DOES THE WORLD TRADE ORGANIZATION DISPUTE RESOLUTION ASSIST DEVELOPING AFRICAN NATIONS DESPITE THE SPECIAL CONDITIONS? A CRITICAL ANALYSIS OF THE WTO DISPUTE SETTLEMENT PROCESS

BY:

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DECLARATION

I, **Monari Beatrice Barongo,** declare that this proposal which I submit for the Masters of Law degree at the University of Nairobi, School of Law is my original work and has not previously been submitted for Masters at another University.

Signed …… Date ……

Supervisor approval

Signed…… Date……

DEDICATION

I devote this task to God Almighty who is my maker, my power and source of strength, insight, knowledge and comprehension. Throughout this program, the Lord has been the source of my strength and on His wings I have soared.

This work is also devoted to my personal heroes and supporters, my parents, Mr and Mrs Christopher and Genevieve Monari who have raised me to be the person I am today. You have been with me every step of the way, through good and bad times. Thank you for everything. Thank you for your never-ending love, help, and advice, which has helped me to achieve success and inspired me to trust that I can do anything I set my mind to. To my brother Fred and sisters Alice, Judy and Joan, thank you for all your support.

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Main agreements

1. General Agreement on Tariffs and Trade 1947
2. Understanding on the Interpretation of Article XXVIII of the General Agreement on Tariffs and Trade 1994
3. Understanding on Regulations and Process Governing the Settlement of Disputes World Trade Organization Agreement

LIST OF ABBREVIATIONS

ACP	African, Caribbean and Pacific
ACWL	Advisory Centre on World Trade Organization Law
AD	Anti-Dumping
AGOA	African Growth and Opportunity Act
AoA	Agreement on Agriculture
CDWTO	Central Department for World Trade Organization in Egypt
COMESA	Common Market for Eastern and Southern Africa
DDA	Doha Development Agenda
DSB	Conflict resolution Body
DSU	Conflict resolution Understanding
EAC	East African Community
EC	European Communities
EU	European Union
FTA	Free Trade Area
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Production
IMF	International Monetary Fund
LDCs	Least Developed Nations
MTI	Ministry of Trade and Industry in Egypt
NAMA	Non-Agriculture Market Access
NEPAD	New Economic Partnership for Africa's Development
RECs	Regional Economic Communities
SCM	Subsidies and Countervailing Measures
SPS	Sanitary and Phytosanitary Measures
TAS	Trade Agreements Sector in Egypt
TRIMs	Trade-Related Investment Measures

TRIPS	Trade-Related Aspects of Intellectual Property Rights
UNCTAD	United Nations Conference on Trade and Development
USA	U.S. of America
USD	U.S. Dollar
WB	World Bank
WTO	World Trade Organisation
SADC	Southern African Development Community

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CHAPTER ONE

INTRODUCTION

The overall research structure is explored in this section. It gives a background of study, statement of problem, objectives, theoretical framework, literature review, methodology and chapter breakdown.

1.1 BACKGROUND TO THE STUDY

The General Agreement on Tariffs and Trade (GATT) was developed as a multilateral trading framework at the end of World War II. The Havana Charter for International Trade Organization was developed as part of talks for a greater inclusive consensus. This was an unprecedented endeavor that aimed to lay down laws not only for international trade, but also for employment, unfair trading policies and economic prosperity in general. The charter never came into effect, but on 1 January 1948 the GATT took provisional effect.[1]

The General Agreement on Tariffs and Trade laid down the basics of global trade on non-discrimination — ethnic representation and the status of the most favored nation [2] - clear subsidy regulations, manipulation, withdrawal of import quantifiable constraints and tariff cut responsibilities. The set of regulations governing global trade and increased access to markets by way of tariff cuts have been implemented since 1948.[3] New partnerships on agriculture, quarantine, technical trade barriers, services trade and conflict resolution were negotiated in the the latest rounds – the Uruguay Round.

On 1 January 1995, the WTO was formed under the Marrakesh Agreement as a replacement to GATT. By establishing a specific administrative mechanism for the conduct of global trading under WTO treaties, the WTO has officiated what was effectively a transitional process

[1] GATT, Analytical Index. "Guide to GATT Law and Practice." *Updated* 1 (1995): 564.
[2] Petros C Mavroidis, *The general agreement on tariffs and trade*. Oxford University Press, 2005.
[3] Ibid.

under GATT.[4] The WTO includes the WTO Agreement on global trade regulations and an institutional system consisting of members in their organizational and decision-making capacity.[5]

The conflict resolution system of the World Trade Organization (WTO) is widely known as the "Jewel in the Crown" of the WTO.[6] It has a framework that allows contractual third-party resolution of disputes between independent states, which is a unique field of public international law. It is probably the world's busiest international conflict management program. International investment arbitration is the only framework which competes with the WTO in a number of instances. Therefore, the extensive use of the World Trade Organization (WTO) conflict resolution process is certainly a result of its effectiveness and the independence of the Member States to address their disputes. The system is far from perfect on the other hand, and has attracted opinions both internally and externally.

A new growth in international economic interactions has been acclaimed by the WTO conflict resolution system, where law, reigns over power.[7] Although these advances in international law are a huge accomplishment, in its system and operation, the framework remains far from an unbiased technocratic method. Leading western nations are better placed to use the regulated process which demands for resources and have done so. In addition, the laws of the process on solutions are designed to their benefit. Most developing nations don't want to include themselves in the dispute settlement process as a third party. In fact, because of the substantial costs and unpredictable benefits of taking part, many of them have little reason to do so.

The objective of this research is to examine in depth the special conditions granted to developing nations as well as other fears that restrict their involvement in World Trade Organization Dispute Settlement. To achieve this objective, the research will explore the current practice of WTO participants. The study will also identify the factors suggested by eastern and western literature that limit this involvement. It will also demonstrate and assess possible solutions to overcome

[4] See the Marrakesh Agreement Establishing the World Trade Organization, Art II(1)
[5] In effect this means that any one Member may veto a decision by formally objecting to it at the meeting where the proposed decision is to be made: DSU Art 2.4
[6]See the press release by WTO Director-General Pascal Lamy, on the occasion of the system reaching the milestone of having the 400thtrade dispute brought to it, in November 2009: WTO, 2009 Press Releases, PRESS/578 (6 November 2009) WTO Disputes Reach 400 Mark, available here:
<https://www.wto.org/english/news_e/pres09_e/pr578_e.htm > accessed on 8th January, 2018
[7] Julio Lacarte-Muro and Petina Gappah, Developing nations and the WTO Legal and Conflict resolution System: A View from the Bench, 4 J. Int'l Econ. L. 395, 401 (2001)

limitations affecting the involvement of developing nations in WTO Dispute Settlement processes.

1.2 STATEMENT OF THE PROBLEM

Dispute settlement in an equal, open manner, was one of the special conditions for establishing the WTO to allow developing nations to benefit, adapt and reduce the risks in dispute settlement. However, has this been accomplished?

About a third of African nations are members of the World Trade Organization (WTO), but their presence in the dispute settlement process (DSB) is worrying. Only South Africa and Egypt have been able to institute a dispute at the DSB. Many African nations have never established DSB cases and have never entered cases as third parties. Is this because e there are no trade disputes between African nations involving the DSB? Different factors, such as the cost of submitting a case to the DSB, lack of censorship protections under the DSB, and lack of a transformative policy for African nations, are responsible for the failure of African states to use the WTO conflict resolution process. After identifying these limitations, researchers have researched how they has influenced WTO DSB quality, settling conflicts and influencing the engagement of developing nations in the WTO process through disputes and arbitration proceedings.[8] The research will take account of the main challenges of instituting a dispute with the DSU by developing nations, such as the lack of financial and legal services, legal proceedings, expenses, retaliation, implementation of DSU decisions, length of the Dispute Settlement process and compensation. This research will analyze the DSU and whether it has accomplished the objective of equal and equitable resolution of disputes.

The aim is to establish if the use of the DSB by African nations faces difficulties and if the DSU is out of contact with African nations and as such African nations tend to shy away from resolving their disputes by the DSB. The main issue discussed in this study seeks to understand of WTO DSU regulations, process and the conflict resolution process, its applicability and use by

[8] Ntozintle Z. Jobodwana.. Participation of African member states in the World Trade Organization dispute settlement mechanism *International Journal of Private Law* 2, no. 2 (2009): 206-226.

African nations. The main focus will be on African nations ' problems in settling trade disputes with the DSB, the drawbacks of their presence and how they can change to boost their engagement and efficiency.

1.3 STATEMENT OF OBJECTIVES

The following are objectives of this study;

1. Analysis of the Dispute Settlement system of the WTO;
2. Determining how much African nations participate in WTO Dispute Settlement;
3. To identify the factors preventing the use of the dispute settlement mechanism by the African nations;
4. Recommend potential DSU reforms to ensure the participation of African nations.

1.4 RESEARCH QUESTIONS

1. What is the dispute settlement process of the WTO?
2. To what extent are the African nations involved?
3. Which issues obstruct the use of the DSB Dispute Settlement system by African nations?
4. What changes need to be put in place to ensure the involvement of African nations?

1.5 HYPOTHESIS

This paper proceeds on the presumption that the Dispute Resolution Body despite the special conditions of equality and fairness is continuously failing in providing conditions for the participation of African nations. The door to successful dispute resolution is constantly being

slammed in African Nations' faces due to factors such as entry barriers to using the WTO dispute settlement mechanism. African nations have been hampered in their involvement in WTO dispute resolution scheme by the expense of referring conflict to the DSB, insufficient or improper nature of the DSU retaliatory process and lack of institutional guidance.

1.6 JUSTIFICATION OF THE STUDY

This work is best illustrated by the manner in which nations participating within the conflict resolution process of the World Trade Organization (WTO) will continuously affect law enforcement and comprehension over time. A framework of international trade law, as well as the ongoing development of the jurisprudence, which will regulate multilateral trade relations for many years to come, is also enshrined with the Dispute Settlement System in the World Trade Organization. The goal of this paper is to figure out what holds Africa down, what needs to be changed and the advantages and disadvantages of these special conditions.

1.7 LITERATURE REVIEW

The aim of the literature review is to find gaps in the literature available and how this research paper tackles the gaps found.

