UNIVERSITY OF NAIROBI

SCHOOL OF LAW

THE EFFECTIVENESS OF THE WORLD TRADE ORGANISATION DISPUTE SETTLEMENT SYSTEM FOR DEVELOPING COUNTRIES IN AFRICA:

LESSONS FOR THE AFRICAN CONTINENTAL FREE TRADE AREA

BY

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ABSTRACT

This study is on the dispute settlement mechanisms in the trade regime of the World Trade Organization (WTO) and the African Continental Free Trade Area (AFCFTA). It aims at analyzing whether the dispute settlement mechanism is an effective form of dispute settlement for African Countries.

The main problem the study scrutinizes is the underutilization of the World Trade Organization dispute settlement system by African Countries, and whether a similar effect would persist within the African Continental Free Trade Area, that adopts a replica of the WTO dispute settlement mechanism. The study highlights the significance of settling trade disputes through a rule based system that offers predictability and security to investors in trade.

In its conclusion the study affirms the hypothesis that the AFCFTA's dispute settlement mechanism will similarly remain underutilized by African countries for trade disputes. Finally, it recommends measures that African countries may consider to make the AFCFTA's dispute settlement mechanism more effective than the WTO dispute settlement system has been for them.

DECLARATION

I, **GICHANE W. PATRICIA**, declare that this research proposal is my original work and has not been presented in any university or other institution for the purpose of obtaining a postgraduate law degree. I also declare that the secondary material used in this research has been duly acknowledged.

DATE: 21.10.2020

SIGNATURE:

This project paper has been submitted with my approval as the candidate's University supervisor:

DR. KARIUKI MUIGUA

DATE:21st October 2020

SIGNATURE:

LIST OF ABBREVIATIONS

WTO- World Trade Organization

ITO- International Trade Organization

GATT - General Agreement on Tariffs and Trade

AFCFTA- African Continental Free Trade Area

SDT- Special and Differential Treatment

BOP- Balance of payment

DSS- Dispute settlement system

DSU- Understanding on rules and procedures governing the settlement of disputes

DSM- Dispute settlement mechanism

DSB-Dispute Settlement Body

CTD- Committee on Trade and Development

MFN- Most favored nation principle

GSP -Generalized System of Preference

LDC- Least Developed Countries

AEC-African Economic Community

REC– Regional Economic Community

ECCAS- Economic Community of Central African States

ECOWAS- Economic Community of West African States

EAC- East African Community

SADC- Southern African Development Community

COMESA- Common Market for Eastern and Southern Africa

AMU- Arab Maghreb Union

CEN-SAD - Community of Sahel–Saharan states

IGAD- Intergovernmental Authority on Development

EC- European Community

ACWL- Advisory Centre on WTO law

CETA- Comprehensive Economic and Trade Agreement

CPTPP- Comprehensive and Progressive Trans-Pacific Partnership Agreement

RTA- Regional Trade Agreements

LIST OF TREATIES

Marrakesh Agreement Establishing the WTO 1867 U.N.T.S. 154 33 I.L.M. 1144 (1994)

Understanding on Rules and Procedures governing the settlement of disputes 1869

Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401; 33 I.L.M. 1226 (1994)

Common Market for Eastern and Southern Africa Treaty 33 ILM 1067 (1994)

The Treaty for the Establishment of the East African Community, Arusha. EAC: 2002 xiv, 111p: 230mm (EAC Publication, No.1)

Agreement Establishing the African Continental Free Trade Area

Protocol on Rules and Procedures on the Settlement of Disputes

LIST OF CASES

Appellate Body case of India and United States -Quantitative Restrictions on imports of Agricultural, Textile and Industrial Products Panel Report,

India – Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products, WT/DS90/R, adopted 22 September 1999, as upheld by the Appellate Body Report, WT/DS90/AB/R, DSR 1999:V, 1799

United States and European Communities Banana III case on the regime for the Importation, Sale and Distribution of Bananas

EC – Bananas III (Article 21.5 – EC) Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas –Recourse to Article 21.5 of the DSU by the European Communities*, WT/DS27/RW/EEC and Corr.1, 12 April1999, DSR 1999:II, 783

Polytol Paints and Adhesives vs. Republic of Mauritius No. 1 of 2012, COMESA Court of Justice

Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe (2/2007) [2008] SADCT 2 (28 November 2008)

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CHAPTER ONE
INTRODUCTION

1.1. Background

After the Second World War the world suffered an economic drain. Multilateral institutions such as the Bretton Woods institutions were created to promote international economic growth and cooperation. [1] There was a proposal to establish an International Trade Organization as a specialized agency of the UN, to regulate trade. However the attempt through the Havana Charter to create the ITO in 1947, at the UN Conference in Havana, Cuba failed.[2]

Prior to this, in 1945 a group of fifteen countries engaged in negotiations to reduce tariffs and promote trade liberalization.[3] Upon failure of the creation of ITO, this group, which had now increased to 23 countries, adopted a 'protocol on provisional application' that took effect in June 1948. This marked the genesis of General Agreement on Tariffs and Trade. The GATT was initially ratified in 1947 by twenty three contracting parties; eleven amongst them were developing countries.[4] The GATT was a group of contracting parties that came together to be governed by a set of rules on international trade they had adopted. The GATT regime evolved as a result of several multi-lateral trade negotiations termed as trade rounds. These multilateral trade agreements were subsequently adopted as a single undertaking by the contracting parties in 1995 upon the establishment of the World Trade Organization.

The WTO was established as an institution to govern the international trading system, unlike GATT which was simply a set of rules adopted by various countries.[5] The institution serves two major roles, legislating and adjudication. In the WTO, the Dispute

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[1]World Trade Organization, Past, Present and Future <http://www.wto.org/english/thewto_whatis_e/tif_e/fact4_e.htm> accessed 26/11/2017.
[2] Ibid.
[3] Ibid.
[4] Ibid.
[5]Ibid.

Settlement System was created to administer its adjudication function that was governed by the Understanding on Rules and Procedures Governing the Settlement of Disputes.[6]

The WTO dispute settlement system became operational on the first of January 1995. However, the DSS was in existence prior to this date as trade disputes were resolved, before the WTO, under the GATT regime.[7] The Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) recognizes this in Article 3.1. which provides that

> 'Members affirm their adherence to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of GATT 1947, and the rules and procedures as further elaborated and modified herein.'[8]

The 1947 GATT dispute settlement system did not set out a detailed settlement process,. It only entailed two provisions that is Article XXII, entitled 'Consultations' and Article XXIII, entitled 'Nullification or Impairment'. [9] Where disputes could not be resolved under these two provisions, working parties were established to resolve the disputes. These working parties consisted of representatives of all interested contracting parties, including the parties to the dispute, and made decisions on the basis of consensus.[10]

The panels reported to the GATT Council, which was composed of all Contracting Parties, that adopted the recommendations and rulings of the panel by consensus, making them legally binding on the parties to the dispute. This diplomatic way of resolving disputes was possible as a result of the small member number and like-minded trade officials within GATT at the time.[11]

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[6]World Trade Organisation, Understanding on Rules and Procedures Governing the Settlement of Disputes <http://www.wto.org/english/docs_e/legal_e/ursum_e.htm#Understanding> accessed 26/11/2017.

[7] Peter Van Den Bossche, The Law and Policy of the World Trade Organisation (first published 2005, Cambridge University Press) 174

[8] Article 3.1 Understanding on Rules and Procedures governing the settlement of disputes

[9] Ibid (fn7) 176

[10]Ibid (fn7)177

[11] Ibid (fn7) 177

However, it was abandoned and from the early 1950s onwards, disputes were usually first heard by 'panels' comprising of three to five independent experts from GATT Contracting Parties that were not involved in the dispute.

As the number of members increased in GATT, especially developing countries, and in the wake of the establishment of the European Economic Community by the 1970s the diplomatic way of dispute settlement by negotiations could not be sustainable.[12] The GATT Secretariat was expanded by including a legal office in 1983 to support the panels in drafting of reports, thus confidence in the panel system was restored as the application of rules of interpretation of public international law were applied as the basis of their rulings rather than diplomacy.

Hudec christened the GATT's Dispute Settlement System as a ''A Diplomat's Jurisprudence'' due to the system's ill-defined procedures and rulings in ambiguous prose. He however noted that by the 1980's, the GATT dispute settlement procedure had transformed into an institution based primarily on the authority of legal obligations .[13]

The GATT dispute settlement system gradually evolved from a power-based system of dispute settlement , through diplomatic negotiations, into a system that had many of the features of a rules-based system of dispute settlement through adjudication.[14]

However, this new system did not lack its shortcomings, such as the susceptibility to stall dispute settlement as all decisions were made by consensus. These included the decisions for the establishment and composition of a panel and the authorisation of the suspension of concessions.[15] This had an effect on how panels arrived at decisions as they would need to give a report that would be acceptable to all parties, regardless of whether they were legally sound. Besides, the fragmentation of dispute settlement procedures in the different GATT Agreements created an issue of varied application of procedures. [16]

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[12]Ibid (fn7) 178
[13] Robert Hudec, 'The New WTO Dispute Settlement Procedure', (Minnesota Journal of Global Trade, 1999, 4.)
[14] Ibid (fn7) 179
[15]Ibid (fn7) 180
[16] Ibid (fn7) 180

At the Uruguay Round, contracting parties agreed on the Understanding on Rules and Procedures Governing the Settlement of Disputes, which provides for an elaborate dispute settlement system. It improved the dispute settlement process within the GATT by creating the appellate structure for panel reports through the appellate review, as well as creating strict timelines for the various dispute settlement processes and quasi-automatic adoption of requests for the establishment of panels, panel reports and requests for the authorization to suspend concessions.

Unlike the GATT dispute settlement system, the WTO dispute settlement system is a rules-based dispute settlement.[17] Noting the context from which the WTO DSS evolved, this research paper discusses the WTO's Dispute Settlement System, specifically from the perspective of small developing countries in Africa. It considers its effectiveness and elaborates the shortcomings of the system for these countries.

The study also considers the adoption of the WTO DSS model by the African Continental Free Trade Area, in its protocol on rules and procedures on the settlement of disputes. The research analyses the possible challenges that may be transposed from the WTO DSS and recommends measures that Africa Countries can take up to ensure utilization of a rule based dispute settlement mechanism within the AFCFTA trade regime.

1.2. Statement of the research problem

The dispute settlement system of the WTO aims at providing security and predictability to the multilateral trading system and preserving the rights and obligations of WTO Members.

The WTO DSS is deemed as one of the most efficient dispute settlement mechanism as it is often termed as the 'jewel in the crown' for the multilateral trading system. However, it poses several hurdles, for small developing countries, that render it ineffective for them.

The effectiveness of the DSS for African developing countries can be measured by several parameters such as evaluating the utilization or participation levels in the system, time frame for settling disputes and ability to enforce recommendations. These countries

[17]Ibid (fn7) 181

encounter several challenges that limit their utilization of the DSS. Some of the challenges include the high costs implication of participating in the DSS, the poor enforcement mechanism of the DSS, and the approach taken by developing countries to disputes. The study seeks to explain why African countries hardly utilize the DSS.

One challenge that African countries may encounter is the lack of technical capacity to pursue claims due to the technical nature of the various agreements that make up the WTO regime. The WTO agreements are considered as a technical regime. Thus, in most cases, due to cost implications, such as high costs of legal fees, expert fees and costs in research and fact finding prior to the institution of a complaint, small developing countries are not able to defend their rights against any violations. In some instances, it has been argued that developing countries are not able to even recognize some of these violations.[18] These challenges hinder them from actively participating in the dispute settlement system and enforcing their rights. In Africa, Tunisia is the only country that has instituted a complaint against Morocco.[19] Other African countries have participated as respondents or third parties. Nevertheless, only thirteen African countries and five least developed countries have utilized the WTO dispute settlement system since its inception.[20]

The second major hindrance for developing countries is the poor enforcement mechanism of the DSS. The main enforcement mechanism of the DSS is retaliation, and its effectiveness is dependent on the contracting party's market power. Thus, because of the weak enforcement structure, victory does not guarantee compliance, as the enforcement mechanism is also termed as enforcement by negotiation. Due to power dynamics, small developing countries cannot enforce the recommendations of the panels in instances of non-compliance by a developed country. As the weaker party economically, and because they do not trade in huge volumes, they cannot effectively pressure or leverage developed countries to comply. They are also highly dependent on access to the large markets of

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[18] Gregory Shaffer, 'Developing Country Use of the WTO Dispute Settlement System: Why it matters, the barriers posed and its impact on bargaining', Paper prepared for the WTO AT 10 :A look at the Appellate Body IN Sao Paulo , Brazil , May 16-17, 2005

[19] https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm Dispute by Member accessed on 26th July 2019 at 3:45 p.m.

