpost.com/wp-dyn/articles/A18996-2004May11.html> visited 1 March 2005.

given the same information to the US Agriculture Department or the United States Trade Representative's office, he stated that "I suspect they wouldn't have wanted it used".[57] In addition to this we can infer from the Panel report that US Food and Agriculture Policy Research Institute (FAPRI) who are the owners and operators of the model used by Sumner to generate the modelling result potentially faced a similar quandary. The irony is that due to the relationship between FAPRI and the US government, the United States was able to get better access to the model relied upon by Brazil, than Brazil itself. The Panel report indicates that "FAPRI has made all of the information available to the US. Why it has done this in the case of the US, but not Brazil, relates to the relationship (commercial or otherwise) between FAPRI (which receives US funding for its work) and the US Government. FAPRI has provided all of the information to the US on the express stipulation that the model not be provided to the Panel or Brazil ('the FAPRI stipulation')".[58] Some deep intrigue by all accounts. For present purposes two issues arise from this set of facts. Firstly, the economic backup needed to make the legal argument in agricultural subsidies is significant, crucial to the case and practised in the first world. Secondly, this highlights the need for Africans to develop this type of capacity for themselves. It is all very neighbourly to employ the services of first-world experts and expert institutions in the normal course of events, but as *Upland Cotton* has shown, this is decidedly risky when the opposition funds these resources. It would be naïve to believe that the likes of Professor Sumner's principled stand will always be available.

In the *Upland Cotton* case Benin and Chad were fortunate. Dr Minot, himself a US citizen, indicated to the author that "For the last 20-odd years I have worked in developing countries and on issues of international development. It would be a false patriotism to ignore cases in which US policy runs against the interests of poverty reduction in developing countries. Also, like many economists, I am suspicious of most subsidies, particularly those for US farmers who are not poor by any standard".[59]

From an African perspective, in *Upland Cotton* and for future actions, the type of resolve shown by researchers like Sumner and Minot must be appreciated and encouraged.

VIII. Awaken, But Then Rise

The analysis to this point has indicated that applying some creativity, and understanding the emerging secondary support structure that surrounds the DSU, can effectively provide the expertise required for DSU participation. This being said, it would be interesting to contemplate participation by an African country assuming that

[57] Quotations, ibid., footnote 56.
[58] *Upland Cotton* Panel Report, para. 7.18, sub-point 2.
[59] Ibid., footnote 48.

it was not able or willing to mobilize these second tier resources. The following discussion addresses this potentiality.

On the assumption that an African country was to bring a case in its own right, three arguments are often mooted as prohibiting this. These are the cost, expertise and the risk of retaliation from large countries. All these arguments are nullified to some degree in the present instance. In their submission to the Panel Benin and Chad indicate that in 2001, the impact of US subsidies cost sub-Saharan Africa US$ 302 million in lost export earnings. The proposed rationale is thus that if bringing a dispute can provide a remedy that results in a recovery of even a fraction of this amount of export earnings, then surely even the most conservative financial advisor would advise that spending US$ 1 million[60] on a competent trade law firm and economic consultancy is an investment well made.[61] Note that this cost estimate is based on participation in the dispute as the primary plaintiff, hence the third party participation cost would be less than US$ 1 million. In addition, Oxfam[62] reports that West African governments have responded to the price crisis in the cotton market by spending US$ 50 million on cotton subsidies of their own. Likewise Tanzania, a Southern African Development Community (SADC) LDC, did the same thing, providing cotton subsidies of US$ 5 million in 2004. These payments made history in the East African country, as it is apparently the first amber subsidy that has ever been provided by the Tanzanian government.[63] A serious reality check is called for here. This is a senseless and unsustainable practice brought about by desperation. With US upland cotton subsidies being in excess of the gross national income of these African countries, African governments can *never* aspire to offset the impact of US subsidies with subsidies of their own, even in the short term. This further goes to the point that a small fraction of this subsidy outlay spent on a WTO action, such as *Upland Cotton*, is money well spent in order to obtain an effective solution. This then addresses the cost and expertise myths.

The element of the perceived threat of retaliation (for instance in the form of the denial of unilateral preferences) is more ambiguous but also at least somewhat in doubt based on the current instance. This relates again to the interrelated dynamic of dispute settlement and the trade negotiation process. If we recall the cotton text in the July Package,[64] it is notable that this text was prepared solely as a result of bilateral negotiations conducted between the United States and the West African countries and provided as is by the United States to the Chair of the agriculture negotiating group, Tim Groser,[65] for insertion into the final text of the July Package in August 2004. Faltering the Sectoral Cotton Initiative in the July Package would certainly have been a

[60] Estimate obtained in correspondence with a leading Washington-based law firm on 22 September 2004.
[61] The author formerly practised as a financial manager.
[62] Oxfam Briefing Paper 30, p. 19.
[63] The East African, 11 August 2004, relayed on <www.tralac.org> (22 March 2005).
[64] WTO document WT/L/579, 2 August 2004, para. 1(b) and Annex A, para. 4.
[65] Comment made to the author by the WTO Secretariat (August 2004) and by the Chair of the WTO Committee on Agriculture, Ambassador Tim Groser (22 April 2005).

viable option for the United States had it been seeking to punish Benin and Chad for their opposition to the United States in *Upland Cotton*. The sceptic may find this anecdotal but it certainly bears some consideration. And after all, Benin and Chad have participated in *Upland Cotton* and to date have not suffered an invasion. This being said, the author's own experience in following and supporting trade negotiations between Africans and the first world, especially in the context of the ongoing USA–Southern African Customs Union (SACU) free trade agreement, leave some sense that the retaliation concern is yet to be fully addressed.