There is vast literature on the involvement of developing nations in the WTO conflict resolution process.This research relies on the texts by Nordstrom, H, Edwini Kessi and Kofi Addo, Mosoti Victor, Roessler, Phoenix X. F. Cai, and George O. Otieno Ochich and Anna C. Konuche to show that besides the established obstacles that impede the participation of Africa and other

factors under the DSU infringing the presence of Africa in the DSB, there still exist conditions within the DSU preventing the successful participation of Africa[9][10].

Nordstrom and Shaffer[11] in their report, state that the DSU does not make any distinction between claims of $100,000 or claims of $100,000,000 involved in the conflict between its members. This is a particular challenge to small WTO nations with restricted exports since litigation costs are more or less independent of the commercial stakes involved in a dispute. In their paper Nordstrom and Shaffer outline, the challenges faced by African nations in dispute resolution and this will be a guide in finding out the flaws that cripple the DSU and what provisions can be made to accommodate nations that bring in small claims and to ensure fairness and equality in dispute resolution[12].

A critical analysis of the roles of African nations on the World Trade Organization Dispute Resolution Process is provided by Edwini Kessie and Kofi Addo[13]. The paper also looks at the role of Africa in the DSU negotiations. The authors states that, in spite of changes in the WTO regulations and dispute resolution mechanisms because of a lack of information about the WTO's problems, high legal costs and other obstacles, African nations are unable to fully exploit new legislation and process to incorporate their rights in accordance with the World Trade Organisation treaty. To date, African nations are only engaged as third parties in conflict resolution method or respondents but not as complainants. This study will take an in-depth examination into the challenges brought forward by Edwini and Kofi to see why these challenges keep arising and offer possible solutions.

In his paper, Mosoti Victor[14] clarified why the WTO Dispute Settlement process was appropriate for African nations. He said that the process does not just deal with conflicts, but with the

[9] Edwini Kessie and Addo Kofi. *African countries and the WTO negotiations on the dispute settlement understanding*. International Centre for Trade and Sustainable Development (ICTSD), 2007
[10] George O. Otieno Ochich & Annah C. Konuche "Enhancing Small Nations Access to the WTO Conflict resolution Process s : A Case for the Loser-Pays-Costs Rule" Vol. 1 No. 1 L.S.K.J (2009) p. 75-104
[11] Hakan Nordstrom and Gregory Shaffer. "Access to justice in the World Trade Organization: a case for a small claims procedure?." *World Trade Rev.* 7 (2008): 587.
[12] Hakan Nordstrom and Gregory Shaffer. "Access to justice in the World Trade Organization: a case for a small claims procedure?." *World Trade Rev.* 7 (2008): 587.
[13] Edwini Kessie and Addo Kofi. *African countries and the WTO negotiations on the dispute settlement understanding*. International Centre for Trade and Sustainable Development (ICTSD), 2007.
[14] Victor Mosoti, Africa in the first decade of WTO dispute settlement.*Journal of International Economic Law* 9, no. 2 (2006): 427-453

constant evolution of a corpus of important principles of international trade law that will continue in the long term to be applied and enforced. Mosoti identifies factors such as high litigation costs in the World Trade Organization (WTO), lack of adequate and competent trade lawyers, global power asymmetries, and lack of appropriate remedies in a number of nations across Africa. The study as well examines the process of the DSU, various awards and how these awards are implemented. What can be done to bridge the gap of power asymmetries and ensure complete fairness?

In contrast, Mosoti pointed out that the insufficient DSU requirements are not enough to allow African nations to take part in the World Trade Organization (WTO) dispute settlement process.[15] He continued that the provisions do not address lack of financial resources and the persistent nature of the retaliatory clauses. In order to ensure that African nations participate in the WTO dispute settlement process, he proposes that certain conditions and additional regulations be taken into account. For example, if the DSU confers some benefits to the developing and least developed nations,, the word "will" will be changed into "shall."

Phoenix X. F. Cai[16] states that the WTO Dispute Settlement system must introduce class suits. The proposition would authorize developing nations to lodge disputes with the developed nations, to exercise their current third-party rights. A regular joinder provision of the DSU is the principal mechanism for this. Yet structural changes, including mandatory accession status to least-developed nations upon notification of the DSB, would further reinforce this strategy. The dispute settlement process will be an active role for each nation but the representative and fair representation of the plaintiff would be one party, usually the most economically powerful one, or facing WTO conflicts, much the same as the appointed claimant. In the mediation process, the identified parties would benefit. Such plans can be made, but would the African nations benefit? Would they be taken out?

[15] Victor. Mosoti Africa in the first decade of WTO dispute settlement." *Journal of International Economic Law* 9, no. 2 (2006): 427-453.
[16] Phoenix X.F. Cai. "Making WTO Remedies Work for Developing Nations: The Need for Class Actions." *Emory Int'l L. Rev.* 25 (2011): 151.

George Ochich and Annah Konuche[17] in their article state that the WTO should introduce the concept of loser-pays-costs rule. According to Ochich and Konuche, more than two-thirds of WTO participants are the least developing nations. This group of nations is heterogeneous, as the interests and challenges facing each member of the group are as diverse as their economic disparities. They further argue that despite their large representation in membership at the WTO, the developing nations are the least represented in the number of cases filed before the DSB.

The developing and least-developing nations, apart from the major developing nations such as Brazil, India, Mexico and Argentina, statistically filed negligible trade complaints before the DSB, For instance, only two African nations Egypt and South Africa, had cases before the DSB and the two were respondents in these cases. As the title implies, the loser-paid-cost principle ensures that the defendant covers the lawyer's and the legal costs to the majority party in any civil dispute. This paper contends that the loser-pays-cost rule will enhance the ability of developing nations to use the conflict resolution process by removing the financial burden and risk of litigation before the DSB while making small claims sustainable if adopted in the World Trade Organization litigation process. The paper will aim to critically analyze the problems of dispute resolution posed by developing nations and how these obstacles can be resolved.

1.8 THEORETICAL FRAMEWORK

This research paper reflects on the legal positivist approach and examines trends in the context of the WTO conflict resolution process, the issues and problems faced by the African nations. Legal positivism is a legal and jurisprudence school of thought. The great philosopher is H.L.A. Hart[18], has rethought the positivist theory and its connections with the other main theories of law in a fundamental way. Other Philosophers in this school of thought are Jeremy Bentham and John Austin. Positivism dictates that law is a matter of what has been ordered, decided, practiced,

[17] George O. Otieno Ochich & Annah C. Konuche "Enhancing Small Nations Access to the WTO Conflict resolution Process: A Case for the Loser-Pays-Costs Rule" Vol. 1 No. 1 L.S.K.J (2009) p. 75-104.
[18] Herbert Lionel Adolphus Hart.The concept of law, 2nd edn. Clarendon. (1994)

tolerated, etc. In a more modern stance, the law is a social construction.[19] Law depends on social facts and not on its merits.[20]

This study is based on the written law that is applied under the DSU, which is the reason why the positivist method was chosen. This study focuses more on whether the law that has been drafted and enforced hinders African nations' participation in the mechanism for resolving disputes in the WTO.

The study also concentrates on the valuable concept of the Utilitarian Theory, which is usually defined as profit maximization while reducing suffering or derogatory consequences. This is an ethical and human (or anthropocentric) economic evaluation. The two major contributors to traditional utilitarianism were Jeremy Bentham and John Stuart Mill.

Utilitarianism looks into whether a particular law is useful to the populace or has it outlived its usefulness. This theory helps in looking at the DSU to identify whether it has outlived its usefulness which will, in turn, motivate the DSU to make changes to its body in order to encourage African nations to use it to their benefit.

1.9 RESEARCH METHODOLOGY

This is research is based on qualitative methodology approach recognizing essential main and secondary sources of data about the subject, the analysis relies on sources of information are reports, studies from scholars and analysts regarding the quality of a dispute resolution agency after 14 years of existence, and papers on the relevant issues in the review. The research is also based on public sources on the Internet.. The main focus of the review is on World Trade Organization legal texts, guidelines, treaties and rulings.

The secondary

[19] Waldron, Jeremy. Waldron Kant's legal Positivism. *Harvard Law Review* 109, no. 7 (1996): 1535-1566.
[20] Ibid

1.10 CHAPTER BREAKDOWN

Chapter one – Introduction

Chapter one presents the introductory part of the study. It outlines the introduction to the research topic, gives the historical background of WTO dispute settlement mechanism, states the significance of the study, offers a statement of the research problem, underlines the justification of the study, presents the statement of objective, the research questions, the theoretical framework, methodology, literature review, limitations of the study and closes with the hypothesis

Chapter two – The WTO Conflict resolution Mechanism

This chapter provides a critical analysis of the WTO Dispute Settlement mechanism. It discusses the requirements of the law on the process and interpretation by the dispute strategists chosen.

Chapter Three – African Nations participation in the WTO Conflict resolution Mechanism

Chapter three offers a study of African nations' involvement in the World Trade Organization conflict in statistical terms in order to define the bottlenecks if any.

Chapter Four – Conclusions and Recommendations

This is the final chapter and it wraps the study by offering conclusions and recommendations.

CHAPTER TWO

THE WTO DISPUTE SETTLEMENT MECHANISM

2.1 INTRODUCTION

The World Trade Organization's system of Dispute Settlement is hailed as one of the most important achievements of the multilateral system of trade, yet the same cannot be said for the participation of developing nations in this achievement.

This chapter examines the legislative and institutional framework governing the mechanism of settlement of disputes in order to understand the reason behind it. The first section provides the

origin of the DSB, while in the second section gives a summary of the regulations governing the process of dispute settlement.

2.2 ORIGINS OF THE WTO

As a follow-up to the GATT, the WTO was established in the year 1995 under the Marrakesh Treaty. The WTO formalized what was previously a transitional structure of the GATT through establishing a specific institutional framework for international trade in accordance with WTO treaties.[21] The WTO comprises both the World Trade Organization (WTO) Treaty establishing international trade guidelines and an institutional framework consisting of operational and decision-making members.[22] The arbitration of conflicts is the main pillar of the multilateral trading system and a unique WTO commitment to global economy peace.[23] Without a dispute settlement mechanism, the regulatory system would be less effective, as laws cannot be followed. The WTO system stresses on the rule of law and enhances trade stability and predictability. This Chapter intends to clarify in detail the purpose, the framework and legislative history of the WTO DSU, both on procedural provisions and their understanding by the dispute body; the outcome of the dispute panel and on matters relating to compensation.