[20] Ibid (fn 19)

developed countries. Thus, retaliation does more harm than good to their economies. The power dynamics create undue influence in decisions for these African governments when considering pursuit of dispute resolution through the rule based system.

Thirdly, the approach taken by developing countries to disputes before the WTO is quite different from that taken by developed countries, which have stronger private sector and government relations. The private sector is the main driver and stakeholder in trade, while governments facilitate trade. The WTO regime affects the private sector, while locus standi before the dispute settlement system is for sovereign states and not private entities. Thus, the lack of a strong partnership between government and private sector, within these African developing countries limits the integrated effort to utilize the DSS in cases of trade violations by other contracting parties. The jurisdiction of the DSS is for state to state disputes, strong private sector government relations must exist for the interests of investors to be taken up by their governments in pursuit of a resolution within the DSS.

There is also the issue of limited political will to institute complaints by these governments. The problem that exists is that African countries do not utilize a rules based dispute settlement mechanism for trade disputes. The study examines the challenges that African countries encounter at the DSS that limit the utilization of the system and renders it ineffective for settling disputes.

The study will also consider the adoption of the WTO DSS model by the African Continental Free Trade Area and whether the same challenges will persist or the dispute settlement mechanism will thrive within the AFCFTA framework.

1.3. Hypothesis

The dispute settlement of the AFCFTA will be as underutilized by African countries as that of the WTO. This is because African Developing Countries have many challenges within and outside the dispute settlement system at the WTO and its transposition to the AFCFTA will yield the same effect, of limited utilization.

1.4. Research questions

The research questions that this paper considers are:

i. How does the WTO Dispute Settlement System work?
ii. What are the challenges and shortcomings of the Dispute Settlement System of the WTO?
iii. How effective is the Dispute Settlement System in settling disputes for African countries in terms of its utilization?
iv. What specific challenges do African countries encounter with regards to the DSS?
v. Will these challenges persist under the AFCFTA dispute settlement mechanism and are there any other unique potential challenges?

1.5. Research objectives

i. The general research objective is to ascertain the effectiveness of the WTO Dispute Settlement System for African countries.
ii. The specific objectives of the research will include critical analysis of the dispute settlement process, the challenges of the system and pre-assessment of effectiveness of a similar model of dispute settlement mechanism in the AFCFTA Protocol on rules and procedures in the settlement of dispute.

1.6. Justification of the study

An effective dispute settlement mechanism is a vital component of trade governance as it ensures security for investors and traders. The lack of utilization by African Countries of a rule based dispute settlement mechanism for trade disputes, does not guarantee traders and investors protection of their interests. The lack of predictability in the regime can be a deterrence essentially working against the objective of the AfCFTA, which is to promote intra-Africa trade. The study will recommend measures and approaches to dispute settlement that African Countries can adopt to ensure the utilization of the DSM under the AfCFTA framework.

1.7. Theoretical framework

This research paper is premised on sociological jurisprudence, the sub branches of critical legal theory and economic analysis of law. Sociological jurisprudence acknowledges the interaction of law and other disciplines, such as economics, culture, unlike positivism which premises itself on the 'separability principle', that the law should be viewed strictly as detached from morals, politics or other influences. The sociology of law states that law must be viewed in a sociological context.

The sociological methodology involves an analysis of the structure, functions, values and effects of the legal system in a society. The sociological school of thought propounds the notion of the living law, that the law in action is the true law, that which comes out of judicial pronouncements. Roscoe Pound noted that law is a social engineering tool that through the adjudication process there can be a paradigm shift of society's legal system.[21]

This research considers the structure, process and function of the dispute settlement system of the WTO and its impact in Africa. It examines the challenges that these countries encounter at the DSS, and how that ultimately affects their trade relations, rights and obligations. Thus, the sociological jurisprudential theory is vital in this research when evaluating the implications of utilization of a rule based dispute settlement system.

Geoffrey Shaffer argues that developing countries' lack of utilization of the DSS is to their detriment. As the Jurisprudence of the WTO continually grows, it will ultimately affect them whether or not they participate; he terms this as the shadow effect of the law.[22]

This research paper is also premised on the critical legal theory that stems from the legal realism school of thought. It asserts the concept of the indeterminate nature of the law. The one key tenet of critical legal theory is that the law justifies and reinforces those in

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[21]Roscoe Pound, 'The Scope and Purpose of Sociological Jurisprudence: Schools of Jurists and Methods of Jurisprudence,' Harvard Law Review, Vol. 24, No. 8 (Jun., 1911), pp. 591-619

[22] Gregory Shaffer, 'Developing Country Use of the WTO Dispute Settlement System: Why it matters , the barriers posed and its impact on bargaining', Paper prepared for the WTO AT 10 :A look at the Appellate Body IN Sao Paulo , Brazil , May 16-17, 2005

power in society thus laws and legal systems serve political purposes this claim could be ascertained by social science theories such as economics and political philosophies.[23] Critical theory jurists' basic assumption is that law is politics. The critical theory is applicable in seeking to ascertain why African countries fail to utilize the rule based dispute settlement system.

1.8. Literature review

Peter Van Den Bossche, gives one a basic introduction to the WTO law and the underlying principles of the world trade system. [24] He gives an in-depth analysis of the WTO Dispute Settlement System. He takes us through the evolution of the WTO Dispute Settlement System, the underlying principles of the system, the various institutions of the DSS and its proceedings. He also gives an analysis of the practice at the WTO DSS and the challenges of the system. The literature however does not address these challenge from the perspective of developing countries to the Dispute Settlement System. This work is relevant in elucidating the history, evolution and underlying principles of the WTO Dispute Settlement System.

Arie Reich conducted a statistical analysis on the cases that have been before the DSS of the WTO for the past two decades to gauge the effectiveness of the system. [25] He also considered the issue of the inability to remand cases by the Appellate Body of the DSS, and its effect in frustrating the conclusion of some cases. His work is significant as the statistical analysis applied by the author will apply to support the issue of effectiveness of the DSS from the perspective of developing countries in this research. Nonetheless the literature analyses the effectiveness of the system through one parameter participation. On the other hand this research will be specific to the participation of developing countries in Africa and enunciate other parameters that measure effectiveness of the system.

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[23] M D A Freeman, 'Lloyd's Introduction to Jurisprudence,' (8thedn, Sweet & Maxwell 2008) p.96

[24] Peter Van Den Bossche, The Law and Policy of the World Trade Organisation: Texts, Cases and Materials, Cambridge University Press,2005

[25] Arie Reich, The effectiveness of the WTO Dispute Settlement System: A Statistical Analysis, European University Institute 2017

Sharif Bhuiyan, discusses the WTO Dispute settlement procedures and the interaction of the institutional framework with national law. [26] He gives a general overview of the WTO dispute settlement mechanism, and elaborates the institutional mandate of the various organs in the dispute settlement system. He also discusses the enforcement mechanism of the WTO dispute settlement rulings and recommendations. He considers the instances where the DSS of the WTO interacts with members' domestic laws and policies, such as through rulings of the DSB, and whether members alter their domestic policies in compliance. The text will be relevant in the second chapter of this research paper as the chapter considers the role, structure and process of the DSS. This study however considers how the process of adjudication and compliance can be difficult for developing countries in Africa.

Asif H. Qureshi, considers the principles of treaty interpretation in the WTO Dispute settlement system. [27] He considers the interpretation of the institutional framework of the DSS. He views the DSS as a disaggregated structure and examines the different characteristics the system. He also examines the dispute settlement system procedure, participatory rights, jurisdiction and implementation of its recommendations.[28] The text will be relevant in this research as we consider the dispute settlement process and interpretations of the DSU, its objectives, and purposes. The gap in this literature that this study fills is the interpretation of the institutional framework of the dispute settlement system as it pertains to developing countries in Africa and its practical utilization by these countries.

Asif H. Qureshi and A.R. Ziegler, discuss the following in detail with regard to the dispute settlement system that is the accessibility, jurisdiction, causes of action and remedies available. [29] They analyse the institutional framework for implementation of the WTO dispute settlement mechanism and the trade Policy Review Mechanism. They

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[26] Sharif Bhuiyan ,National Law in WTO Law Effectiveness and Good Governance in the world trading system, Cambridge press 2007

[27] Qureshi A H, 'Interpreting WTO Agreements: Problems and Perspectives,' (Cambridge University Press 2006)

[28] Ibid (fn 25) 47

[29] Qureshi A H & Ziegler A R, 'International Economic Law', 3rd edition Sweet & Maxwell Publishers, 2011

discuss the various proposals for reform of the DSU, such as the issue of lack of framework for the Appellate Body to remand case to the original panel in instances where factual issues arise at the appellate stage, and the issue of introduction of procedural rules for compliance to rulings. The text will be of significance as we consider the process of the dispute settlement system, the challenges that developing countries face and reforms to the DSU. The literature does not address the perspective of developing countries to the Dispute Settlement System.

Gregory Shaffer, considers the barriers that small developing countries encounter that limit their utilization of the WTO dispute settlement system.[30] He states that utilization of the DSS by developing countries is hampered by various factors, such as costs of litigation, complex procedures and limited effective remedies for smaller developing countries. He asserts that the participation of smaller developing countries in the DSS may be realized where legal resources are mobilized, simplified procedures are adopted, and compliance mechanisms are strengthened. The text will be relevant when addressing the challenges of developing countries in the WTO DSS. This study will focus on whether such challenges for developing countries will persist in the AfCFTA framework.

Linimose Nzeriuno Anyiwe, considers the dispute settlement rules specific to developing country disputes, and the challenges that developing countries face. [31] Linimose also looks at the role of the advisory centre on WTO law, an independent international organisation that provides legal advice and support for developing countries and least developing countries. The article will be applicable in this research as we discuss the various challenges that developing countries face and their inability to participate in the dispute settlement system.

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[30] Gregory Shaffer, 'Developing Country Use of the WTO Dispute Settlement System: Why it matters , the barriers posed and its impact on bargaining', Paper prepared for the WTO AT 10 :A look at the Appellate Body IN Sao Paulo , Brazil , May 16-17, 2005

[31] Linimose nzeriuno anyiwe, Developing countries and the WTO dispute resolution system: a legal assessment and review, Journal of Sustainable Development Law and Policy, Vol. 2 Iss. 1 (2013), pp 121-138

Jimcall Pfumorodze's, focuses on the DSS enforcement mechanism. [32] He states that the implementation and enforcement of rulings of the WTO dispute settlement body are weak and serve the interests of developed countries at the expense of developing countries. He considers the challenges that developing countries face when they are respondents to disputes at the WTO DSS.[33] The work is relevant as we consider the enforcement mechanism of the DSS and its shortcomings that limit its effectiveness for developing countries. The gap within this literature is that it only considers the challenge of enforcement while this study will highlight other challenges that African developing countries encounter at the WTO DSS.

Shahram Shoraka, discusses the development aspect in WTO law interpretation.[34] He considers the implication of interpretation of this regime on developing countries. The work focuses on three agreements within the regime, that is, the TRIPS agreement, Antidumping and DSU. The relevance of this work to this research is that we also consider the dilemma that developing countries face in a dispute settlement system in which their levels of participation are quite low, but the burgeoning jurisprudence of the system eventually affects any future cases or bargaining positions with developed member countries.

Kristin Bohl, considers the hindrances that developing countries face that limit their access to the dispute settlement system.[35] She highlights some of these constraints, such as the issue of fact finding, and examines its relevance in WTO jurisprudence and the challenge that developing countries face with regards to it. She also identifies the issue of lack of political will in participation in the DSS and the non-existence of government and

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[32]Jimcall Pfumorodze, 'WTO Dispute Settlement: Challenges faced by developing countries in the implementation and enforcement of the dispute settlement body recommendations and rulings' , Post Graduate Degree in Master of Laws Thesis, University of Western Cape Law Faculty,2007.

[33] Ibid (Fn 30) 13

[34] Shoram Shoraka, 'World Trade Dispute Resolution & Developing Countries Taking a development approach to fair adjudication in the context of the WTO Law', Doctorate Degree in Law, London School of Economies, June 2006.

[35] Kristin Bohl, Problems of Developing Country Access to WTO Dispute Settlement, 9 Chi.-Kent J. Int'l & Comp. Law 131 (2009)

private sector partnerships in these countries that would ensure active participation in the system. The work will be relevant as we consider some of the reform proposals in the WTO DSS and developing countries approach to the dispute settlement system.

Clement Ng'ong'ola considers the replication of the WTO dispute settlement rules and procedures in the SADC Protocol on Trade.[36] He discusses the WTO DSS, the structure and process of dispute settlement, and the features replicated in SADC. The author supports the incorporation of the WTO rules in the SADC regime. However, he suggests the review of certain provisions to strengthen them, especially those relating to adoption, implementation, and surveillance of decisions of rulings. He also advocates for the authorisation of panel establishment without interference from political institutions, such as the Committee of Ministers responsible for Trade (CMT). The significance of the article is that it indicates the apathy to settle disputes through a rule based mechanism by African countries within SADC, despite the benefits and security that such a system provides. This study will focus on similar issue within the context of the AfCFTA.