A final observation that arises from Benin and Chad in *Upland Cotton* is that the combined use of private counsel and research by an academic research organization holds definite potential for the role that regional players with WTO trade expertise could play in support of dispute settlement actions brought by African countries, where the analytical resources provided by the non-governmental organization element and the legal advice from private counsel element are both readily available from a single source attuned to African dynamics. This opportunity has not been readily recognized or exploited to date, but should be seriously considered in taking on future African DSU participation.

IX. Concluding Remarks

Upland Cotton marks an awakening, hopefully to be followed by an emergence, of African countries in the field of WTO dispute settlement. Benin and Chad noted in their submissions that the current dispute saw their participation for the first time, which they saw as an "unprecedented step".[66] It is the hope of the author that the "unprecedented step" builds momentum into a "brisk walk" for other African countries that follow Benin and Chad in making the WTO subsidies disciplines work to reflect the comparative advantage that Africa enjoys in the field of agricultural trade. This is especially in commodities like cotton where Africans are among the world's lowest cost producers.

The lessons and encouragements in engaging the DSU that have emerged from the analysis provided in this paper can be summarized as follows:

- Participating in the DSU is not merely something that Africans can only aspire to. Participation is actually far easier than previously thought, brought home neatly by Benin and Chad. Third-party participation is an effective way of getting involved in the DSU without having to bear the full responsibility of a lead party. Third-party status enables the country to draw on the main thrust of work on the case by joining in support of a principal country. In *Upland Cotton* Benin and Chad did this successfully on the side of Brazil. Third-party participation generally, even with just a systemic interest, may be a better

[66] *Upland Cotton* Panel Report, Annex E-4, para. 1.

training experience than a decade's worth of training on technical assistance courses.

- By the admission of the Appellate Body itself, *Upland Cotton* was a complex dispute. Complexity goes hand-in-hand with the DSU and understandably is the pinnacle of intellectual operation of the WTO. After ten years of DSU existence post Uruguay Round, in which time formidable *juris prudence* has emerged, argument in disputes has by progression become more sophisticated as there is more history to draw upon. Africa needs to be aware that non-engagement to date sets up a "back foot" experience, with Africa not having ridden the exponential sophistication learning curve over the past decade.
- This complexity in law and economics cannot be mastered without drawing on outside expertise. This may be only in part for better resourced Members, but it is certain that no African country could engage the DSU using government officials alone. This help is at hand via a fledgling support structure has developed in a second tier around the DSU which can serve to support participation in the DSU by African WTO Members who would perhaps be loathe to do so in the absence of such support. The ACWL provided a crucial facilitating benefit, a function that UNCTAD, and regionally, university law faculties with trade law programmes may also perform. The networks available from these organizations show that there are indeed trade law firms and research organizations willing to provide *pro bono* or lower cost rates to countries with a low propensity to pay. Even if this were not the case the financial returns liberated from reforming the perversions of the trading system make it an infinitely possible cost/benefit decision to bring a dispute as a fully paying client.
- A blend of legal and economic expertise is required to make an effective case. A country needs to bring a combination of technical expertise from different disciplines to maximize resources within tight budgetary constraints. In the field of subsidies in particular, economic modelling is required to build a legal argument. In *Upland Cotton*, it would have been impossible to address "serious prejudice" without drawing on both disciplines.
- The ongoing generation of sound basic research is critical in pointing out areas where potential dispute action is needed, and then supporting the action once initiated. There is plenty of high-level potential evidence in the public domain. The IFPRI cotton study was a pertinent example. Research needs to be integrated into the wider pool of first line trade practitioners. Clearly the network of who knows who on the sharp end of DSU practice is relatively small and this network plays a definite role in mobilizing the required resource mix to take on a dispute.

  There is potentially a high cost to first-world experts who assist in disputes against their own countries. In the medium term Africa needs to develop this expertise at home.

– There is an imperative in making systemic progress for the further reduction of agricultural subsidies under the negotiations pursuant to the Doha Development Agenda. In short, agricultural subsidies need to be, and can be, addressed immediately under the current DSU rules and in the medium term under improved rules resulting from ongoing trade negotiations. Reformist members should guard against only taking *Upland Cotton* as a signal to litigate against more subsidies at the expense of the Doha Round. Both approaches to agricultural subsidies reform need to be addressed simultaneously. Benin and Chad clearly understood this two-pronged approach to pursuing reform.

Benin and Chad with their expert counsel and specialists have shown that commitment, resolve, creativity, understanding one's interest and putting pride aside makes the DSU a plausible spanner in the trade policy tool box of African WTO Members. Whilst we contemplate the next participation by an Africa country in WTO dispute settlement, it is perhaps fitting to give the last word to our African compatriots whose participation in *Upland Cotton* stands as an inspiration, as well as a challenge, to the rest of the African contingent among the Members of the WTO. Naïm Akibou from Benin said in the final oral statement by Benin and Chad to the Appellate Body on 13 December 2004:

> "In closing, I would note that many people in sub-Saharan Africa believe that the rules of the multilateral trading system were written by major countries for the benefit of major countries. However, we believe that the WTO dispute settlement system can and will recognize the impairment of rights suffered by least-developed countries. Indeed, this is why we decided to intervene in these proceedings."