2.2 THE FOUNDATION OF THE WTO DSU

In 1995, the WTO was created, preceding the GATT, and was defined by the Marrakesh Agreement establishing the WTO Agreement as the legal and institutional basis for the international trading process. The WTO is an international organisation as opposed to GATT. The WTO Treaty, however, subsumes the GATT. Therefore, GATT has eventually become a framework for its administration without any agency.

[21] Peter Van den Bossche, *The law and policy of the World Trade Organization: text, cases and materials*. Cambridge University Press, 2008.

[22] Ibid.

[23] WTO, Understanding the WTO (2011) at p.60. WTO Publications

In an International Trade Organization already founded, GATT was created.[24] Due to the devastating effects of the Second World War, world leaders had for many years promoted the idea of a global trade organization.[25] The GATT was signed in 1947in Geneva amid talks on the terms of the International Trade Organization[26]. The objective was to incorporate the GATT into the ITO. GATT was to be a temporary arrangement until legal provision was reached. However, many nations could not wait until the various regulatory permissions required for the ITO to come into force, GATT was thus an unintended necessity device.

The GATT's main objective was to promote free international trade through creation of laws that limit national trade barriers.[27] According to Hudec,[28] the "nullification and defects" clauses of the Geneva ITO draft were the only divisive mechanism in GATT. The early arbitration of conflicts was strongly political, and it was dubbed "conciliation."[29]

Dispute Settlement in GATT included protest actions taken by another participant in order to provide special consideration or benefits in certain industries that conflicted with international trade.[30] The General Agreement included many clauses aimed at settling contractual conflicts between its members. This rule usually arose when a member reported a loss due to another participant who had nullified or disrupted his benefits. In the GATT, Article XXIII was the principal provision for settling disputes.[31] Article XX111:2 specified that all conflicts between different contracting parties had to be dealt with by the contracting parties themselves, working together.[32]

Previously in GATT, a dispute party was also panel members to decide the case. The parties directly tangled in the cases were eventually disqualified and impartial observers were appointed to three or five panels. Yet, instead of the lawyers versed in international trade policy, these

[24] Robert Hudec Essays on the Nature of International Trade Law (1st edn, Cameron and May 1999)
[25] David Palmeter and Petros Mavroidis Dispute Settlement in the World Trade Organisation (2nd edn, Cambridge University Press 2004)
[26] Paul Demaret, 'The Metamorphosis of the GATT: From Havana to the World Trade Organisation' (1995) 34 CJTLL126
[27] William J. Davey. The WTO dispute settlement mechanism.*Illinois Public Law Research Paper* 03-08 (2003).
[28] Robert E. Hudec *Enforcing international trade law: The evolution of the modern GATT legal system*. MICHIE, 1993.
[29] Paul Demaret, 'The Metamorphosis of the GATT: From Havana to the World Trade Organisation' (1995) 34 CJTLL126
[30] Ibid
[31] Ibid
[32] WTO Website available at http://www.wto.org/english/tratop_e/dispu_settlement_cbt_e/c2s1p1-e.htm

commissions were made up of diplomats. So "legal decisions with diplomatic vagueness were drawn up."[33] The recommendations of a commission would then be forwarded to the contracting parties and would become binding on the parties, if accepted by the council. From the above, the resolution of disputes under Articles XXII and XXIII probably called for the process of informal disposal of disputes, and the process was not "judicialised' or" legalized "

The arbitration of a dispute in the GATT had no enforcement mechanisms.[34] One of GATT's main shortcomings was that it was a multiparty contract and a resolution on modifying, adjusting or interpreting needed the consent of both sides (positive concensus). In the case of a panel report, the loser could block as a result of not agreeing with the proposal and a document would not be approved if a faction rejected a report based on a consensus principle. The losing party used the report to discourage the creation of a panel by means of the principle of consensus and to defend themselves from unfavorable panel results. Certain GATT shortcomings included anonymity in the dispute settlement process, rulings were easy to block and setting dates for dispute resolution, among others. These GATT flaws led to the establishment of the WTO. [35]

2.3 REGULATIONS AND PROCESSS OF THE DSU

The DSU establishes the DSB consisting of representatives from all WTO member states; DSB has a mandate to monitor the implementation of the DSU in accordance with DSU provisions.[36] The DSU elaborates on how disputes arise in accordance with the agreements to be adjudicated, namely;[37]

a) the Marrakesh Agreement establishing the WTO;
b) the General Agreement on Tariffs and Trade (GATT);
c) the General Agreement on Trade in Services (GATS);

[33] Robert Hudec. *Enforcing international trade law: The evolution of the modern GATT legal system*. MICHIE, 1993.
[34] Eric Reinhardt Adjudication without enforcement in GATT disputes." *Journal of Conflict Resolution* 45, no. 2 (2001): 174-195.
[35] John Howard Jackson Organisation mondiale du commerce, and Royal Institute of International Affairs (London). *The world trade organization: constitution and jurisprudence*. Vol. 89. London: Royal Institute of International Affairs, 1998.
[36] Article 2 of the DSU
[37] Article 1.1 of the DSU.

d) the Agreement on Trade-Related Aspects of Intellectual Property Rights; and
e) the Multilateral Trade Agreements linked to the Marrakesh Treaty in certain situations.

The DSU is, however, open to the implementation of rulings by the Parties to the Agreements in relation to disputes under the multilateral trade treaty.[38] In the GATT conflict resolution process, the main focus of Article XXIII of the GATT is the continued interpretation of the conditions under which infringements of the WTO regulations allow members to seek redress. In Article XXIII there are three special circumstances under which WTO members may lodge claims under the DSU. When a Member State breaks WTO regulations she impacts other Member States negatively. This is referred to as the 'violation complaint' pursuant to Article XXIII: 1(a) of GATT 1994.[39] The second is 'non-violation complaint' pursuant to Article XXIII:1(b) of GATT 1994 where damage is caused without any specific breach of a GATT provision.[40] Lastly, there is a "situation complaint" pursuant to Article XXIII:1(c) of GATT 1994. The "situational grievance" simply interpreted could cover any condition so long as it ends in a "nullification or disability."

The article's application covers all the multilateral aspects of the WTO treaties. It means that any member state may seek redress in relation to any violation by another member of the WTO regulations. The breach should not be injurious because all members are obligated to comply lawfully with WTO regulations.[41] The main aim of the WTO DSU system is to resolve commercial disputes among WTO members through first-instance bilateral consultations and arbitration. When all other possibilities of conciliation have failed, recourse to a structured dispute panel is designed as a last resort.[42]

A WTO member may have access to the DSB if he feels that an action adopted by another member state has invalidated or compromised the gain which has been gained from the treaties affected. In the following four steps that a member takes a grievance to the DSB, the matter shall be dealt with.

[38] Appellate body annual report 2009, circulated as WT/AB/13 http://ww.wto.org accessed on 28 th March, 2019
[39] Amin Von Bogdandy. "Non-Violation Procedure of Article XXIII: 2, GATT-Its Operational Rationale, The." *J. World Trade* 26 (1992): 95.
[40] Ibid
[41] Ibid
[42] Hakan Nordstrom and Gregory Shaffer. "Access to justice in the World Trade Organization: a case for a small claims procedure?." *World Trade Rev.* 7 (2008): 587.

2.3.1 CONSULTATIONS

A dispute is started by one or many member, but first they have to seek mediation before it progresses into a systematic panel system to address the dispute.. A hypothetical case between nation A and B will be viewed in order to assess the WTO dispute settlement process by which these conflicts are resolved:

For example, nation A can apply for bilateral consultations in relation to specific policy if it investigates and finds that nation B's trade policy infringes some WTO commitments, in compliance with Article 4 DSU. In other words, Nation A makes a written complaint concerning the contravened obligation to nation B, the DSB Chairman, and the WTO Council concerned based on Article 4.4 DSU. Nation B shall subsequently be required to respond under Article 4(3) of the DSU within ten days of receipt by Nation A of its invitation for consultation. In addition, a third party, say, Nation C which has significant interest in this dispute may request to join these consultations within 10 days.

Nation C request must be sent to Nation A, B and the DSB.[43] Nevertheless, the proposal by nation C cannot be made until, nation B accepts that the allegations of material interest in nation C are well established and the original request for a consultation by nation A was introduced in compliance with Article XXII of the GATT 1947, paragraph 1 of Article XXII of the GATS, or the relevant clauses in other correspondent agreements.[44] Nation B shall respond to nation A's request for consultations with the objective of achieving a mutually suitable alternative and may acknowledge or refuse to take part in the consultations on claims raised by nation A. Nations A and B can also ask the WTO Director-General for conciliation and arbitration. If a mutually acceptable settlement is unsuccessful after 60 days of consultations, Nation A may then apply for

[43] Article 4.11 DSU
[44] Eliza J Rivera,The Incorporation of a" reasonable Standard Test" for the Selection of a Counterfactual in Procedures Under Article 22.6 of the DSU: A New Standard with a Similar Approach to that Followed in Procedures Under Article 4.11 of the SCM Agreement. PhD diss., George Washington University Law School, 2009.

a panel, pursuant to Article 4(7) of the DSU. When Nation A or B are developing nations or the dispute is about perishable goods, a panel may be formed within 20 days.