Olabisi Akinkugbe considers the dispute settlement mechanism of the AFCFTA, against the backdrop of the discontent and unsupportive practices of African countries to legalized settlement systems.[37] The author highlights the main provisions of the AFCFTA Protocol on Dispute Settlement and asserts that the DSM will have the same non-litigious experience as other dispute settlement mechanisms in Africa. He suggests certain amendments to the DSM protocol such as the inclusion of private parties. He also raises the concern of geopolitical challenges and power dynamics amongst the Francophone, Anglophone and Lusophone within Africa, and the tension and distrust amongst the region that may contribute to slow integration. This work is relevant to this research as we conduct a similar study on the extent of effectiveness of the AFCFTA DSM. However,

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[36] Clement Ng'ong'ola, Replication of WTO dispute settlement processes in SADC, SADC Law Journal Vol I-2011

[37] Olabisi D. Akinkugbe, Dispute Settlement under the African Continental Free Trade Area Agreement <https://ssrn.com/abstract=3403745> accessed on 19th October 2019 at 5:22 p.m

this study takes a step further and considers the implications of non-utilization and practical measures that can advance or encourage utilization.

James Gathii analyses the flexible nature of regional trade agreements in Africa. [38] He asserts that African Regional Trade Agreements (RTA's) have altered the theory of comparative advantage because of two features namely the application of variable geometry and distributional equity. He examines the vinerial model to which most African RTA's are modeled. The vinerial model was conceptualized for an industrial context , while Africa is mainly in an agrarian or raw material producing context. He argues that majority of the African countries have largely similar products. Thus, they cannot reap comparative cost advantages through trade liberalization. Most African RTA's are modeled as cooperation regimes where they apply the principle of variable geometry, that is, transitional liberalization depending on the economic ability and interests of the members. They also apply the principle of distributional equity, which provides for compensation for losses caused from liberalization commitments.

James Gathii also maintains that the overlapping of membership in African Regional Trade Agreements also illustrates the flexibility of these regimes. He asserts that flexibility has undermined the economic gains of regional trade integration, as African countries prefer the short term benefits. These cooperation models seek integrated development of common resources such as natural resources like river basins and common projects. This work is relevant in this study as we consider the AFCFTA regional integration model and the cooperation and flexible approach to regional integration by African countries. It gives a background understanding of regional integration in Africa from a historical, social and economic perspective. The shortcoming in this literature is that for the AFCFTA a continental bloc agreement that seeks to form a single market not a cooperation model and it can yield the economic gains of trade liberalization, as the issue of overlapping membership or limited comparative advantages

[38] James Thuo Gathii, African Regional Trade Agreements as Flexible Legal Regimes, University of North Carolina Journal of International Law and Commercial Regulation. 2010

will not exist. The study also has not considered dispute resolution mechanisms within these African regional trade agreements and their effectiveness.

This research paper will add to the wealth of knowledge on the WTO dispute settlement system, from the perspective of developing countries in Africa. It will aim to address the problem of why the WTO dispute settlement system is not an effective system for African countries and why its replication in the AfCFTA will not work.

1.9. Research methodology

The research methodology included a textual analysis of primary and secondary sources, which included internet sources, library materials, published treatises, scholarly writings or journals, books and treaties.

The research undertaken is quantitative and the research design applied is both descriptive and causal. The descriptive part elaborates on the structure and process of the DSS, while the causal design analyses how the model adoption of the DSS in the AFCFTA framework, will have similar effect as that of the WTO for African Countries.

1.10. Limitations

The limitation encountered in the study is with regards to data collection on the AFCFTA as the research is exploratory since the setting up of the AFCFTA is underway. The impact on findings is that they are more speculative rather than factual. This therefore points to the need for continued research as the AFCFTA is operationalized.

1.11. Chapter breakdown

CHAPTER 1- RESEARCH PROPOSAL

The Research proposal introduces the research problem, it sets out the historical background of the problem and the hypothesis of the research. It also sets out the theoretical framework guiding the research, and the literature review gives an overview of treatises and articles of various aspects of the research paper.

CHAPTER 2-THE WTO DISPUTE SETTLEMENT SYSTEM

Chapter two evaluates the WTO DSS its structure, role and process of dispute settlement. The chapter also discusses the implementation and enforcement mechanism at the WTO DSS. Lastly it highlights the challenges of the WTO DSS.

CHAPTER 3: AFRICAN COUNTRIES IN THE WTO DISPUTE SETTLEMENT SYSTEM

Chapter three discusses the WTO DSS as it relates to African countries, the challenges that African developing countries encounter at the DSS that limits its effectiveness for them. Further the chapter also evaluates the AFCFTA's DSM and the lessons it can adopt from the interaction of the WTO DSS with Africa countries.

CHAPTER 4: CONCLUSION AND RECOMMENDATIONS

The fourth chapter discusses the conclusion of the research, it sets out the findings from evaluation of the research problem, and proves the hypothesis. It also sets out recommendations for the AFCFTA for effective utilization of its dispute resolution mechanism. It also points to further areas of research.

BIBLIOGRAPHY

CHAPTER 2
THE WTO DISPUTE SETTLEMENT SYSTEM

2.1. Introduction

Under GATT, there existed a dispute settlement system based on Articles XXII and XXIII, The principles in these articles were codified in the DSU Article 3.1.[1] In article XXIII the disputes were resolved by countries themselves, individually or jointly. There was no body set up to settle the disputes. Thus, rulings were made by the chairman of the GATT Council. However, later on, as GATT evolved and expanded, working parties were formed that made decision on disputes by adoption of their reports by consensus.[2] The working parties consisted of both the disputing countries and representatives of interested contracting parties. Later on panel of experts took over from the working parties, they were neutral or had no interest in the dispute.[3]

The panel reports recommended and ruled on the dispute. The panel then referred them to the GATT Council. Upon approval of the reports by the GATT Council, the rulings became legally binding on the disputing parties.[4] The contracting parties to GATT 1947 progressively codified procedural dispute settlement practices.[5]

The GATT DSS suffered major challenges and the system was deemed weak because of the rule of positive consensus. Positive consensus was vital in the GATT Council to refer a dispute to a panel, it was also a prerequisite for the adoption of the panel report. It is important to note that disputants or interested parties actively participated in the decision making process. Thus, a respondent contracting party could object to the formation of a panel.[6] Lastly, the same consensus was necessary in determining the countermeasures against a non-implementing respondent. The same was susceptible to the frustration by a respondent through objections.

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[1] <https://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm> accessed on 1.9.2018 at 4:55p.m
[2] Ibid
[3] Ibid (fn 1)
[4] Ibid
[5] Ibid
[6] <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c2s1p1_e.htm> 21.08.2018 at 5:41 p.m

In the 1980s there was a deterioration of the dispute settlement system as contracting parties increasingly blocked the establishment of panels and the adoption of panel reports.[7] Further, the tendency to block panel reports weighed in on the impartiality of panel rulings, as the panelist opted to give diplomatic rulings rather than those based on legal merit.[8] This also encouraged unilateral action by individual contracting parties in a bid to enforce their rights instead of submission to the GATT dispute settlement system, a clear sign of lack of confidence in the system.[9] Another issue that arose that made the DSS of GATT weak was the multiplicity of dispute resolution mechanisms found in other GATT agreements and codes that were applicable to signatories of these treaties specific to the subject matter of the treaty. The case of an alternative resolution mechanism gave contracting parties an opportunity for forum shopping to select the mechanism that best suited their interests, either under GATT 1947 or specific treaties, such as in the Tokyo Round Codes.[10]

At the Uruguay Round of negotiations, detailed procedures for the various stages of a dispute were codified, including specific time-frames to ensure prompt resolution. The DSU contains these timelines.[11] Further, the new dispute settlement system was adopted as a single undertaking to cover all agreements with only minor variations eliminating the multiplicity of resolution mechanisms.[12] The DSU reduced the right of individual parties especially the participation of the respondent party, in decision making that would allow them to challenge or veto the establishment of panels or the adoption of a report. Under the DSU, the DSB is now mandated to establish panels and adopts panel and Appellate Body reports unless there is a consensus against it. The "negative" consensus rule contrasts sharply with the practice under the GATT 1947 of a positive consensus.[13] The

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[7] ibid
[8] Ibid
[9] Ibid
[10] Ibid
[11] <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c2s2p1_e.htm > accessed on 1.9.2018 at 5:35 p.m
[12] Ibid (fn 14)
[13] Ibid (fn 14)

DSB also authorizes the counter-measures against a party which fails to implement a ruling.[14]

2.2. Structure, role and process of the DSS in the WTO legal regime

The WTO dispute settlement system involves the participation of several bodies and players. These include the Dispute Settlement Body (DSB), the Director-General and the WTO Secretariat, Panels, Appellate Body. Besides, arbitrators and experts are also involved in dispute resolution.

2.2.1. The Dispute Settlement Body (DSB)

This is the institution mandated to administer the DSU Treaty and dispute resolution within the WTO Framework. The DSB has the authority to establish panels, adopt panel reports and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize the suspension of obligations.[15]

The DSB is composed of representatives of all WTO Members. The DSB makes a decision by consensus.[16] The DSU considers consensus as attained where no Member, present at the meeting of the DSB, when the decision is taken, formally objects to the proposed decision.[17] However, when the DSB establishes panels, when it adopts panel and Appellate Body reports, and when it authorizes retaliation, the DSB must approve the decision by way of negative consensus. Thus, its decisions are practically automatic unless there is a consensus not to do so.[18] Each WTO member, including the complainant and respondent is prevented from participation in the decision-making process. The implication of this is that the Member requesting the establishment of a panel, the adoption of the report or the authorization of the suspension of concessions, can ensure that its request is approved by merely placing it on the agenda of the DSB.[19] Consequently, any member party opposing the panel establishment, adoption of reports

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[14] <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c2s2p1_e.htm> on 1.9.2018 at 5:35 p.m

[15] Article 2.1 Understanding on Rules and Procedures governing the settlement of disputes

[16] Article 2.4. Understanding on Rules and Procedures governing the settlement of disputes

[17] Ibid

[18] Ibid (fn 14)

[19] ibid

and retaliation has the overwhelming task of convincing all member parties, including the complainant, to object or remain neutral. Thus, unlike in the GATT dispute settlement system of positive consensus, the WTO negative consensus safeguards member countries against abuse of veto.

2.2.2. The Director-General and the WTO Secretariat

The Director- General, with a view to assisting Members to settle a dispute of the WTO may, acting in an ex officio capacity, offer his or her good offices, conciliation or mediation .[20]Also under the special procedures applicable to Least Developed Countries, the Director General may offer their good offices, conciliation or mediation with a view to assisting Least Developed Countries to settle a dispute, where consultations have failed.[21]

The Director-General is the convener of the DSB meetings, she also has mandate to appoint panel members and arbitrators.[22]

2.2.3. Panels

Panels are quasi-judicial bodies that adjudicate disputes between Members in the first instance at the WTO DSS.[23] They are composed of three, and exceptionally five, experts selected on an ad hoc basis.[24] The panels are temporary in nature thus are not a permanent body of the DSB, such as the Appellate Body. Article 8 of the DSU provides for the composition of panels. It gives criteria of individuals that are considered qualified for empanelment, such as persons who have served on or presented a case to a panel, served as a representative of a Member or as a representative to the Council or Committee of any covered agreement or who have worked in the Secretariat, taught or published on

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[20] Article 5.6 Understanding on Rules and Procedures governing the settlement of disputes

[21] Article 24.2 Understanding on Rules and Procedures governing the settlement of disputes

[22] Article 8.7, 21.3, 22.6 Understanding on Rules and Procedures governing the settlement of disputes

[23] https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s3p1_e.htm#fnt1 2/9/2018 at 3:59p.m

[24] https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s3p1_e.htm#fnt1 2/9/2018 at 3:59p.m.

international trade law or policy, or who have served as senior trade policy officials of a Member.[25]

The Secretariat maintains an indicative list of names of such persons.[26] The function of panels is to assist the DSB discharge its responsibility of dispute resolution. The panel makes an objective assessment of the matter and the applicability of and conformity with the relevant WTO agreements, and makes findings that will assist the DSB in making the recommendations or in giving the rulings provided for in the agreements.[27] The WTO Secretariat assists panels with legal, historical and procedural aspects of the dispute and provides secretarial and technical support, with at least one secretary and one legal officer.[28] The Panel may give a ruling and state the extent that the respondent's actions are inconsistent with the relevant WTO agreement and give recommendations.[29]

2.2.4. Appellate Body

Unlike in the GATT 1947, the Appellate Body is a permanent institution under the DSB, created by the DSU and mandated to hear and determine appeals on legal issues from the Panel rulings and reports.