2.3.2 PANEL PHASE

The petition for a panel starts with the adjudication process. Nation A calls for the creation of an interalia committee, the dispute challenged and the legal basis of the claim, by writing to the Chairman of the DSB.[45] To request an item to be included on the agenda of a meeting of DSB, Nation A must apply this application at least 11 days prior to the next meeting of the DSB. Nevertheless, in the first DSB session in which a request was made, nation B could obstruct or manipulate the petition, as was seen from the New Hormones controversy when the proposal for a tribunal was rejected by the U.S. and Canada in 2005. The request was also sabotaged by the European Commission.[46]

Nevertheless, a panel can be set up at the second meeting of the DSB one month later, unless the DSB agrees not to form the panel through a reverse consensus. Ten days after the institution of the panel, the Secretariat proposes to Nations A and B, from its indicative list, three people with experience in international commercial law and politics. Nations A and B are free to respond to the appointments and if there is no resolution within 20 days of the formation of the panel, the director general may be asked to nominate the panel by each of these parties.[47]

When the panel is set up, the provisions for the establishment of the Committee, originally sent by Nation A to the DSB, as well as the covered arrangement referred to in that agreement shall be identified by its authority and terms of reference, [48] and as was stated by the ***Appellate Body in Australia - Measures Affecting Importation of Salmon***.[49] If the application was not particular

[45] Article 6(2) DSU. Such a panel must be established unless it is decided by consensus not to do so. See Article 6(1), DSU)
[46] Chad P Bown. "The WTO secretariat and the role of economics in DSU panels and arbitrations." *Available at SSRN 1274732* (2008).
[47] Article 8.7 DSU
[48] Article 7 DSU
[49] Chad P. Bown "The WTO secretariat and the role of economics in DSU panels and arbitrations." *Available at SSRN 1274732* (2008).

in respect of the claim alleged by nation A, the application cannot consequently be cured, according to the written or oral submissions of the ***Appellate Body in EC - Regime for the Importation, Sale and Distribution of Bananas***.[50] When setting up a panel, any other country, for example nation D (a third-party other than nation C) drawn to participating in the dispute can, with the presumption that the nation has a significant interest in the dispute, inform the DSB within 10 days without regard to whether it participated in consultations.[51]

The panel must prepare a calendar for its tasks after its creation. Section 12.3 DSU Article 12.3. The panel has autonomy and can, after consulting with the parties, actually follow different procedures.[52]

Nations A and B have to file their claims following the panel's protocol. Nation A first send its written submissions to the Registrar of the Dispute settlement Secretariat and then transfers the submissions to Nation B.[53] In practice, Nation A can, however, serve nation B the written submissions in its Geneva delegation's letterboxes in the WTO building. Nation C and D (third parties) normally file their applications after Nation A and B. The panel, in consultation with the stakeholders, shall decide the timeline within which parties will submit their submissions once its operation is established.[54]

The first oral hearing (first substantive meeting), which is limited to the panelists, interpreters, Nation A, Nation B and Nation C / D (third parties), is held in response to the initial submissions exchanged. Evidence from Nation A, Nation B and Nation C / D, (third parties) will been noted. The panel offers third parties a chance, during the hearing to express their views orally at a special session dedicated to submissions from third parties. The panel may also question any person, authority or entity it deems suitable for knowledge and technical advice.[55]

Nation A, B and C / D are invited to answer questions from the panel and from other sides after the oral statements in order to verify all legal and fact based issues.[56] Around four weeks later,

[50] Appellate Body report, EC - Bananas III, WT/DS27/AB/R, adopted 25 September 1997Para. 143
[51] Article 12 DSU and Article 10, DSU
[52] Article 12.1 DSU, and Paragraph 11 of Appendix 3
[53] Article 12.6 DSU
[54] Ibid
[55] Rambod. Behboodi. Should'means' shall': a critical analysis of the obligation to submit information under article 13.1 of the DSU in the Canada-Aircraft case. *Journal of international economic law* 3, no. 4 (2000): 563-592.
[56] Ibid.

Nations A and B exchange each other's initial written comments and verbal announcements at the first oral hearing by replying to written rebuttals.[57] These submissions are not provided to nation C and D.[58] The second hearing will then be held by the tribunal in which Nations A and B will once again present their truthful and legal claims and address more questions by the panel. Nations C and D are invited to express their views and to make their oral comments accessible to the committee in writing.[59] Panels have the power to call for a third session or more in a dispute.

The panel shall produce a two-stage interim report of review and clarification after the oral hearings and rebuttal submissions given by the parties.[60] At this point, Nations A or B are allowed to send to the committee written requests to change relevant aspects of the interim report before it is released as a final report. Article 15 DSU. Within six months of the date of creation of the panel, the panel shall finalize and submit its report to the DSB.[61] The panel may, however, still request the Chairman of the DSB for a time extension for the report. For example, the panel called for extension of around one month highlighting the argument's ambiguity, in the Australian, Brazilian and Thai disagreement with the EU over the Sugar Challenge. The resolution must be approved by the members of the DSB within 60 days after the publication of the document to the DSB unless Nation B advises the DSB of the decision to appeal or by consensus does not decide to approve it (reverse consensus). [62]

2.3.3 APPELLATE PHASE

The right of redress/appeal under Article 16(4) DSU is available to both Nation A and Nation B, who may appeal a panel's report to a three-person appellate whose jurisdiction is limited to legal issues and the panel's legal understanding.[63] However, this limitation is broadly interpreted to include sometimes a Panel review of the evidence, as emphasized by Korea Taxes for alcoholic beverages, where the Appellant Body stated that an appeal can be established as an issue of legally binding characterization based on the credibility and weight of the facts. The Appellate

[57] Paragraph 7 of the working procedures appendix 3 DSU
[58] World Trade Organization. *A handbook on the WTO dispute settlement system*. Cambridge University Press, 2017.
[59] Paragraph 8 and 9 of the working procedures appendix 3 DSU
[60] Article 15, DSU
[61] Article 12.9 DSU
[62] Article 16, DSU
[63] World Trade Organization. *A handbook on the WTO dispute settlement system*. Cambridge University Press, 2017.

Body can retain, amend or overturn a panel's legal findings.[64] If the Appellant Body sets out an assessment of a legal issue, it must make its own findings so that the legal analysis as conducted may be completed as stated in ***Australia, Measures Affecting Importation of Salmon***.[65]

Having considered the appeal, for example, when the Appellate identifies that Nation B's trade policy breaks a WTO requirement, the Appellate Body would then propose that Nation B comply with the WTO Agreement with its ' criminal ' trade policy and may prescribe more ways in order to enforce this.[66] The appellants ' document must then be circulated within 60 days of the date of appeal. The DSB shall adopt the appellate's body's report unless it decides by consensus not to do so.[67] The disputing members must accept the decision unconditionally when adopted.

2.3.4 IMPLEMENTATION OF RECOMMENDATIONS

When a panel or appellate body declaration is adopted, the DSB automatically conform and so will the defaulting country.[68] Nation B shall report to the DSB of its specific objective in adopting the guidelines. Nevertheless, if instant compliance is not practical a justifiable amount of time to comply with the guidelines is provided to nation B.[69] Article 21.3 DSU calls for the calculation of this reasonable period of time by three different methods:

a) Nation B must recommend and consent by consensus made by the DSB;

b) Nations A and B must jointly concur within 45 days following receipt of the report or

c) The Arbitrator may decide.

Nation B has the burden of proof to prove that the period of any proposed period of performance establishes "a reasonable period of time". The longer the recommended duration of time greater the burden.[70] ***In EC, Regime for the Importation, Sale, and Distribution of Bananas,***[71] the

[64] Article 17(3) DSU
[65] Appellate Body Report, Australia - Measures Affecting Importation of Salmon, WT/DS/18/AB/R, adopted 6 November 1998, DSR 1998: V111, 3327
[66] Article 19(1) DSU
[67] Article 17(4) DSU
[68] Article 21(1) DSU
[69] Article 21(3) DSU
[70] World Trade Organization. *A handbook on the WTO dispute settlement system*. Cambridge University Press, 2017.

Appellate Body noted that no longer than 15 months from the date of the implementation of the panel or appeal body report will take reasonable time to implement the Appellate Body recommendations or the panel. Where the proposal for reasonable time from Nation B has not been approved by the DSB and nations A and B cannot agree on a suitable period for the removal of the measure, nations A and B can resort to arbitration.[72] This process is lodged by nation A or nation B on an arbitration request sent to the chairperson of the DSB. In EC, Regime for the Importation, Sale, and Distribution of Bananas, the disputants demanded that the arbitrator be named by the WTO Director-General to set an appropriate date because EC and USA and others had not reached consensus.

2.4 SURVEILLANCE BY THE DSB

The main aim in the dispute settlement process of the WTO is to ensure that multilateral trade regulations are observed at national level and to make sure that dispute settlement is effective.[73] The matter of implementation is put on the agenda of the DSB six months after a suitable period of time has been defined. The issue remains on the agenda of the DSB until it is settled. For instance, the EC, the Bananas III dispute is settled, for many years it remained on the agenda of the DSB and on the front line of any ordinary DSB conference.[74]

It should nevertheless be remembered that the dispute settlement process is too lengthy and inefficient.[75] Because of this period it weakens the DSU goal of protecting the interests of the WTO Member States. Nation B must provide a written status report on progress made in the adoption of the DSB report and recommendations at least 10 days prior to each DSB session. Not only do these status reports guarantee transparency but they also allow Nation A to demand full and swift implementation.

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[71] EC - Bananas III Appellate Body Report WT/DS27/AB/R adopted 25 September 1997, DSR 1997: II, 591
[72] Article 21.3 (c) DSU
[73] Article 21 DSU
[74] Panel Report, European Communities - Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/RW/EEC and Corr.1, 12 April 1999, DSR 1999:II,783

[75] Benjamin Brimeyer. Bananas, Beed, and Compliance in the World Trade Organization: The Inability of the WTO Dispute Settlement Process to Achieve Compliance from Superpower Nations." *Minn. J. Global Trade* 10 (2001): 133.

When nations A and B do not agree on the application of the guidelines and decisions by nation B, any nation can pursue a panel in compliance with Article 21.5 DSU. For example, if Nation B adopts a new law to remedy the broken WTO law but nation A disagrees because it feels the full compliance will not accomplished, the disparity will be expressed by the DSB in the initial panel and will make a decision within 90 days.[76] The role of this initial panel is not only to confirm, as set out in the Canadian-Aircraft,[77] the remedy of the breach or other nullification or disability, but also to identify whether the new measure as a whole is in accordance with the arrangement. [78]

2.5 THE REGULATIONS AND PROCESSES OF THE DSU ON AFRICAN NATIONS

The DSU system is seen to help developing nations greatly. Even smaller and weaker economic powers are empowered to implement the regulations under which they operate and thus to provide their trade relations with unparalleled security and predictability.[79] Although a more stable area of operation has been reached, developing nations continue struggling to make successful use of the process.[80] Respectfully, the DSU should be reformed. The DSU is slow and takes years to arrive at a sensible conclusion.[81] After 20 years of mediation in the EU-Latin American banana conflict, it shows how cumbersome the process can be. Although there have been six individual disagreements in the' mutually agreed agreement' signed by the EU and Latin American nations, a trade dispute that takes so much time is particularly unreasonable and inexcusable. The developing nations concerned would undoubtedly have experienced serious difficulty while the grievance remains unabated. In future situations an accelerated form of dispute resolution must be implemented. It is important for WTO lawyers to improve the

[76] Article 21.5 DSU
[77] Appellate Body Report, Canada - Measures affecting the Export of Civilian Aircraft, WT/DS70/AB/R, adopted 20 August 1999, DSR 1999: III, 1377
[78] Hunter Nottage, Trade and competition in the wto: Pondering the applicability of special and differential treatment. *Journal of International Economic Law* 6, no. 1 (2003): 23-47.
[79] Hunter Nottage. .
[80] Gregory Shaffer and Ricardo Melendez-Ortiz, 'Conflict resolutionat the WTO: The Developing Nation Experience' [2012] ICTSD 8
[81], Eustace Chikere Azubuike. "The Participation of Developing Countries in the World Trade Organization (WTO)." *Baku St. UL Rev.* 4 (2018): 121.

domestic systems for identifying and communicating trade barriers. The latest DSU reform talks "do not address this weakness in many developing nations' successful use of the framework."

Public-private export support networks should be built to warn governments about trade challenges and build capacity to communicate these hurdles to WTO's legal assessment lawyers. The range should be expanded, in line with the enforceable WTO regulations for developing nation's trade. It is easy to say that developing nations should receive preferential treatment, but how and where would it be most successful? The conflict resolution process would be improved by a permanent panel or body within the WTO. The current system of conflicts, in which panelists are ad hoc, leads to difficulties[82]. A permanent panel would reduce the time involved on setting up panelists because panelists would be always accessible. This would greatly reduce situations where panelists are always moving from their nations of origin to Geneva, as well as leading to better panelist dedication, since they are now employed permanently rather than on ad hoc basis.

The greatest problem for developing nations is the lack of legal aid from the WTO. The Advisory Center on WTO Law should be expanded in order to provide effective legal aid for developing nations. It was set up in 2001 to ensure that developing nations were aware of their rights and responsibilities under the WTO Treaty. The sums paid for such a service may be exorbitant for poor countries and should be available freely to poor countries who are not able to afford it or in the alternative a trust fund should "be established to help finance the costs of retaining external experts."

For this reason the WTO Advisory Center was founded in 2001 to include, but not limited to, legal support for the application of conflict resolution operations in the WTO in developing nations.[83] The ACWL provides dispute resolution support and has a price cap at far lower rates than private law firms.[84] In order to qualify for these programs, the developing nations must be ACWL affiliates and pay a single fee based on their position in the world trade. In accordance with the member's category, ACWL services are invoiced per hour which represents an extremely important step forward.

[82] Mari Pangetsu, 'Special and Differential Treatment in the Millennium: Special for Whom and How Different?' (2000] 23 (9) TWE1295
[83] Ibid
[84] Ibid

The power of the DSB to accept panel and appellate reports must be canceled. There is a possibility that the DSB will deny such a report. In the DSB there is a risk that a strong nation will still be able to block a report if it has other nations in backing.

2.6 CONCLUSION

The WTO dispute settlement is a three-part (appeal where applicable) phase, the consultation phase, the panel phase and the implementing phase. The mediation process means that disputes are settled in a comfortable and fast way as they are cost-effective before they are turned over to the panel. The DSB generally forms the Panel where consultations have failed and the plaintiff has asked the DSB to establish the Panel. The AB is the appellate body concerned with all matters decided by the panel and either side can not commit to the determinations made. AB cases are generally based on law and at the appeal stage no new evidence can be allowed. Finally, the phase of implementation monitored by the DSB is the stage in which the DSB enforces the panel's decision, requiring the guilty party to incorporate its actions and its agreements in line with the WTO.

In recognition of the central role of the system in ensuring the safety and consistency of the multilateral trade process, African nations' constructive participation in the negotiations of the Dispute Settlement Understanding is encouraged. It is expected that African nations will support and protect their interests and legal aspirations with a new pledge to become active users of this system.

CHAPTER THREE

AFRICAN NATIONS PARTICIPATION IN THE WTO CONFLICT RESOLUTION MECHANISM

3.1 INTRODUCTION

This Chapter addresses the challenges to the settlement of disputes between African World Trade Organization (WTO) members. To effectively do so, the chapter summarizes the results of studies of the system's use and, in light of these findings, posits explanations for smaller developing countries' lack of engagement in the DSB mechanisms of WTO.

3.2. REASONS BEHIND THE INEFFECTIVE PARTICIPATION OF AFRICAN NATIONS

Scholarly writings have presented data on the use of the WTO dispute resolution process to analyze who are the major participants and which of them are the most successful. Several researchers have analyzed how "developing nations" have fared in contrast to "developed nations."

3.2.1 PARTICIPATION OF DEVELOPED NATIONS

Statistics show that, by far, the U.S. and the EC are the most frequent users of the WTO dispute settlement mechanism and therefore their larger structural benefit is most likely to be promoted through the judicial process and through "bargaining in its shadow". While their share of total WTO grievances in recent years has marginally decreased, they are still the main users of the system. In general, during the first 13 years of the WTO (as of 1st January, 2008), the US and

EC respectively filed as claimants for nearly 44% of the cases and defendants for 43% of the total lawsuits.[85]

Such figures increase significantly when the structural impacts are highest by accounting for cases that have completely been litigated before WTO panels. Usually the USA and EC are third parties when they are not complainants or defendants. For proceedings entirely litigated before WTO panels (from 1 January 1995 to 31 December 2007), their respective participation rates increased to 99% (US) and 85% (EC).[86] By the end of 2007, the U.S had been in every Appellate Body proceeding as a plaintiff, claimant or third party, except one.[87]

In 2006 the US and EC participation rates were substantially higher than their global trade figures, with world exports respectively about 12.6 and 18.1%.[88] As parties and third parties, the US and the EC seek to safeguard their institutional rights through the interpretation of WTO regulations over time.

3.2.2 PARTICIPATION OF DEVELOPING NATIONS

[85] Leitner and Lester (2008, p. 179). These figures are for all cases filed, not all Panel or Appellate Body decisions that were adopted. Compare Leitner and Lester (2005, pp. 231, 234) and Leitner and Lester (2003, pp. 251–253) (where collectively, the U.S. and EC were complainants in 48% and defendants in 41% of total complaints filed). From 1948 through the end of June 2000, the U.S. was either a complainant or defendant in 340 GATT/ WTO disputes, constituting 52% of the total number of 654 disputes, while the European Community, which became more active over time, was a party in 238 disputes, or 36% of that total. See Busch and Reinhardt (2002, p. 462).

[86] Shaffer, Gregory Charles. *How to make the WTO dispute settlement system work for developing countries: some proactive developing country strategies*. International Centre for Trade and Sustainable Development (ICTSD), 2003

[87] Worldtradelaw.net, Participants and Third Participants in Appellate Body Proceedings, worldtradelaw.net/dsc/database/partiesab.asp (last visited June 19, 2019). Technically, the United States was not a third party in case DS290 (EC-Protection of Trademarks and Geographical Indications), but it was a complainant in the similar case that preceded it and which has the same title, DS174. These percentages have increased, in particular for the EC which has become a more systematic participant as a third party. See, e.g., Smith (2004, pp. 542, 561) (''Measured as a proportion of their opportunities to appear (i.e. the number of cases in which they are neither complainant nor defendant), the US has taken part as a third party participant in a remarkable 94% of appeals (15 of 16), while the EU has done so in 64% (18 of 28). The next most frequent participant is Japan at a much lower rate of 33 percent (10 of 30), followed by India (7 of 39) and Canada (6 of 34) at 18 percent.'').

[88] Bernard Hoekman, and Michel M. Kostecki. "The political economy of the world trade system: The WTO and beyond." New York, Oxford University Press(2001).

Nonetheless most initiatives have proven relatively successful in the justice framework for the larger developed nations. Since the establishment of the WTO there has been a significant increase in both cumulative and aggregate use of the legal system in developing nations as well as in its relative success.[89]

A comparison of sample figures of "claimants," according to GATT and the WTO shows that the percentage of developing nations has increased from about 31 per cent (GATT) to about 40 per cent (WTO) as a share of total bilateral grievances lodged.

Yet, according to Hunter Nottage, 5 developing nations make up 60% of the complaints and 13 developing nations account for 90% of grievances. In all, 95 of the 120 members of the WTO who were not from the OECD had never filed a complaint before the WTO and 62 had not even been involved as a third party[90]

None has ever been a plaintiff before the WTO with respect to nations in Africa and the Middle East. Besides Egypt (four times) and South Africa (three times), no nation in the region has ever been a respondent[91].

The statistical data clearly exceeds the real experience of in-house judicial members of developing nations', which may be used for potential arbitration conflicts and legal proceedings. In several cases, developing nations will take part, through direct financial and legal support from the stronger WTO members, as in the EC-Sugar case involving Brazil, in which fourteen ACP countries pulled together to hire lawyers in Brussels for the purpose of defending their interests as a third party (and, indirectly, of the EC's interest). While some of the Geneva states aggressively pursued their legal arguments, they were an exception.[92]

Likewise, in terms of market participation, the success of WTO litigation in developing nations (in contrast to GATT) seems to have improved. Busch and Reinhardt noted that "the plaintiffs

[89] Chad P Bown. "The WTO secretariat and the role of economics in DSU panels and arbitrations." *Available at SSRN 1274732* (2008

[90] Hunter Nottage, Trade and competition in the wto: Pondering the applicability of special and differential treatment. *Journal of International Economic Law* 6, no. 1 (2003): 23-47.

[91] Amin Alavi African countries and the WTO's Dispute Settlement Mechanism. *Development Policy Review* 25, no. 1 (2007): 25-42.