Since Panel reports are automatically adopted unless through the blocking by negative consensus, the only other way to challenge such Panel reports is through an appellate review on legal issues in the dispute. The Appellate Body may uphold, reverse or modify the Panel's findings.[30] The body is composed of seven members, three of whom serve in one dispute.[31]

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[25] Article 8.1 Understanding on Rules and Procedures governing the settlement of disputes
[26] Article 8.4 Understanding on Rules and Procedures governing the settlement of disputes
[27] Article 11 Understanding on Rules and Procedures governing the settlement of disputes
[28] Article 27.1 Understanding on Rules and Procedures governing the settlement of disputes
[29] Article 19.1 Understanding on Rules and Procedures governing the settlement of disputes
[30] Article 17.13 Understanding on Rules and Procedures governing the settlement of disputes
[31] Article 17.2 Understanding on Rules and Procedures governing the settlement of disputes

The DSB established the Appellate Body in 1995.[32] The DSB appoints the members by consensus. [33] The Appellate Body member serves for a maximum of eight years.[34] Appellate Body members must be persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements, and must not be affiliated with any government.[35] The seven Appellate Body members elect one of their own as Chairman who serves a term of one or a maximum of two years.[36] The Chairman is responsible for the overall direction of the Appellate Body business, especially with regard to its internal functioning.[37]The Secretariat provides legal assistance and administrative support to the Appellate Body.[38]

2.2.5. Arbitrators

As provided in the DSU, there are various instances where arbitrators are appointed by the Director General, or the DSB chairperson, to adjudicate disputes. Arbitration is an alternative to dispute resolution by panels and the Appellate Body.[39] Arbitration is usually applied at the implementation phase of the dispute settlement process where it determines the reasonable period within which the panel or appellate ruling or recommendations ought to be implemented.[40] Arbitration may also be instituted at the compliance phase, where a party objects to the proposed compliance measure.[41]

2.2.6. Experts

Experts are also involved in the resolution of disputes as the WTO disputes often involve complex technical and scientific issues for determination. Panels often seek out the expert

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[32] <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s4p1_e.htm#fnt2 > accessed on 2/9/2018 at 7;02 p.m

[33] Article 2.4 & 17.2 Understanding on Rules and Procedures governing the settlement of disputes

[34] Ibid (fn 29)

[35] Article 17.3 Understanding on Rules and Procedures governing the settlement of disputes

[36] paragraph 5 of the Appellate Body Working Procedures

[37] paragraph 3 of the Appellate Body Working Procedures

[38] Article 17.7 Understanding on Rules and Procedures governing the settlement of disputes

[39] Article 25 Understanding on Rules and Procedures governing the settlement of disputes

[40] Article 21.3(c) Understanding on Rules and Procedures governing the settlement of disputes

[41] <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s5p1_e.htm#fnt1> accessed 2/9/2018 at 3:56 p.m.

opinion in the adjudication process. Article 13.1 of the DSU provides for the right to information for Panels or the Dispute Settlement Body. Certain agreements within the WTO Framework explicitly provide for expert opinion, such as Article 11.2 of the Agreement on Sanitary and Phyto-sanitary Measures. The experts may be individuals or a group. The rules for the establishment of an expert review group and its procedures are set forth in Appendix 4 of the DSU.

2.2.7. The Dispute Settlement Process

The dispute settlement process is in four phases as indicated in the diagram below. It begins at the consultation phase which serves as an informal pre-trial discovery phase as the parties deliberate and understand the factual issues and the legal claims to the dispute.[42] Consultations undertaken pursuant to Article XXII of the GATT 1994 may include other members in the consultative process who have substantial trade interest.[43]

The consultations between parties are undertaken within 60 days, successful consultations lead to mutually agreed solutions consistent with WTO Law. Where parties fail to agree the complainant may request for the establishment of a panel. However, consultations can exist even while panel proceedings have begun.[44]

The second phase is the panel phase, which is the beginning of the adjudication process. The panel is established as stipulated in Article 6 of the DSU. Article 10 provides for the rights of third parties to participate in the panel proceedings. They are accorded the opportunity to make submissions to the panel and are heard during a special session. Their participatory rights are, however, limited. The nature of disputes before panels often involves complex factual, technical and scientific issues. Article 13 of the DSU provides that panels can seek technical advice from experts. Article 15 of the DSU provides for the Panel's interim review report that shall be issued to the parties after their

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[42] Peter Van Den Bossche, The Law and Policy of the World Trade Organisation (first published 2005, Cambridge University Press) 255
[43] Ibid(fn 48) 258
[44] Ibid.

oral and written submissions. The final panel report shall include any discussion of the arguments made by the parties at the interim review stage.

The third phase is the appellate review proceedings; where a party is dissatisfied with the ruling. The appeal is limited only to issues of law. Unlike panels the Appellate Body has detailed standard working procedures set out in the Working Procedures for Appellate Review adopted in 2010.[45]

The appeal recourse is also limited to parties at the panel phase. Third parties may only submit in accordance with article 10 of the DSU where they have substantial interest in a matter or where a measure taken up by a party to the dispute impairs their benefit to an agreement under the WTO regime. The appellate proceedings are concluded within 60 days. The Appellate Body may uphold, modify or reverse the legal findings and conclusions of a panel.[46]

The final phase is the implementation and enforcement phase, where parties seek to implement the recommendations and rulings of either the panel or appellate body. The implementation and enforcement phase come in the forms of an arbitration process or compliance proceedings. The enforcement of rulings will be discussed in depth in the next section.

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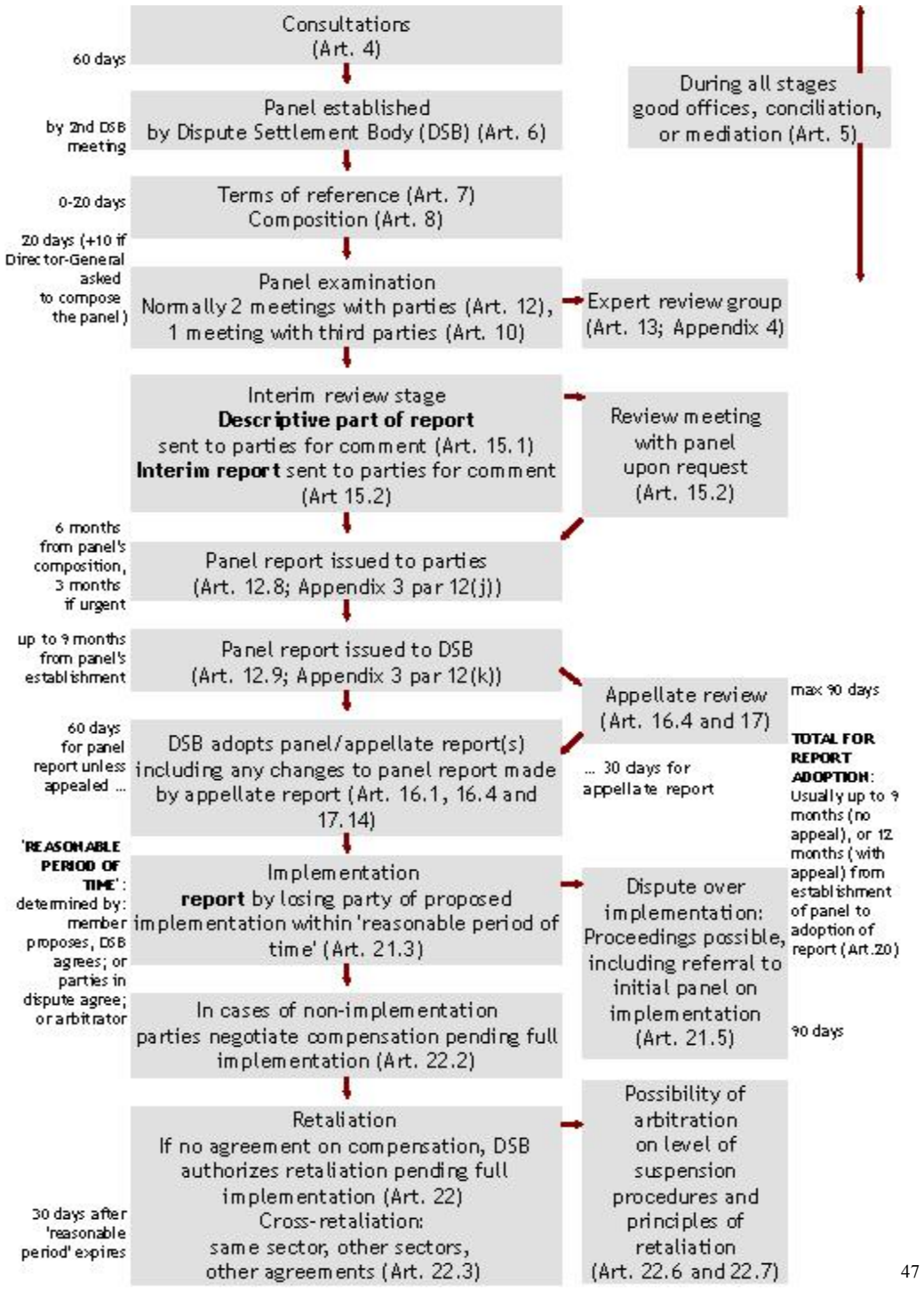
[45] **WT/AB/WP/6** 16 August 2010 from< https://www.wto.org/english/tratop_e/dispu_e/ab_e.htm > accessed on 6th August 2019 at 3:08 p.m.

[46] Article 17.13 Understanding on Rules and Procedures governing the settlement of disputes

The Dispute settlement Process



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2.3. Implementation and enforcement mechanism at the WTO DSS

[47] Flow chart of the Dispute settlement process, <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s1p1_e.htm > accessed on 2/9/2018 at 7:26 p.m.

2.3.1. Implementation process

After the findings of a panel or Appellate Body are adopted by the DSB the implementation and enforcement phase of the dispute settlement process commences. The DSU encourages prompt settlement of disputes; it states the primary objective should be withdrawal of the inconsistent measure taken up by the respondent.[48] Article 21.1 of the DSU provides that prompt compliance with the recommendations or rulings of the DSB is essential in order to ensure the effective resolution of disputes.[49]

A DSB meeting is held within 30 days after the date of adoption of the report. The respondent member country states its intention to comply with the recommendations immediately; if it is impracticable to comply immediately, it gives a reasonable period within which it will comply.[50]

The implementation process involves the surveillance of the implementation of the adopted panel and Appellate Body reports, arbitration and compliance proceedings. The DSU provides for the surveillance of implementation of panel or Appellate Body reports, after the establishment of a reasonable time frame to implement the report. The DSB places the implementation of the recommendation on its agenda.[51] The member country that ought to comply has to issue an update every 10 days prior to a DSB meeting until the resolution of the dispute.[52]

Arbitration proceedings may be instituted as part of the implementation phase to determine the reasonable period of compliance with the panel or Appellate Body report. Unlike panel or Appellate Body reports, such an arbitration award pursuant to Article 21.3, is not adopted by the DSB. [53] Article 21.3 provides for arbitration to determine the time frame for the implementation of the DSB ruling by the Respondent party. The

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[48] Article 3.7 Understanding on Rules and Procedures governing the settlement of disputes

[49] WTO Secretariat, 'A Handbook on the WTO Dispute Settlement System',(Cambridge University Press, 2004) 75

[50] Art 21.3 Understanding on Rules and Procedures governing the settlement of disputes

[51] Article 21.6 Understanding on Rules and Procedures governing the settlement of disputes

[52] ibid

[53] Ibid(fn 80) 279

arbitration must be instituted within 90 days of the adoption of the panel and Appellate Body report. Parties may mutually agree to extend this time frame. [54]

Arbitration proceedings may also be instituted as an enforcement mechanism under Article 22.6. to determine the suspension of concessions or other obligations in enforcement of panel reports. Article 22 provides that such arbitration may be conducted by the original panel and the concessions made by the complainant subsist during the course of the arbitration. The arbitration should be concluded within 60 days of the expiry of the reasonable period of time. The arbitrators decide on whether the concessions made by the complainant in enforcement are inconsistent with principles set out in Article 22.3 of the DSU.