[92] Marc L. Busch, and Eric Reinhardt. "Testing international trade law: Empirical studies of GATT/WTO dispute settlement." *The political economy of international trade law: Essays in honor of Robert E. Hudec* (2002): 457-481

were able to liberalize disputed initiatives 36% under the GATT, which rose to 50%," under the WTO"[93]

The statistics from Chad Bown also show "that in the WTO regulations on the settlement of disputes, developing nation plaintiffs have had more impact than in GATT, which are based upon a measure of real liberalization as an improvement in exports into the nation of the defendants three years after the legal decision."[94]

Such statistics, however, suggest a further deterioration of the inequalities in the use of the justice framework and the performance rates of members of the WTO. Bown has found empirical evidence for" institutional bias" against the capacity to use the legal system by smaller exporting nations, especially because of" them being unable to make serious threats against the respondents in trade, the unwillingness to take part in disputes against the respondents for whom exporters depend on bilateral assistance and the difficulties of affording legal representation because of the exporting countries' low levels of income."[95]

3.3.3. ANAYTICAL TABULATION OF DEVELOPING NATIONS PARTICIPATION

Developing nations are often focused on as defendants by all classes of nations. As shown in Table 1, a developing nation is approximately 4.5 times more likely than under the GATT to be subject to a WTO complaint.[96] Indeed the main reason that developing nations have been more likely to be defendants is because they have embraced a greater number of legal duties under the

[93], Ibid.
[94] Chad P Bown. "The WTO secretariat and the role of economics in DSU panels and arbitrations." *Available at SSRN 1274732* (2008

[95] Chad P Bown. "The WTO secretariat and the role of economics in DSU panels and arbitrations." *Available at SSRN 1274732* (2008
[96] Marc L. Busch, and Eric Reinhardt. "Testing international trade law: Empirical studies of GATT/WTO dispute settlement." *The political economy of international trade law: Essays in honor of Robert E. Hudec* (2002): 457-481..

WTO relative to that under the GATT, in which they had little tariff duty and were often not subject to the side "codes", and there are more developing nations today.[97]

Table 1. Nature of complainant: developed or developing nation

Regime	Developed	Developing	Total
GATT	299	134	433
	69.05%	30.95%	100.00%
WTO	240	157	397
	60.45%	39.55%	100.00%

This database covers all complaints filed through December 31, 2007. Available at http://worldbank.org (search for ''WTO Conflict resolution Data Base'') (last visited November 20, 2008); see also Chapter 1.

Table 2.Nature of defendant: developed or developing nation

Regime	Developed	Developing	Total
GATT	395	37	432
	91.44%	8.56%	100.00%
WTO	246	151	397
	61.96%	38.04%	100.00%

This list covers all complaints filed until 31 December 2007. Nation scores developed or created by the Horn registry were based on them. Thanks to its change in status, we have found Korea to be a developing nation under the GATT and a developed nation under the WTO. The move would not impact Korea's argument outlined by the table if it were deemed to be a developed nation under GATT because it was a respondent only four times under GATT.

[97] John Howard Jackson Organisation mondiale du commerce, and Royal Institute of International Affairs (London). *The world trade organization: constitution and jurisprudence*. Vol. 89. London: Royal Institute of International Affairs, 1998.

Smaller developing nations were also less likely to protect their structural interests as third parties to within the WTO.

Table 3.Target of developing nation complaints

Regime	Developed	Developing	Total
GATT	123	5	128
	96.09%	3.91%	100.00%
WTO	84	73	158
	53.16%	46.84%	100.00%

This list covers all complaints filed by 31 December 2007. Nation categories as developing or developed are positioned in the Horn Database. Due to the changes in status it has evolved over time, Korea has been regarded as a developing nation under the GATT and a developed nation under the WTO. Under the GATT the numbers would modify only slightly and would not influence analyses if Korea is regarded a developed nation.

In recent years, the participation of larger developing nations as third parties has increased significantly. By 31 December 2007, more than 13 developing nations had engaged as third parties more than ten times led by China (61), India (50), and Brazil (49). However, most developing nation members have never engaged as a party or a third party in a World Trade Organization case.

The powerful WTO members believe that third party involvement is important in keeping them aware of changes in WTO Dispute Settlement process. A solicitor from a medium-sized firm in a developed nation has three main reasons to be a third party. First, all future cases might be affected by a rising a significant procedural issue. Secondly, in the future, the interpretation of a substantive law point could influence the nation. Thirdly and perhaps the most significant, in order to adapt legal arguments and legal policies to the complaint, a nation has to "keep in contact with the panel" activities to learn about the panel's functions and the Appellate Body. The WTO leaders and representatives of the secretariat change over time. As in domestic cases, a party must know the institutions and identities of the judges and the Court.'[98]

[98] The quoted passages are excerpts from the interview.

Finally, in the case of developing nations, their complaints are less likely than those of the developed nations to get favorable concessions. Much more importantly, Busch and Reinhardt found that, "the income (and market size) of the complainant has no influence on their outlook for winning a judgment given that one was going to be issued," suggesting that the judicial system itself does not show a statistically apparent political bias[99]. They also noticed that "[the] rich claimant does not have any special advantage over a weak, but comparable, complainant in ensuring that the defendant complies with a number of cases considered to be in breach of WTO commitments," at least partially demonstrated by the lack compliance of a number of completely litigated U.S .– EC proceedings.[100]

Busch and Reinhardt nevertheless argued that during the consultation phase, developing nations are less likely to settle complaints advantageously, including a significant percentage of WTO grievances, and most that have generated a considerable amount of market compromise.[101] Their analysis shows that the claimant in WTO proceedings generally found himself liberalizing disputed policies 74% of the time in a developed nation, compared with only 50% among the claimants in developing nations.[102]

The disparity has increased considerably when the major developing nations were removed. 71% of situations where the developing nations benefited from compliance "constituted complaints from the largest and wealthiest developing countries (Brazil, India, Korea,Singapore, Thailand, Mexico, Chile, and Argentina).[103] After a grievance has been filed and before a WTO panel has issued a ruling that "the rich complainants are much more likely to get the defendants to concede than poor claimants, the GDP constant"[104]

[99] Marc L. Busch and Eric Reinhardt. Developing countries and general agreement on tariffs and trade/world trade organization dispute settlement." *J. World Trade* 37 (2003): 719.
[100] Id., p. 732. Busch and Reinhardt note that greater concessions are obtained, on average, after a complaint is filed and before it is fully litigated, since full litigation indicates that a defendant may face severe domestic political constraints against modifying its trade restrictive national measures. Id., p. 474.

[101] Busch, M. L., and Reinhardt. E. "Developing countries and general agreement on tariffs and trade/world trade organization dispute settlement." *J. World Trade* 37 (2003): 719

[102] 118 Marc L. Busch and Eric Reinhardt. Developing countries and general agreement on tariffs and trade/world trade organization dispute settlement." *J. World Trade* 37 (2003): 719.
[103] Gregory Shaffer. The structural factors include internal governance challenges in many developing nations.2006
[104] Ibid

The statistics show that developing nations can less capable to persuade a claimant at any early stage of the eventual success of their lawsuit and that a respondent is likely to drag a legal case against a complainant of a developing nation in order to enforce legal costs which they are more able to absorb. Busch and Reinhardt argue that "The World Trade Organization's ability to free up the disputed policies exaggerated the gap between developed and developing plaintiffs[105]. In short, wealthier claimants are far more likely to secure their preferred WTO results than poorer plaintiffs.[106] In other words, while developing nations have benefitted from a system of legitimized dispute resolution, these studies suggest that they achieve fewer concessions than developed nations, whether because of constraints of the legal capacity or political considerations. This assessment further illustrates the importance of effective trade talks in the shadow of the WTO legal system.

Because of its structural factors, African nations are less likely to be actively involved in WTO dispute settlement. In terms of their sales, the price and quality of their goods are smaller, thus reducing their cumulative stakes in WTO claims. As a result they usually benefit less from a successful claim.[107]

The WTO's weak remedies further reduce their incentives to initiate complaints. On the cost side, most developing nations have lower institutional structures, including a diminished ability to identify and manage cases of the WTO. The restrictions on legal, financial, political, and, simply, legal, financial or political understanding are cost-induced parameters.[108]

Such considerations deal with risks and benefits. Simply put, prospective litigation benefits are less likely to outweigh litigation costs, including economic and political costs, in most African nations.

[105] Marc L. Busch and Eric Reinhardt. Developing countries and general agreement on tariffs and trade/world trade organization dispute settlement." *J. World Trade* 37 (2003): 719.
[106] Ibid

[107] Gregory Shaffer. The structural factors include internal governance challenges in many developing nations.2006
[108] Ibid.

3.3. CONCLUSION

Like every legal system, the Dispute Settlement System of the WTO is far from flawless from the viewpoint of an African nation. African nations' are to increase their capacity and coordination in the multiple areas of trade policy at institutional and regional levels, but each African nation faces different contexts and has no single strategy that fits them all if they are to take meaningful part in the World Trade Organizations dispute settlement mechanism.

It never succeeded, regardless of the context, to spread legal techniques through societies. In terms of their specific circumstances, each African State needs to decide how best it can apply the approaches set out in the next section.[125]

CHAPTER FOUR

CONCLUSION AND RECOMMENDATIONS

4.1 INTRODUCTION

Due to a number of major constraints discussed in this research, developing nations may find it difficult to enter into a World Trade Organization dispute settlement system. Given the limitations on developing nations ' membership in the DSU, the use of the dispute settlement system has increased in recent years, as can be seen from an increased number of disputes.[109] As at 31st December, 2018, 570 commercial disputes will be forwarded to the WTO for arbitration.[110]

[109] Annual Report 2016, World Trade Organization p 102
[110] 'Ibid.

More and more participants from the WTO are relying on the system to function together to address problems and improve the overall usefulness of the dispute resolution structure. In recent years in many developing nations, dispute settlement frameworks have played a progressive role. Through the implementation of their WTO rights and commitments against larger economies, the developing nations were willing and motivated to become more involved in international trade. But how can the conflict resolution system be modified to allow the involvement of developing nations? How can the dispute settlement process of developing nations change optimally? What are the best ways to achieve this?