The arbitrators measure the equivalence of the concession to the damage/loss of trade caused by the respondent.[55] The DSB is informed promptly of the decision of the arbitrator and grants, by reverse consensus, the requested authorisation to suspend concessions or other obligations where the request is consistent with the decision of the arbitrator.[56]

Compliance proceedings are governed by Article 21.5 which provides for recourse where a disagreement arises on the measure adopted by a respondent party in compliance with the panel's recommendation. They are instituted where parties disagree on the consistency to WTO law of the measure taken by the respondent party in implementation of the recommendations. In most instances, the original panel oversees the compliance proceedings, once its report is adopted the complainant can request authorization from the DSB to enforce through retaliation immediately.[57]

2.3.2. Enforcement

[54] Ibid(fn 55)77
[55] Ibid(fn 48) 184
[56] Ibid(fn 55) 77
[57] Ibid

The primary objective of the DSU in the resolution of disputes is the withdrawal of the inconsistent measure taken up by the respondent party. However, where there is non-compliance by the losing member country, to conform to its WTO obligations within the set reasonable timeframe, the complainant may seek temporary measures.[58] These measures include compensation and the suspension of WTO concessions and obligations.

Compensation as a measure is voluntary and should be consistent with the WTO agreements and the Most Favoured Nation principle.[59] The implementing Member may enter into negotiations with the complaining party and agree on mutually acceptable compensation.[60] Compensation is in the form of a benefit rather than financial for instance a party may offer a reduced tariff. [61]Article 22.3 of the DSU provides for principles and procedures that the complainant should consider while applying these temporary enforcement measures.

Article 22.2 of the DSU provides that where compensation fails, twenty days after the expiry of the reasonable period of time, the complainant may seek the authorisation of the DSB to suspend concessions or other obligations under the covered agreements. The suspension of concessions serves as a retaliation measure to the respondent member country for their violation. These suspensions are discriminatory to the respondent country, and are applied as a last resort as they go against liberalization.[62] Suspension can have the effect of inducing the respondent to achieve implementation; the DSB is tasked to keep the enforcement measure under surveillance.[63]

Article 22.3 sets out the guiding principles and procedures for the complainant country to adhere to when exercising its retaliation measure against the respondent country. The key principles are that firstly concessions should be made within the same sector as the violation or impairment, where it is impractical the second principle provides that concessions can be made in other sectors but within the same agreement. Llastly where

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[58] Ibid(fn 55) 80
[59] Ibid(fn 48) 284
[60] Ibid(fn 55) 80
[61] Ibid(fn 55) 80
[62] Ibid(fn 55) 81
[63] ibid

that is impracticable concessions can be suspended under another agreement, often termed as cross retaliation.

Also the DSU Agreement provides that the level of suspension of obligations authorized by the DSB must be "equivalent" to the level of nullification or impairment.[64] However, before concessions are made, authorization from the DSB must be sought by the complainant country within thirty days after the expiration of the reasonable period of time. The DSB decides by way of negative consensus; thus, the approval is automatic unless unanimously voted against, because the respondent Member alone could prevent any possible consensus against granting the approval. [65]

Where a dispute arises on the application of this measure with regards to the form of retaliation, arbitration proceedings may be instituted pursuant of Article 22. Also notable is that the DSU currently does not provide for a procedure for the withdrawal or termination of the authorization to retaliate.[66]

2.4. Challenges in the WTO DSS

The dispute settlement system of the WTO has both institutional and procedural challenges that limit its effectiveness in the resolution of disputes.

2.4.1. Institutional challenges

The institutional challenges relate to the function and composition or structure of the DSS. As regards the function of the DSS an institutional challenge of imbalance between the DSS and other organs of the WTO arises. While as regards the composition of the DSS, the institutional challenge arises with regards the composition of the Appellate Body.

The institutional imbalance between the judicial and political organs of the WTO

According to Peter Van Den Bossche, the main challenge of the WTO DSS is the imbalance in effectiveness between the WTO judicial body and the WTO political body

[64] Article 22.4 Understanding on Rules and Procedures governing the settlement of disputes
[65] Ibid(fn 55) 84
[66] Ibid(fn 48) 283

and, subsequently, its impact on dispute resolution.[67] The imbalance between the WTO's highly efficient judicial arm and its far less effective political arm, occurs where countries do not pursue political solutions through active diplomacy to resolve political and controversial issues. As a result they set out ambiguous rules to govern politically sensitive issues such as on public health, taxation and environmental protection.[68] The lack of political solutions, through negotiations and compromise, to these issues before the political organs of the WTO has overburdened the dispute settlement system , as it is forced to resolve political and controversial issues, thus there is excessive reliance on adjudication even on issues that ought to be resolved politically [69] diminishing to some extent its efficiency.

The practice of institutional imbalance has also been an issue in the WTO's judicial review, the question being whether, the judicial organ of the WTO considers the deliberations of political organs or in exercise of their power, they give due regard to the jurisdiction of other organs of the WTO.[70]

The principle was raised by India in the case of Quantitative Restrictions on imports of Agricultural, Textile and Industrial Products before the Appellate Body. India argued that the panel should consider the competence conferred on other WTO organs in order to establish an institutional balance between the judicial and political organs of the WTO.[71] In this case the dispute was about the balance of payment restrictions and whether review of the justification of such issues was to be left to the political organ, the BOP Committee and the General Council.[72] India's rationale was that the judicial organ has a duty to cooperate with other organs to achieve the WTO obligations and should refrain from reviewing matters that were subject to review in another organ.[73] The Appellate Body

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[67] Ibid(fn 48) 298
[68] Ibid
[69]Ibid(fn 48) 299
[70] Asif H Qureshi , 'Interpreting WTO Agreements: Problems and Perspectives,' (Cambridge University Press 2006) 63
[71] ibid
[72] ibid
[73] Ibid(fn 78)65

differed and relied on the scope of the competence of the panel as provided in the DSU to consider trade restrictions from Balance of Payment problems.[74]

According to Asif Qureshi, the principle of institutional balance can be discerned from the process of interpretation.[75] The principle encompasses the recognition that different organs have different functions, such as the Balance of Payment Committee and the Panels. It also recognizes that the judicial findings need to be without prejudice to the role of political organs, such as the General Council or the Balance of Payment Committee. Thirdly it recognizes that the judicial organ cannot substitute itself for the political organ. Thus, panels can review the justification of a BOP measure and not substitute themselves for the BOP Committee. Lastly it recognizes that judicial organs cannot ignore the determinations of political organs.[76]

This imbalance has created a different outlook on the DSS, as a system of judicial activism or overreach. The Chairman of the WTO Appellate Body, Mr. Ujal Singh Bhatia, in his address in June 2017, on the emerging problems of the WTO dispute settlement system, noted that certain member countries believed that the interpretation of certain provisions by the panels failed to consider the political pillar of the WTO, such as the negotiation history of how such provisions were created and the compromises that were made. They thus imposed their specific reasoning on provisions that were meant to be broad and open ended.[77] He stated that Panels and the Appellate Body have to provide answers to questions and claims raised by WTO Members in their dispute. WTO Members should refrain from seeking judicial solutions to issues which are essentially political and which negotiators agreed upon with constructive ambiguity. Members ought to engage in political discussions and try to reach mutually satisfactory solutions. He also recognized the need for the negotiation or political pillar of the WTO to be revived so as not to place more strain on the dispute settlement pillar of the WTO.

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[74] Ibid(fn 78)64
[75] Ibid(fn 78)66
[76] Ibid
[77] Ujal Singh Bhatia, 'The Problems of Plenty: Challenging Times for the WTO's Dispute Settlement System', Public Address by Chairman of the Appellate Body made on 8 June 2017 at the release of the annual report of the Appellate Body

Panel Composition and ad hoc nature of Panels

The institution of the DSS is fragmented as the dispute resolution can be achieved through various modes, such as adjudication, arbitration, mediation and conciliation.

Panels serve on an ad hoc basis and this impermanent state creates problems of delays. For instance where a dispute is referred back to the original panel and they are unavailable, this resorts to the appointment of an arbitrator such as in the proceedings pursuant to Article 21.5 of the DSU.

Further, a standing body of panelists would remove any preference for government affiliated panelists.[78] In the DSU review proposals, the European Communities had made such a proposal of a system of permanent panelists that would lead to faster procedures and an increase in the quality of the panel reports.[79]

The Appellate Body has been plagued with the problem of selection of new members. Mr. Ujal Singh commented on how the appointment process of new members of the Appellate Body was often frustrated by an impasse that led to delays in the resolution of disputes thereby limiting the functioning of the Body.[80] Presently, the Appellate Body is in a state of crisis post December 2019, when there will be only one serving Appellate Judge present. Also the lack of geographical representation has raised questions on the Appellate Body's legitimacy.[81]

2.4.2. Procedural challenges

Some of the procedural challenges of the WTO DSS include the sequencing issue, the inability to remand cases back to the original panels, the lack of a procedure to terminate concessions and the prolonged time frames for settling disputes.

Sequencing Issue

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[78] Andreas F. Lowenfeld, 'International Economic Law Series', (Oxford University Press ,2008 reprinted 2011)178

[79] Ibid(fn 48) 293

[80] Ujal Singh Bhatia, 'The Problems of Plenty: Challenging Times for the WTO's Dispute Settlement System', Public Address by Chairman of the Appellate Body made on 8 June 2017 at the release of the annual report of the Appellate Body

[81] ibid

The sequencing issue is the conflict between parallel proceedings which include the enforcement procedure for authorisation for retaliation from the DSB under Article 22.6 and the compliance procedure under Article 21.5 that confirms whether the respondent has complied with the panel recommendations.[82]

The conflict of the timeframes for these procedures displays disconnect of the DSU. Under Article 21.5, the compliance panel circulates its report within 90 days after the date of referral of a matter to it. Article 22.2 provides that the prevailing complainant can request authorization to retaliate from the 20th day after the expiry of the reasonable time period.

The classic case of US and EC Banana III illustrates this issue, where the USA insisted on the right to obtain authorization to retaliate, while the EU sought compliance proceedings under Article 21.5 to confirm that the implementing measures taken by them were not WTO inconsistent. [83] Parties unblocked the situation by agreeing that the compliance proceedings were a prerequisite to the enforcement proceedings.[84]

There is no common understanding about sequencing and, hence, this creates tensions as disputing parties no longer seem to be adopting ad hoc agreements on the sequencing of procedures.

Procedure for the termination of concessions

The other challenge is that the DSU does not provide for a procedure to terminate suspension of concessions where a prevailing complainant retaliated.[85] There is need for a procedural provision that outlines withdrawal process and the timeframe once the respondent country is in compliance.

Remand of Cases

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[82] Ibid (fn 48) 280
[83] ibid
[84] Ibid (fn 48)281
[85] Arie Reich, 'The effectiveness of the WTO Dispute Settlement System: A statistical analysis', (European University Institute 2017) 29

The inability of the Appellate Body to remand cases to the original panel because of its ad hoc nature and the lack of a procedural provision for the same limits the system's effectiveness. This is because some issues are left unresolved after the appellate review, as the original panel is the only one that can complete the factual findings to conclude on the legal analysis . Appeals are brought on issues of law or on legal interpretations by the panel.[86]

Time Frame for dispute resolution

The prescribed timeframes of the DSU for the resolution of disputes is also a challenge for panels and Appellate Body. In principle, panel proceedings should not exceed nine months. Arie Reich, in a statistical analysis of the same, found that the average duration from the consultations phase to the recommendation phase of a dispute in the WTO was gradually increasing.[87] As analyzed, between 1995 and 1998 disputes took 23 months, those between 2007 and 2011 took an average of 28 months, and disputes from 2013 would take up to 34 months.[88]

The increase in dispute resolution timeframes is, thus, a challenge as the complainant continues to suffer economic harm from the violation. There is also no interim relief provision to protect their economic and trade interests.[89]

2.5. Conclusion

This chapter analyses how the problem of limited utilization by developing countries arises by examining the WTO dispute settlement system, its structure and procedures. It also highlights the systemic and institutional challenges of the system. As compared to the GATT dispute settlement mechanism, the WTO DSS can be viewed as a more effective dispute resolution mechanism, as its quasi-judicial and quasi-automatic nature allows it to resolve complex cases.

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[86] Ibid p.26.
[87] Arie Reich, 'The effectiveness of the WTO Dispute Settlement System: A statistical analysis', (European University Institute 2017) 29
[88] ibid
[89] Ibid (fn 55)117

However, effectiveness of the system should be determined by the system's ability to guarantee the achievement of the DSU's objective of preserving the rights and obligations of all members of the WTO. This includes developing countries in Africa.

In the next chapter, we consider the interaction of African countries with the WTO dispute settlement system and how the challenges unique to developing countries limit the system's effectiveness.