From the considerations above, the Dispute Settlement Mechanism could, without economic segregation, be more versatile and encompassing in order to enable developing nations to partake in and resolve claims successfully, thus strengthening DSU legality.

This section seeks to review the outcomes and to discuss how the problems found in the previous chapters can be solved.

This will lead to information that can help developing nations to gain better access to the DSU and strengthen DSU regulations by finding possible solutions to fix those restrictions that restrict developing nations' involvement in the WTO dispute settlement process. This chapter examines and explores these possible recommendations.

4.2 MEASURES TOWARDS AN AFRICAN RICH DSB SPHERE

4.2.1. FINANCIAL RESOURCES

For developing nations, the DSU system often entails high costs. In the least-developed and developing nations, there is little trade and scarcer resources with limited public taxes to finance their disputes under the DSU system's heavy legal burden. To help with bringing legal claims, within the DSB, they must receive funding. Kenya has made a specific proposal for funding stressing that a dispute settlement fund with WTO funding should be established to support the use of the DSU by developing nations[111]. The African Group offers assistance in the form of a "inventory of experts and lawyers in the planning and execution of litigation, payment of fees

[111] Chad P Bown and Bernard M. Hoekman. "WTO dispute settlement and the missing developing country cases: engaging the private sector." *Journal of International Economic Law* 8, no. 4 (2005): 861-890.

and costs, and a full list of all applicable panel and appellate body cases by World Trade Organization Secretariat,"[112]

The WTO budgets could support least developed and developing nations in the DSU mechanism by providing financial assistance that reduces the involvement of developing nations in the DSU, thereby covering the high cost of human and financial capital. The budget can help poor and developing nations employ people or get competent experts to resolve the problems and issues that are important to developing nations with legal expertise and financial resources. The grants also allow the poor nations to learn how to comply with WTO regulations in accordance with their domestic law. The obstacle of lack of financial funds will be eliminated and developing nations will be ready to take part in the WTO conflict settlement process. Developing nations will be able to understand their rights, adequately protect themselves under WTO regulations and function successfully in the same way as developed nations through more legal and financial practice.

This will allow developing nations, especially in a DSB Panel or Appellate Body, to face the high costs of WTO litigation. Superior expertise and as much experience as the advanced nations will also be received by developing nations. They will also be able to encourage their legal assertion in a WTO dispute with better distribution of funds among developed nations and developing nations as a result of the growth in capacities required to handle the WTO's comprehensive data and paperwork requirements. Developing nations will not be forced to employ external legal expertise if they can use local juridical experts for WTO regulations. Private law firms and related litigation costs would be less costly in developing nations. There will be an increasing number of disputes brought by developing nations in the World Trade Organization.

The lack of expertise and knowledge of the complex WTO regulations is resolved by additional funds. Such funds will meet the DSU criteria for preparatory work in developing nations, like the preparation of comprehensive documents to be provided as evidence for the use of the WTO, the preparation of trade and economic information, testimony, and political and technological evidence to be submitted before the WTO dispute settlement process is brought forward.

[112] Ibid.

Developed nations have many representative officials with good WTO regulations experience; developing nations could increase their chances of winning cases brought to the DSU by funding.

4.2.2 LEGAL RESOURCES

It was argued that ' one way to tackle the issue of imbalances in legal resources would be to impose cost regulations. Its required that a developed nation should pay at least a percentage of the legal cost of the winner when it loses a case against one of the least advanced nations."[113]. Mexico proposed a bill to pay the fees to lawyers in all WTO cases "regardless of the development position of the parties in question".[114] Cuba has advocated reducing the high costs of WTO litigation by special and preferential consideration of developing nations, especially for developing nations.[115] The problem of lawyers' costs could also be protected by special and differential treatment.

This payment method would be used when there is a disagreement between a developing and a developed nation and when the developing nation is successful in the dispute, the developed nation will pay the fees to lawyers even before the panel stage.[116] This way a fair DSB system is created. Developing nations may therefore have the right to request reimbursement of substantial legal expertise. Developing nations cannot pay legal or expert fees if they are successful in a dispute without receiving fees from developed nations[117]. It cannot be hoped that developing nations will take part and succeed in the WTO proceedings without recruiting sophisticated lawyers, since the present WTO structure entails significant litigation costs for them and might be used to provide advanced nations with a way of imposing additional costs on those

[113] Susan, Esserman and Robert Howse. "The WTO on trial." *Foreign Affairs* (2003): 130-140.
[114] Shaffer, Gregory Charles. *How to make the WTO dispute settlement system work for developing countries: some proactive developing country strategies*. International Centre for Trade and Sustainable Development (ICTSD), 2003.
[115] Shaffer, Gregory Charles.
[116] Shaffer, Gregory Charles
[117] Chad P Bown., and Bernard M. Hoekman. "WTO dispute settlement and the missing developing country cases: engaging the private sector." *Journal of International Economic Law* 8, no. 4 (2005): 861-890.

developing nations by "legal proceedings to delay WTO cases".[118] "We always try to solve a case because it is too complex and costly to go to a panel," one of the biggest developing nations said.[119] The WTO may take on new ways of restricting the tradition of prolonging conflict resolution proceedings, including the payment of developing nations for lawyers ' fees.

It was proposed that developing nations should not suffer from the high financial expense "spent on US and European trade lawyers in exercising their WTO rights against developed nations when it is successful in bringing complaints against a developed nation".[120] The compensation of the attorneys must be paid according to WTO regulations in order to promote the protection of the interests of developing nations. The rights of weaker members will otherwise have no sense.

There can be limits on the amount of lawyer's fees just as many national courts often restrict them.[121] The WTO arbitrators ' fees were already identified under Article 22 of the DSU, and the attorney's fees were to be included in the DSB . The "price directives could be negotiated and added to the DSU, and periodically revised"[122] The method eliminates the high cost of assistance for developing nations but must be initiated under WTO regulations.

[118] Shaffer, Gregory Charles. *How to make the WTO dispute settlement system work for developing countries: some proactive developing country strategies*. International Centre for Trade and Sustainable Development (ICTSD), 2003

[119] "Interview with a representative from one of the largest developing countries, in Geneva, Switz. (Sept. 13, 2002)"

[120] ibid

[121] (reviewing alternative methods of calculating attorney's fees in class action cases before U.S. state courts, including fees based on a percentage of a total recovery and lodestar methods based on an hourly rate and a reasonable number of hours). (It occurs all the time in domestic legal systems). Capisio, M. V., Cohen, H., (eds.), (2002). Awards of Attorney's Fees by Federal Courts, Federal Agencies and Selected Foreign Countries. Nova Publishers. "Robert Rossi, Attorneys' Fees (2nd ed. 1995); and Krivacka, C., Krivacka, P., Method of Calculating Attorney's Fees Awarded in Common Fund or Common Benefit Cases–State Cases, 56 A.L.R. 5th 107 (1998) (reviewing alternative methods of calculating attorney's fees in class action cases before U.S. state courts, including fees based on a percentage of a total recovery and lodestar methods based on an hourly rate and a reasonable number of hours).See, Shaffer, G., (2003), 'How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies';Gotanda, J. Y., (1998), "Supplemental damages in private international law: the awarding of interest, attorneys' fees and costs, punitive damages and damages in foreign currency examined in the comparative and international context." Kluwer Law International. ("Most countries throughout the world statutorily provide national courts and arbitral tribunals with the authority to allocate costs in the award. The general practice in most countries is for the losing party to pay for all of the costs and legal fees of the winning party.")

[122] Gregory Charles Shaffer. *How to make the WTO dispute settlement system work for developing countries: some proactive developing country strategies*. International Centre for Trade and Sustainable Development (ICTSD), 2003.

4.2.3 REINFORCEMENT OF THE ACWL

The lack of legal assistance is a major limitation for developing nations. In 2001, a separate and independent body from the WTO established the Agreement Establishing the ACWL to provide the provision of WTO and LDC legal services for developing nations and LDCs in the WTO dispute settlement system.[123] Developing nations can still pay the high fees for the settlement of lawsuits and thus need more effective WTO rule and enforcement assistance. During World Trade Organization arbitration and aid in drafting legal documents, the ACWL provides low-cost legal services to developing nations and LDCs, as well as involvement in WTO disputes.[124]

For WTO members to be aware of their WTO rights under the DSU, more legal training opportunities to officials of developing nations are essential and this is supported by the ACWL. The ACWL is discussing the disadvantages of inclusion by developing nations and LDCs in the WTO conflict resolution system in the form of legal capacity and cost of restrictions on litigation. Member States may benefit from their World Trade Organization rights and obligations if they can understand how the WTO operates and how disputes are settled. The WTO law has a complex structure with its over 20 agreements, with more than 20,000 pages of schedules of concessions and commitments, and the jurisprudence of the conflict resolution body.[125] In this regard, the ACWL provides the necessary knowledge to the eligible WTO members who lack legal and financial resources.[126] The ACWL gives legal advice free of charge through its own staff or external legal counsel on all WTO issues such as procedural and substantive law and it also provides legal opinions on different stages of dispute settlement process, negotiations and trade measures taken by and/or against developing nations and/or LDCs.[127] As well as providing legal advice by ACWL's staff, the ACWL also offers a network of external legal counsels who are experts in international trade law and WTO law.

The ACWL statistics show that in the 56 independent WTO disputes by its workers and seven disputes between 2017 and 2017 the ACWL provided aid to representatives of developing

[123] The ACWL's Mission' available at http://www.acwl.ch/acwl-mission/ , accessed on 23rd June 2019
[124], Chad Bown., and Rachel McCulloch. "Developing countries, dispute settlement, and the Advisory Centre on WTO Law." *The Journal of International Trade & Economic Development* 19, no. 1 (2010): 33-63.
[125] 'The ACWL's Mission'
[126] Ibid
[127] 'Legal Advice' available at http://www.acwl.ch/legal-advice/ . accessed on 23 rd June, 2019

nations and LDCs and constitutes about 20% of all WTO disputes within the same span. In 2017 the ACWL decided to give legal services through 31 private law firms and four people all licensed. The ACWL also delivers WTO-specific training programmes through trainee programs, annual training workshops, conferences and the Second Programme Trade Lawyers

The ACWL is funded on a voluntary basis, mainly by high-income WTO members and also developing nations make contributions to the Endowment Fund based on their economic share within the international trade and income per capita.[128] Richer economies can refrain from funding the ACWL due to some political reasons that may challenge their own actions under the WTO.[129] The ACWL, therefore, needs reform in terms of its funding sources. In this regard, WTO and ACWL can work together to create an awareness of the importance of the Endowment Fund for developing nations and LDCs. The ACWL could alternatively obtain funding from non-governmental sources.[130] The more funders and supporters will also show that the legal assistance to developing nations and their participation to the WTO dispute settlement system is essential for global trade and it will also encourage the richer economies to contribute to the Endowment Fund.