CHAPTER 3
DISPUTE SETTLEMENT BY AFRICAN COUNTRIES IN THE WTO AND UNDER THE AFCFTA FRAMEWORK

3.1. Introduction

The benefits of utilization of the DSS are numerous for developing countries as the decisions of the DSS have tangible effects on the socio-economic welfare of a country such as its trade interests through the provision of market access for specific industries.[1] Further, developing countries' should actively utilize the system because the jurisprudence of the DSS affects future cases.[2] Even though precedents do not apply, the jurisprudence from the DSS ultimately affects the interpretation, application and eventual meaning of the law.[3]

The practical benefit for developing countries' participation is the wealth of experience they gain on WTO practice, even as third parties to cases, as they are able to understand litigation strategies at the DSS.[4]

Finally, the participation of developing countries has an impact on their future bargaining positions. As Geoffrey Shaffer opines, the DSS has a shadow effect on both domestic and bilateral bargains of a country.[5] This is because even without full adjudication of a complaint, at the consultation phase of the dispute settlement process, concessions may be made. Further, because of the weak enforcement system, settlement is usually by negotiations and with a favorable ruling, a country may have better bargains.[6]

The limited participation at the DSS is usually as a result of the various hurdles encountered in the process of dispute settlement and within the system, such as retaliatory

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[1] Gregory Shaffer, 'Developing Country Use of the WTO Dispute Settlement System: Why it matters, the barriers posed and its impact on bargaining', Paper prepared for the WTO AT 10: A look at the Appellate Body in Sao Paulo, Brazil, May 16-17, 2005 p.14
[2] Ibid
[3] Ibid
[4] Ibid
[5] ibid
[6] Ibid p.15

trade threats, reliance on bilateral trade aid and the high litigation costs.[7] The challenges unique to African countries are addressed in the subsequent sections of the chapter.

This chapter analyzes the specific challenges African countries encounter that limit their participation at the DSS. The chapter also looks at the dispute settlement mechanism of the African Continental Free Trade Agreement that is modeled after the WTO dispute settlement system, and considers whether the same challenges persist and the extent to which African countries will utilize it.

3.2. Extent of effectiveness of the DSS for African countries

The hypothesis of this research is that the power dynamics of the WTO and the numerous challenges that the small developing countries face render the DSS an ineffective system for settling disputes for African countries.

The extent of effectiveness of the DSS is herein considered by looking at both the utilization of the system by African countries and the power based bargains of the system.

3.2.1. Participation in the Dispute Settlement System

African countries hardly institute any complaints before the Dispute Settlement System, mainly because of the numerous systemic, institutional and procedural challenges of the DSS.

Some of these challenges undermine the access and utilization of the DSS by African countries. The WTO provides statistics on their utilization. The figure below[8] indicates the participation levels of African countries.

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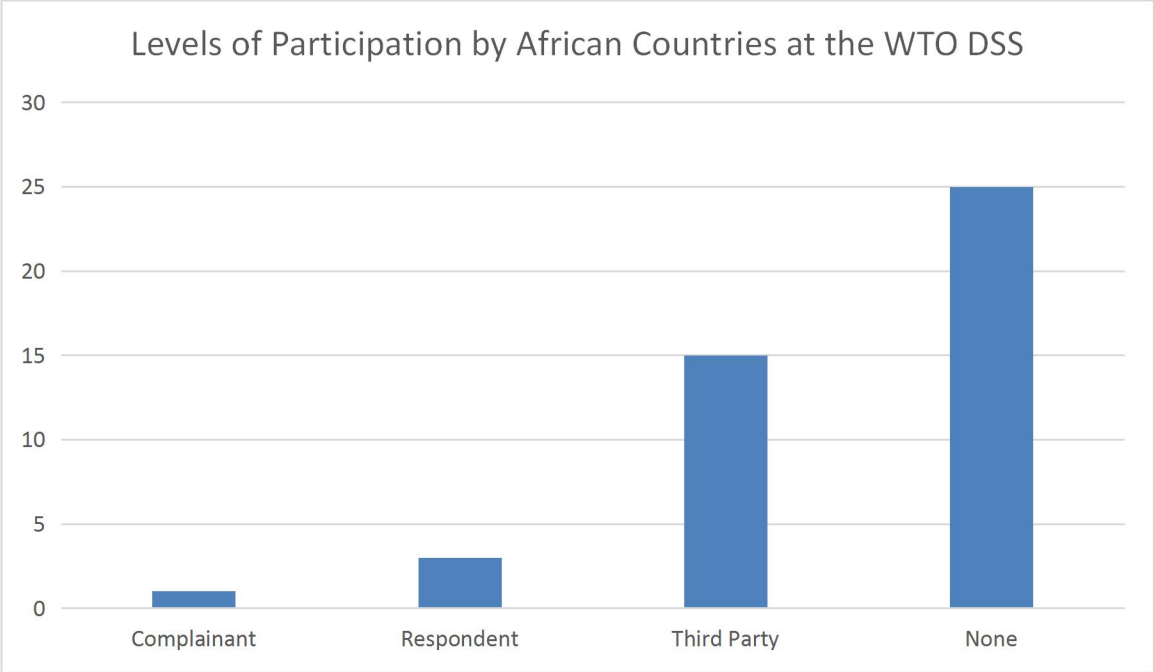
[7] Ibid p.9

[8] Source: Disputes by Members
<https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm>



African countries mostly participate as third parties to complaints. Third party participation allows interested parties to join in a complaint as they can substantively submit on the issues; such participation does have its own benefits for the third party for instance lower litigation costs and positive effect on trade bargains with the respondent country.[9] Third party status may also be taken up in support of the defendant or trade restriction, or as a neutral party. Neutral third parties benefit from direct access to relevant information of the dispute as an observer. They are able to formulate expectations for when they could be in violation of the WTO law and the concessions available.[10]

3.2.2. Power based bargains within the dispute settlement system

The enforcement mechanism of the DSS is impractical for African countries. Enforcement through retaliation is highly dependent on large trade volumes for the complainant to have any clout. Thus, where there exists a power imbalance between the complainant and respondent, the rulings are not likely to be implemented.

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[9] Gregory Shaffer, 'Developing Country Use of the WTO Dispute Settlement System: Why it matters, the barriers posed and its impact on bargaining', Paper prepared for the WTO AT 10: A look at the Appellate Body in Sao Paulo, Brazil, May 16-17, 2005 p.16

[10] ibid

Recent demonstration of a power based DSS can be seen in the trade wars between developed countries, such as the USA and China, where members embark on retaliatory measures before beginning the process of dispute settlement.[11] Such actions have gone against the norms of the WTO DSS of prohibition on counter retaliation and the DSS's mandate on regulation of remedies.

The unilateral trade sanctions by USA to invoke a GATT exemption on China in June 2018 for alleged trade violations in intellectual property and subsidies, and the retaliatory sanctions by China without the use of the WTO DSS demonstrate the disregard for the rule based system.[12]

Also the veto block on the appointment of Appellate Body members by the USA in a bid to push for reforms based on their systemic concerns of the DSS will paralyse the Appellate Body Post December 2019 when only a single appellate member remains. This further demonstrates the power based distinctiveness of the WTO DSS.[13]

The function of the Appellate Body is pivotal in seeking appellate redress to panel rulings. Thus, where it is not functional WTO members are forced out of the adjudication system; because a member state cannot wait upon an appeal they will likely take unilateral retaliatory measures.[14]

African countries are also highly dependent on non-reciprocal trade relations with developed countries. This dependence on the market access that is provided creates a power imbalance, as one cannot bite the hand that feeds him.

3.3. Challenges of developing countries at the WTO DSS

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[11] Rachel Brewster, Can International Trade Recover? WTO Dispute Settlement: Can we go back again? American Journal of International Law , vol. 113, 2019 p.62
[12] Ibid.
[13] Professor Joost Pauwelyn, WTO Dispute Settlement Post 2019: What to expect? What choice to make?, (7th July 2019) Available at
SSRN: https://ssrn.com/abstract=3415964 or http://dx.doi.org/10.2139/ssrn.3415964
[14] Ibid

Developing countries face several challenges within the WTO Dispute Settlement System. This section discusses these challenges to understand the perspective of African countries on the factors that limit their utilization of the system.

3.3.1 Costs Implications

The procedures of the DSS demand a lot of resources the exports of developing countries have lower aggregate value hence they benefit less from a successful claim unlike a developing country that trades globally in large volumes.[15] This means that the potential trade benefits of a successful claim does not outweigh the cost of instituting a claim for the developing country. They also have less legal capacity. They often need to hire foreign law firms that practice WTO law, this increases their cost implication.[16] Therefore because the benefits of instituting a claim rarely exceed litigation costs, small developing countries shy away from the DSS to address any trade violations. For instance the only African country that has instituted a complaint at the DSS is Tunisia.

3.3.2 Fact Finding Problem

The preliminary phase before launching a complaint at the DSS involves intense fact finding that is highly technical. This is because WTO cases are more factually contextualized. Panels do not just apply general legal principles; they analyze on a case by case basis.[17] For instance, cases brought under the Sanitary and Phyto-sanitary Agreement rely on factual analysis of the scientific evidence.[18] Developing countries, therefore, also incur pre-litigation costs that include both resources for fact finding and technical expertise, depending on the nature of the complaint.

3.3.3 Inapt approach to disputes

WTO disputes are only brought forth by a complaint from countries because the jurisdiction of the WTO is only for states, thus private entities or litigants can only seek

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[15] Ibid (fn 9) p.22
[16] Ibid
[17] Kristin Bohl, Problems of Developing Country Access to WTO Dispute Settlement, 9 Chi.-Kent J. Int'l & Comp. Law 131 (2009) 139
[18] Kristin Bohl, Problems of Developing Country Access to WTO Dispute Settlement, 9 Chi.-Kent J. Int'l & Comp. Law 131 (2009)

recourse for trade violations through their governments by lobbying. . However, more often than not, trade barriers affect private sector industries within a country and it is private industries that recognize these barriers. The lack of clear domestic procedures for private industries and entities to lobby their government to initiate complaints at the WTO DSS is another hurdle that limits the participation of developing countries.[19]

The USA and European Community both have models of communication with private sector industries and public-private partnerships in this regard.[20] This ensures the safeguarding of their trade interests as the private sector plays a critical role by providing human and financial resources and independent investigations of the violation, thereby taking part in the pre-litigation costs.[21]

The EU model can be found under Article 133 of the European Union Treaty and the Trade Barrier Regulation. The regulation provides a petition mechanism for private sector that can urge the European Community to investigate foreign trade barriers and initiate claims before the WTO.[22]

3.3.4 Inadequate technical assistance and capacity building or lack of expertise

The WTO Appellate Body requires the use of statistical trade data as opposed to legal presumptions; consequently, the cost of legal expertise has increased.[23] Developing countries have had difficulties engaging relevant expertise for litigation purposes.

According to the billing policy and time budget for the Advisory Centre on WTO Law, developing countries are charged a maximum cost between 23,652 and 47,304 Swiss francs for panel proceedings, depending on their classification, while for appellate proceedings, the costs range between 14,418 and 28,836. [24]

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[19] Ibid p.153
[20] ibid
[21] Kristin Bohl, Problems of Developing Country Access to WTO Dispute Settlement, 9 Chi.-Kent J. Int'l & Comp. Law 131 (2009) 161
[22] Ibid 157
[23] Ibid (fn 9)23
[24] ACWL Billing Policy and Time Budget <https://www.acwl.ch/download/basic_documents/management_board_docs/ACWL-MB-D-2007-7.pdf> accessed on 17-september 2019 at 9:21 p.m.

The Advisory Centre on WTO Law provides subsidized technical assistance to developing countries. The Centre also maintains the Technical Expertise Fund, as it acknowledges the strain of litigation and costs of technical experts for developing countries. However the Centre is highly dependent on donor funding and the large economies, such as the United States, refuse to support it.[25]

3.3.5 Poor enforcement mechanism

The enforcement system of the DSS has been discussed at length in the previous chapter. However, we now consider the same from the perspective of a small developing country. Geoffrey Shaffer argues that WTO trade remedies limit utilization of the system because of structural disadvantages, such as low trade volumes, and how the rulings are referred to as recommendations. They, thus, tend to be ambiguous and to largely favor the party with more bargaining power. Further, an ambiguous ruling allows such party to shape compliance while retaining the protectionist measure they took up.[26]

Another disadvantage is the enforcement mechanism by retaliation, a trade remedy that is highly dependent on bargaining power or market power to be effective. Small countries wield no clout.[27]

The prospective nature of trade remedies covers losses from the date of the ruling and not the date of the trade violation. This allows the respondent party to drag out the legal case, with the aim of closing its markets for years.[28] The same can be illustrated in safeguards, where a party in trade violation can close off its market for years without any consequence as it drags out the case. Thus, Shaffer suggests effectiveness of the system should also be measured by its impact on a party's behavior.[29]

3.3.6 Lack of political will power

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[25] Kristin Bohl, Problems of Developing Country Access to WTO Dispute Settlement, 9 Chi.-Kent J. Int'l & Comp. Law 131 (2009) 150

[26] Gregory Shaffer, 'Developing Country Use of the WTO Dispute Settlement System: Why it matters , the barriers posed and its impact on bargaining', Paper prepared for the WTO AT 10 :A look at the Appellate Body IN Sao Paulo , Brazil , May 16-17, 2005 p.24

9[27] Ibid (fn 9) p.24

[28] Sharif Bhuiyan ,National Law in WTO Law Effectiveness and Good Governance in the world trading system, Cambridge press (2007) 25

[29] Ibid

A challenging political environment exists for developing countries with regards to their utilization of the DSS. Developing countries do not hire trade experts as their representatives at the WTO. Unlike developed countries, they appoint career diplomats with inadequate trade expertise to advance and safeguard their trade interests. Some countries lack a mission presence in Geneva.[30] Some of these countries may not even recognize trade barriers in the first place, [31] let alone challenge them.