The ACWL does not provide legal advice prior to a WTO case. However, developing nations need to identify the violation and prepare pre-litigation documents in order to initiate and pursue a successful case. The ACWL system offers low-cost legal services not only to importing and trade associations in developing nations that are key players in the public-private relationship to enforce their interests against the victims. In order to encourage them to engage in the WTO dispute-settlement system, the ACWL should extend its legal services to developing nations in terms of prelitigation funding.

There have been mixed results from the impact of ACWL on participation. The funded programs for developing nations have expanded their presence to some extent in the WTO Dispute Settlement Process. On the other hand, it is not sufficient and remarkable and, because of a lack of legal and financial capacity, ACWL did not address every question of conflict resolution in

[128] Chad P. Bown & Bernard M. Hoekman 'WTO Conflict resolution and The Missing Developing Nation Cases: Engaging The Private Sector' (2005) 8:4 Journal of International Economic Law 861 at 874
[129] Most powerful WTO members such as Japan, Germany, France, US do not contribute the ACWL's Endowment Fund
[130] Ibid

the context of the participation of developing nations. The ACWL supports developing nations' participation in the WTO, but its full performance has not yet been achieved. To produce more concrete results, it still needs to be improved.

4.2.4 CONSULTATION AND MEDIATION

A consultation stage is offered by the DSU as an alternative solution during the course of a dispute by any disputing party to solve the dispute between the WTO members.[131] The WTO members must engage in a consultation stage before bringing a case in an attempt to reaching a positive mutually acceptable decision to a dispute.[132] The DSU supports the nations to enter into consultation in order to settle their disputes amicably. The DSU also offers special consultation guidelines to developing nations specifying that during the consultations, special attention must be paid to their concerns and interests.[133]

The DSU offers long periods of consultation for developing nations.[134] The consultation phase can be used as an additional solution in order to promote the engagement of developing nations in dispute settlement as it prevents developing nations from using their monetary base for the introduction of a whole WTO conflict resolution process; it also avoids the enforcement procedure for the panel or Appellate Body rulings against developed countries. The WTO members successfully use the consultation process because a joint arrangement is found or the plaintiff party decided that it would not follow up the case for specific reasons. 157 disputes have been solved by using consultation which approximately equals 30 percent of all WTO disputes since 1995

Members can also use other alternative dispute instruments such as conciliation and mediation. If the consultation stage fails, disputing parties could use mediation as an intervening option in which a third party assists in resolving the dispute.[135] Parties can avoid using costly and time-consuming litigation proceedings. Developing nations can benefit from mediation by using third-

[131] DSU Article 4.
[132] DSU Article 3(7)
[133] DSU Article 4(10)
[134] DSU Article 12(10)
[135] Nilaratna Xuto. "Thailand: conciliating a dispute on tuna exports to the EC." *Managing the Challenges of WTO Participation* 45 (2005): 666.

party assistance in resolving their disputes. Article 5 of the DSU provides that nations may choose the Director-General of the WTO as the mediator due to his/her knowledge and expertise on the WTO law. Mediation as an alternative dispute resolution mechanism can be undertaken voluntarily upon the parties' consent.[136]

Mediation can address the problems that developing nations face under the DSU process. The advantage of using mediation is that it does not create a hostile or political opposition environment and it provides nations with a way to solve their disputes mutually. Also, once the parties agree on mediation, they can also enforce the mutually agreed solution voluntarily. Therefore, developing nations do not face any difficulty arising from the enforcement process, such as using retaliatory counter-measures.

In Thailand / Philippines / EU tuna dispute,[137] these nations used meditation as a method of conflict resolution pursuant to the WTO. Because of its advantages as regards financial ability, developing nations could use arbitration against developed nations more often. Mediation can facilitate the agreement of nations during the negotiating process. It would also offer developing nations the incentive to seek their WTO rights in a less legalistic and fairer way.

4.2.5 PRIVATE LAW FIRMS

Due to insufficient legal expertise and the legal capacity to pursue a case before an international court, experts in international law and lawyers as advocates and advisors act on behalf of governments.[138] The need for representation before the WTO panel and Appellate Body by lawyers is even more specific involving WTO law and dispute settlement. Governments need highly specialized lawyers in the WTO law and dispute settlement process. Many private law firms offer legal services in WTO litigation to clients; private law firms could be a part of the solution for assisting governments of developing nations. Private law firms could provide legal

[136] DSU Article 5
[137] Liliia Khasanova and Adel Abdullin. Pacific means of dispute settlement in the WTO: challenges and perspectives." *National Academy of Managerial Staff of Culture and Arts Herald* 1 (2018).
[138] Bruce Wilson & Rufus Yerxa World Trade Organization Key Issues in WTO Conflict resolution: The First Ten Years (2005) p 15

assistance to developing nations on pro bono or at reduced fees in return law firms improve their reputation worldwide as being a contributor to the public benefit.[139]

Private law firms can also coordinate with the ACWL.[140] In order to offer legal services to the developing nations in WTO conflict resolution at discounted rates, the ACWL has already registered 30 private law firms and 4 persons.[141] This is an example for other private law firms to offer similar services on pro bono basis or at reduced rates to developing nations either through ACWL or on their own initiative. To assist developing nations to initiate proceedings, working jointly with private law firms could create a long-term solution for developing nations to access to legal services and pre-litigation investigation.

4.2.6 PUBLIC-PRIVATE PARTNERSHIP

Although the WTO dispute settlement process is a system of government for government alone, without intervention of the private sector, states cannot successfully litigate. Public private partnership in a developing nation through which small and medium enterprises, professional associations, consumer groups, importers, exporters and chambers of commerce raise trade issues, seek for investigation and bring them to the attention of the legal service providers helping responsible government bodies to litigate at the WTO. By more actively involving the private sector, the national authorities will encourage the creation of reflexes in businesses and business associations so that the WTO can provide a way to secure market access, thus improving the efficiency and benefits of the WTO system. Through partnering with the business sector to resolve disputes at the WTO, the government will maximize its limited resources through prioritizing public spending and fiscal discipline. [142]

To be able to lodge a dispute in the WTO, like South's third-party did in a dispute in Canada-U.S a member has to provide accurate information and private sector facts to the government. The

[139] Chad P Bown., and Bernard M. Hoekman. WTO dispute settlement and the missing developing country cases: engaging the private sector. *Journal of International Economic Law* 8, no. 4 (2005): 861-890.
[140] Navneet Sandhu. Member Participation in the WTO Dispute Settlement System: Can Developing Countries Afford Not to Participate. *UCLJLJ* 5 (2016): 146.
[141] Ibid.
[142] Michael S. Matsebula, 'European Community's Subsidies on Sugar: Observations on AfricanParticipation as a Third Party in the Challenge at the WTO', in Trudi Hartzenberg (ed), WTO Dispute Settlement System: An African Perspective, (Cameron May, 2008), pp. 91-102

Department of Agriculture, the Directorate of International Trade, the Legal Division and the Ministry of Commerce and Industry were all involved.

To provide the government with significant economic and technological support in the private sector, it is important to deal with all inadequate connections between the private and public sectors. In another case of Brazil, the private sector played an important role in arbitration. Brazil requested private companies and industrial entities, before the WTO arbitration process, to work with a law firm to prepare the legal proceedings of over two-two cases.[143]

4.2.7 ALLIANCE AMONG AFRICAN STATES

The lack of internal unity and coordination in African nations is weakening its DSB presence and creating a vicious circle that further marginalizes its participation. African nations should develop geographical alliances with a view to achieving improved WTO negotiations in the particularly in areas where they produce and export a similar product.[144]

Benin, Burkina Faso, Chad and Mali Upland Cotton Subsidy Partnership in the Americas show that cooperation is more effective in addressing specific issues. The explanation is that nations follow common positions on their common issues. In the DSU, as was the case at the 2005 Hong Kong Ministerial Conference, African nations will agree on their general problems and priorities and support the other States which have similar goals. The G20 position on agriculture was supported by the African nations without jeopardizing the process of fighting among themselves.[145] As the coalition tackles common problems, it gives nations a superior viewpoint to present workable proposals.

[143] Varella, Marcelo D. Varella.The effectiveness of the dispute settlement body of the World Trade Organization. *Journal of International Trade Law and Policy* (2009).
[144] Amin Alavi, "African Nations and the WTO's Conflict resolution Mechanism; Development Policy Review" (2007).

[145] Ewelukwa Uché.Multilateralism And The WTO Dispute settlement mechanism –Politics, ProcessOutcomes And Prospects,2005

4.3 CONCLUSION

The WTO DSB has come a really long way in Dispute Settlement but it has some major setbacks when it comes to inclusivity of developing African nations. This research has looked at the Dispute Resolution Body as a whole; its structure, statistics, achievements, and developing nations always seem to receive the short end of the stick. Chapter 4 discussed several potential solutions which can boost the involvement of developing nations in the DSB. Financial and legal services are some of the ideas suggested, but only fair rights can help developing countries at the end of the day. In my opinion, mediation should be encouraged in the settlement of disputes. This is an accessible and impartial approach which promotes the active participation of all parties involved. Mediation in Dispute Settlement and the involvement of developing nations should be encouraged. The time is coming when all member states may, if required, launch a WTO complaint as quickly and competently as the U.S. and EC are capable of doing today, although the dispute settlement process of the WTO may need to be reorganized entirely by making full-time members of the panel and of the appeal body. Both developed and emerging Nations should be treated equally, which is why a well-built global forum is needed to support the participation of developing nations in the DSB.

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