In most instances, developing governments will be reluctant to pursue trade remedies through the DSS because of financial constraints as they would rather utilize their resources on pressing national economic concerns.

The DSS does not guarantee them successful claims. They are, however, guaranteed of encountering political and trade reprisals from developed countries because of their need for market access in developed countries. Further, most developing countries are reliant on development assistance and aid initiatives from developed countries. They thus face more than WTO retaliation, they risk losing the non-reciprocal preferential trade arrangements that they have with developed countries.[32]

They also fear counterclaims from developed countries that have the capacity to accommodate high litigation costs.[33] The political context of trade disputes is indicative of the power dynamics of the WTO DSS.

3.4. Lessons for the AFCFTA dispute settlement mechanism

The AfCFTA is an agreement that seeks to create a single continental market for goods and services to promote intra Africa trade. The treaty has been signed by 54 African

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[30] Kristin Bohl, Problems of Developing Country Access to WTO Dispute Settlement, 9 Chi.-Kent J. Int'l & Comp. Law 131 (2009) p. 162
[31] Ibid (fn 9) p.1
[32]Kristin Bohl, Problems of Developing Country Access to WTO Dispute Settlement, 9 Chi.-Kent J. Int'l & Comp. Law 131 (2009) p165
[33] Ibid

countries and ratified by twenty eight African member states.[34] It entered into force on 30 May 2019 for the countries that had deposited their instruments of ratification.[35] The AFCFTA creates a foundation for a Continental Customs Union and a single Continental Market for goods, services, investments and movement of persons within the continent.[36]

The AFCFTA is a comprehensive partnership agreement that will adopt a single undertaking of its various agreements. The phase one protocols adopted include protocol on trade in services, trade in goods and the protocol on the rules and procedures on the settlement of disputes. The phase two protocols that are still being negotiated include protocol on investment, intellectual property and competition.[37]

The objectives of the Agreement are to promote social-economic development through intra Africa trade, structural transformation and competition of economies in the continent.[38] It seeks cooperation in elimination of non-tariff barriers, liberalization of trade in services and implementation of trade facilitation.[39]

It is estimated that the gains of the AFCFTA, with the opening up of a market of more than 1.2 billion people and a combined GDP of US Dollars 3.4 trillion, will be the creation of the largest FTA since the formation of the WTO. It is also estimated that intra-Africa trade will grow by 52% through the elimination of import duties and non-tariff barriers to trade.

The ACFTA framework falls within the African Union's development initiatives under its Agenda 2063, the master plan on sustainable economic growth and development of the continent. The background of the AFCFTA framework is the Abuja treaty i.e. the Treaty establishing the African Economic Community. The Abuja treaty of 1991 was signed by

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[34] African Continental Free Trade Area - Questions & Answers,
United Nations Economic Commission on Africa (UNECA)
(2019), https://www.uneca.org/publications/african-continental-free-trade-area-questions-answers.
[35] AfCFTA launch of operationalization phase
< https://www.tralac.org/documents/resources/infographics/2605-status-of-afcfta-ratification.html >
[36] Ibid (fn 35)
[37] James Thuo Gathii, "Agreement Establishing he African Continental Free Trade Area', International Legal Materials, 2019
[38] AfCFTA Agreement Article 3
[39] AfCFTA Agreement Article 3

all member states of the African Union. It establishes the AEC. It seeks to promote social and economic development and integration of African economies, through phases. It is established by the strengthening of REC's (Regional Economic Communities), coordination and harmonization of policies in the continent and the liberalization of trade.[40] The treaty aims to create the free trade area, customs union and an African monetary union.[41]

The framework of the AFCFTA will build on the foundation of regional blocs within the continent. The agreement reaffirms the rights and obligations amongst member states within REC's.[42] These are the Eight REC'S the Economic Community of Central African States, (ECCAS), Economic Community of West African States (ECOWAS), East African Community (EAC), Southern African Development Community (SADC), Common Market for Eastern and Southern Africa (COMESA), Arab Maghreb Union (AMU), Community of Sahel–Saharan states (CEN-SAD) and Intergovernmental Authority on Development (IGAD). The AFCFTA Agreement recognizes that for state parties within RECs with higher levels of integration they shall maintain such levels.[43] This means that for regional economic communities that were at an advanced stage of integration such a customs union they would negotiate the AFCFTA schedule of commitments or rules of origin as a bloc and not individual state parties.

The institutional framework of the AFCFTA consists of the African Union Assembly, the Council of Ministers, the Senior Trade Officials, and an independent Secretariat.[44] One of the guiding principles of the AFCFTA is that it will be executed by members of the African Union,[45] the implication of this is that the African Union members that are not state parties or have not ratified the agreement have control over the AFCFTA and its

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[40] AfCFTA Agreement Article 5
[41] Abuja Treaty Article 6.2 provides the establishment of the community in six stages over a period of thirty four years.
[42] The AfCFTA and its legal instruments <https://www.tralac.org/discussions/article/12869-how-will-the-afcfta-be-established-and-its-legal-instruments-be-implemented.html> accessed on 31/10/2019 at 12:23 p.m.
[43] Article 19 (2) AFCFTA
[44] Article 9 of AFCFTA
[45] Article 5 of the AFCFTA

institutions through decisions of the assembly. The AfCFTA therefore is not autonomous from the African Union.

The Secretariat shall have a distinct legal personality from the AU Commission.[46] The Council's decisions are binding on state parties and the Committee implements the Council's decisions. It also develops programmes and action plans for the implementation of the AfCFTA Agreement.[47]

3.4.1. AfCFTA Dispute Settlement Mechanism

The AFCTA dispute settlement system is provided for in the Protocol on Rules and Procedures on the Settlement of Disputes. The dispute settlement mechanism is initiated upon the request for a consultation to find an amicable resolution.[48] The Protocol provides that state parties ought to accord affordable opportunity for consultations, request for consultations are made through the DSB.[49] The time frame for such resolution is within sixty days, or ten days in the case of urgency such as disputes involving perishable goods.

The utilization of good offices, mediation and conciliation mechanism is also another option for state parties. The Secretariat facilitates the process and notification is made to both the DSB and Secretariat. Arbitration can be a first recourse to the settlement of disputes where parties agree not to proceed by the ad hoc panels. The DSB is notified of the arbitration award for enforcement.

The Dispute Settlement Body comprises of representatives of state parties. It has the mandate to establish dispute settlement panels and an Appellate Body, to adopt their reports, to conduct surveillance on the implementation of the rulings, and to authorise the

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[46] Article 13.3 , 13.4 Agreement establishing the African Continental Free Trade Area

[47] <https://www.tralac.org/discussions/article/12838-the-legal-and-institutional-architecture-of-the-agreement-establishing-the-african-continental-free-trade-area.html >

[48] Article 3.3 Agreement establishing the African Continental Free Trade Area, Protocol on Rules and Procedures on the settlement of disputes

[49] Article 7 Agreement establishing the African Continental Free Trade Area, Protocol on Rules and Procedures on the settlement of disputes

suspension of concession or other obligation under the agreement. Decisions of the DSB are by consensus.

Where consultations, good offices or arbitration mechanism cannot be utilized, state parties may request for panel establishment through the DSB. The DSB consists of representatives of state parties.[50] The panel is constituted within ten days of the meeting of the DSB. A roster of panelists is maintained by the Secretariat. The framework allows for the participation of third parties to the dispute. The panel submits its findings in a written report to the DSB for adoption.

The Appellate Body is also established by the DSB, with the mandate to determine appeals from panel decisions. Persons serving on the Appellate Body serve on rotational basis, for a term of four years. The framework also provides that where the DSB fails to appoint a member of the Appellate Body in due time, the Chair of the DSB, in consultation with the Secretariat, may appoint within two months.[51] This provision safeguards against the dilemma that the WTO is facing at the moment with the veto on appointment of Appellate Body judges by a state party. The appeal should be determined within sixty days.

Compliance proceedings are also justiciable before the dispute settlement mechanism. An arbitrator may be appointed by parties or the Secretariat, in consultation with the DSB, in the implementation phase of the panel rulings. The Protocol also provides for temporary enforcement measures of compensation and suspension of concessions, which are imposed by the DSB.[52]

3.4.2 Utility of the AFCFTA dispute settlement mechanism

[50] Article 5 Protocol on Rules and Procedures on the settlement of disputes
[51] Article 20.6 Protocol on Rules and Procedures on the settlement of disputes
[52] Article 25 Protocol on Rules and Procedures on the settlement of disputes

Even though, now under the AFCFTA Framework, African countries are not subject to the power dynamics of preferential trade arrangements with developed countries, the dispute settlement mechanism will remain underutilized. This is because of several reasons. The first is the lack of political will by African countries to adjudicate in a rules-based mechanism. Even though the imbalance of power dynamics may not exist in the DSM of the AFCFTA, the culture of African states not to adjudicate in a rule based system will hinder the extent of their utilization of the mechanism. At most, it is expected that the consultation phase will be the only utilization of the DSM.[53] In Africa, whether the dispute settlement model was transposed from the European Union or the WTO, experience reveals a strong discontent and apathy towards a highly legalized and formal trade dispute system.[54]

This is manifested by the death of the SADC Tribunal, where SADC members states sought to frustrate the DSM by not appointing new judges or renewing their terms in 2010, thus suspending the tribunal.[55] This was after the Tribunal gave an unfavorable ruling against Zimbabwe, for its policy on evicting white settlers, in the case of *Mike Campbell (Pvt) Ltd. and others v. Republic of Zimbabwe.*[56] Even though this was not a trade dispute, the actions of the SADC member states is an indication of the reluctance of African countries to cede their sovereignty to tribunals in claims brought by individuals. Subsequently, in 2014, the SADC Summit adopted and signed a new Protocol to explicitly limit the Tribunal's jurisdiction to inter-state disputes.[57] The poor private sector and government engagement almost guarantees that no disputes will be launched in such instances.

The issue of the culture of apathy to adjudicate in a rule based system can only be addressed at the domestic level of each state, where accountability measures and policies

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[53] Olabisi D. Akinkugbe, Dispute Settlement under the African Continental Free Trade Area Agreement, 2018 p.3

[54] Ibid.

[55] <http://arbitrationblog.kluwerarbitration.com/2019/09/29/dispute-settlement-under-the-african-continental-free-trade-agreement-what-do-investors-need-to-know/ > accessed 22/10/2019

[56] Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe (2/2007) [2008] SADCT 2 (28 November 2008) <http://www.saflii.org/sa/cases/SADCT/2008/2.html>

[57] Ibid.

are present to ensure governments safeguard the interests of their investors within the free trade area.

The second is the problem of fact finding. Most African countries do not have good trade data management. Hence they are unable to have evidence based justiciable claims. Poor trade data management and low trade volumes have cut out trade remedies claims at the WTO DSS on the basis of the de minimis principle.[58] Furthermore some countries do not even have investigation authorities for trade remedies. For instance Kenya is just now in the process of setting up its trade remedies investigation authority, the Kenya Trade Remedies Authority (KETRA).

The third reason is the challenge of high cost implications prior to the adjudication process. Most African countries will be unwilling to incur the expenses on intensive investigation and litigation for unjust application of trade remedies or non-tariff barriers. This is because they have other pressing national economic priorities and limited expenditure resources.

The fourth reason is the jurisdiction challenge of AFCFTA DSM for private litigation. The DSM is a forum for states. There is no locus standi for natural and legal persons, unlike in the COMESA[59] or EAC[60] framework, where private litigants can seek redress in the regional dispute settlement mechanism. Since natural and legal persons are the parties mostly affected by trade regimes, because they actively engage in trade, they lack a forum for redress, unless their governments seek recourse on their behalf.

The Investment Protocol is in the second negotiation phase of the AFCFTA Framework. The issue of ISDS (Investor state disputes settlement) also arises. It is noted that African states now prefer state to state investment dispute settlement as can be seen in reforms on ISDS national frameworks, such as in South Africa. The Protection of Investment Act,

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[59] Article 26 COMESA Treaty
[60] Article 30 EAC Treaty

2015 (Act No. 22 of 2015) that became effective in 2018, [61] that limits ISDS to be subject to national court's jurisdiction or state to state international arbitration forums.

It could be that the jurisdictional framework of the AFCFTA DSM to limit locus standi to state parties exclusively, was intentional because of the shift in Africa's investments regime. The same can only be determined after the negotiations on the Investments Protocol are concluded. Probably an independent dispute settlement mechanism may be adopted within the protocol for recourse for private litigants, or the state to state arbitration will be the preference of member states.

The rationale of free trade agreements is to establish unimpeded exchange and flow of goods and services between trading partners. Similarly, the AfCFTA is a liberalization framework that seeks to promote free flow of goods, investments, services and capital across the African continent. The potential trade gains are not only for African countries but also for foreign investors that would seek to explore the huge market.

In other FTA frameworks such the Comprehensive Economic and Trade Agreement and Comprehensive and Progressive Transpacific Partnership Agreement, they accommodate ISDS in their investment protocol to ensure that private sector and FDI's, the main drivers of trade and investment, have recourse in a rules based mechanism that they trust.

3.5. Conclusion

In summary the chapter at first considered the effectiveness of the WTO DSS for small developing countries in Africa by looking at their levels of participation. It then reviewed the challenges that African developing countries face at the DSS which revealed the institutional hurdles as well as their inept approach to disputes that limit their utilization of the DSS. It also considered whether the same model of dispute settlement mechanism would thrive within the AFCFTA framework or remain ineffective and underutilized by African countries.

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[61] Department of Trade and Industry, South Africa Notice 395 of 2018 Government Gazette dated 13 July 2018

CHAPTER 4
CONCLUSION AND RECOMMENDATIONS

4.1. Conclusion

The institutions for dispute settlement are core elements in any society as they ensure the laws or rules are administered. Therefore, an effective rules based dispute settlement system within a trade regime ensures good trade governance as it guarantees predictability, respect and protection of rights and obligations of all parties and a robust economic environment for trade and investments to thrive.

The research problem sought to understand why there was limited utilization of dispute settlement mechanisms of the WTO by African Countries. It also sought to examine whether the same limited participation would persist under the AfCFTA dispute settlement regime. The research questions investigated the main shortcomings of the DSS of the WTO for African Countries. It scrutinized the effectiveness of the dispute settlement system in a bid to ascertain the extent of effectiveness of a similar dispute settlement model in the AFCFTA framework.

Chapter two examined the systemic, procedural and institutional challenges of the WTO DSS. The primary reason African countries do not utilize the WTO DSS is because of the non-reciprocal trade arrangements between developed countries and African countries, because of the power dimensions in these trade relations African countries hardly seek redress for trade violations against developed countries. This is due to the fact that they are highly dependent on market access and foreign aid from these countries. The study in chapter three examined the challenges unique to developing countries in Africa at the WTO and under the AFCFTA dispute settlement framework.

The conclusion confirms the hypothesis that the DSS of the WTO is not an effective system for settling trade disputes for African Countries. Consequently, the WTO replica DSM model adopted in the AfCFTA will hardly be utilized by African Countries.

4.2. Findings

The lessons for the AFCFTA can be found in the assessment in both chapters two and three. They include firstly that the enforcement mechanism of the WTO DSS remains impractical for small African countries because they have lower trading stakes as against large developed countries. The procedural challenge is the weak enforcement mechanism, where enforcement is by negotiations or dependent on the country's economic clout. The same enforcement mechanism has been adopted by the AfCFTA, it will thus most likely remain enforcement by diplomacy as most African countries do not have clout over each other, as intra-Africa trade is yet to grow.

Secondly, most of the challenges that African countries encounter as regards their limited utilization of the WTO DSS are those incidental to the adjudicating process, such as the lack of technical expertise, the high costs implications, the challenge of fact-finding and their inapt approach to disputes i.e. the lack of cooperation between governments and the private sector, which is the main driver of international trade. This then renders the rule based system ineffective for African Countries only to the extent that they are unable to utilize it. These challenges that African countries encounter at the WTO DSS still persist therefore it is almost guaranteed that there will be limited utilization of the AfCFTA DSM.

Thirdly, the DSM as modeled after the WTO DSS does not take into account Investor State Dispute Settlement, perhaps intentionally as seen in the shift of preference of inter-state dispute settlement in investment disputes by some African countries. However, the Investment Protocol of the AfCFTA is yet to be negotiated, probably an independent dispute settlement mechanism of ISDS will be incorporated.

The fourth lesson is that African countries seem to be apathetic towards utilizing a rules-based dispute settlement system as under the WTO. They take up this attitude either for political reasons or because they are unwilling to cede their sovereignty, to private litigants, as was manifested in the SADC tribunal. Nevertheless such indifference will limit utilization of the AFCFTA DSM as it has been the case under the WTO DSS. At

most the expected utilization of the dispute settlement mechanism is the consultation phase.

4.3. Recommendations

In order to ensure proper trade governance, the rule based dispute settlement mechanism should be recognized and utilized by African countries. The proposed recommendations can allow African countries embrace and participate effectively in the DSM under the AFCFTA framework.

1. Majority of African countries do not pursue trade remedies because of the costs implications. For instance, due to the technicality of the trade regimes the existence of domestic investigation authorities is necessary to assess trade violations. However in Africa only Egypt and South Africa have functional trade remedies authorities. Kenya is in the process of setting up its trade remedies authority. Nevertheless, such a body or a structured functional department within the trade ministry that has the capacity and technical skill-set can allow African countries to pursue claims and trade remedies in a rule-based framework.

2. The need for the establishment of a legal advisory centre under the AU-AFCFTA similar to the Advisory Centre on WTO Law. The centre can conduct periodic trainings on technical trade issues and build capacity of trade analysts or specialists working within governments to understand how to pursue their government's rights and obligations under the rule based framework. Funding for such an organization could be through the African Union by all member countries.

3. There is also need to strengthen private sector- government engagement in trade relations. The private sector is the main stakeholder in international trade as they are directly and actively engaged in trade, while governments facilitate the environment for trade and investments. Thus, the private sector should play a pivotal role in trade governance. This can be done formally through lobbying

groups that can ensure they are able to advocate for the protection of their interests. The domestic legal frameworks can also create an accountability mechanism for government officials to take up the legitimate concerns of the private sectors and ensure due process and the application of the trade remedies within the AFCFTA framework, through utilization of the DSM.

Under the Tripartite Free Trade Area an online complaint system for Trade Barriers was created where private parties may lodge their complaints on trade barriers online[1] to be administered by the domestic relevant officials. However, the system lacks accountability domestically and simply acts as a notification mechanism.

Under the European Community the petition rights for individual private enterprises are under Article 133 EU Treaty, which allows participation of commercial interests and trade associations. Also, the European Community trade barrier regulation section 301 gives petition rights to private entities. Such entities can urge the European Community to investigate foreign trade barriers and institute claims before the WTO.[2]

Legal frameworks such as these within the AFCFTA or in domestic trade regulations will act as tools that ensure African governments utilize the rule based DSM to address the trade concerns raised by the private sector.

4. African developing countries need proper management of trade data as such data is significant in proving violations in trade disputes. African Countries need to maintain and properly manage trade data as it is a vital component in evidence based claims. Trade disputes are highly technical and dependent on good trade data management. Trade data can enable a country to measure the merits and

[1] www.tradebarriers.org The mechanism was created to under the Tripartite Free Trade Area for the identification , removal and monitoring of non-tariff barriers by Member states.
[2] Kristin Bohl, Problems of Developing Country Access to WTO Dispute Settlement, 9 Chi.-Kent J. Int'l & Comp. Law 131 (2009) 157

demerits of trade liberalization. The challenge for African countries is a lack of management of such data.

Statistics on trade between African countries and non-African countries have been more abundant and more reliable than statistics on trade between African countries.[3] The aim of the AfCFTA is to increase the intra Africa trade, African countries need to ensure proper management of trade statistics. Countries presently are obliged to report their import and export statistics to the United Nations for its COMTRADE and FAOSTAT databases.[4] The African Union's initiative to improve Africa's trade information system, is represented by the African Charter on Statistics and in the creation of the African Union Trade Information Observatory.[5]

The Observatory will aim to collate data from the various member states national bureau of statistics, trade ministries and customs offices, analyse it and publish and disseminate via its data websites. The Observatory will be tasked to maintain data, such as the trade remedies taken by countries, trade-related performance indicators including growth rates, market shares, market concentrations and non-tariff measure taken by countries.[6]

5. The establishment of a framework that allows for private trade related claims for investor state disputes. The AFCFTA should consider Investor States Disputes Settlement in its framework. The DSM of the AfCFTA already bars its forum to private entities for settling trade disputes. The trend taken up by African countries is preference for state to state dispute settlement and the exhaustion of local remedies rather than ISDS.

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[3]<https://www.tralac.org/images/docs/12174/working-paper-on-trade-information-systems-in-africa-usaid-ea-trade-hub-september-2017.pdf> p.28
[4] ibid
[5] ibid
[6]<https://www.tralac.org/documents/events/tralac/2801-tralac-annual-conference-presentation-african-trade-observatory-brian-mureverwi-auc-march-2019/file.html> accessed 24/11/2019 at 10:52 p.m.

The phase two of the AFCFTA negotiations is ongoing and the Protocol of Investment will be negotiated in this phase. Member states should, therefore, make a conscious decision to provide a framework for ISDS in which investors will find security and have the confidence to invest in the Continental Free Trade Area as it has been adopted in other FTA's such as the CPTPP[7] and CETA.[8]

4.4. Areas of further research

There is need for further research in the following areas:

a) How the WTO DSS will function post 2019, without the Appellate Review

b) How private sector engagement in Africa for trade can create accountability through policy, domestic and international law.

c) How an independent court system works in a contemporary modern free trade agreement as a dispute settlement system for investor state trade disputes

d) The shift in dispute settlement under bilateral investment treaties in Africa-
   The inter-state investment trade disputes and the delicate balance between sovereignty and the protection of investors rights

[7] The Comprehensive and Progressive Trans Pacific Partnership Agreement provides in Article 28 provides for the ISDS dispute resolution

[8] Comprehensive Economic and Trade Agreement, the FTA between EU and Canada provides for ISDS in its Investment chapter as an independent court system.

BIBLIOGRAPHY

Books

i. Peter Van Den Bossche, The Law and Policy of the World Trade Organisation (first published 2005, Cambridge University Press)
ii. M D A Freeman, 'Lloyd's Introduction to Jurisprudence,' (8thedn, Sweet & Maxwell 2008)
iii. Qureshi A H, 'Interpreting WTO Agreements: Problems and Perspectives,' (Cambridge University Press 2006)
iv. Sharif Bhuiyan, National Law in WTO Law Effectiveness and Good Governance in the world trading system, Cambridge press 2007
v. Qureshi A H & Ziegler A R, 'International Economic Law', 3rd edition Sweet & Maxwell Publishers, 2011
vi. WTO Secretariat, 'A Handbook on the WTO Dispute Settlement System',(Cambridge University Press, 2004) 75
vii. Andreas F. Lowenfeld, 'International Economic Law Series', (Oxford University Press, 2008 reprinted 2011)178

Internet sources

i. World Trade Organisation, Past, Present and Future <http://www.wto.org/english/thewto_whatis_e/tif_e/fact4_e.htm>
ii. World Trade Organisation, Understanding on Rules and Procedures Governing the Settlement of Disputes <http://www.wto.org/english/docs_e/legal_e/ursum_e.htm#Understanding>
iii. Dispute Settlement by Country Territory <https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm >
iv. Understanding on Rules and Procedures Governing the Settlement of Disputes <https://www.wto.org/english/docs_e/legal_e/28-dsu_e.htm>
v. Historic development of the WTO dispute settlement system <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c2s1p1_e.htm>
vi. WTO Bodies involved in the dispute settlement process

<https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s4p1_e.htm#fnt2 >
<https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s5p1_e.htm#fnt1>

vii. WT/AB/WP/6 16 August 2010 from< https://www.wto.org/english/tratop_e/dispu_e/ab_e.htm >

viii. Flow chart of the Dispute settlement process, <https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s1p1_e.htm >

ix. ACWL DECISION 2007/7 adopted by the management board on 19 November 2007 Billing Policy and Time Budget <https://www.acwl.ch/download/basic_documents/management_board_docs/ACWL-MB-D-2007-7.pdf >

x. How will the AfCFTA be established and its Legal Instruments be implemented? <https://www.tralac.org/discussions/article/12869-how-will-the-afcfta-be-established-and-its-legal-instruments-be-implemented.html>

xi. The legal and institutional architecture of the Agreement establishing the AFCFTA <https://www.tralac.org/discussions/article/12838-the-legal-and-institutional-architecture-of-the-agreement-establishing-the-african-continental-free-trade-area.html>

xii. The AFCFTA Legal documents and policy texts <https://www.tralac.org/resources/by-region/cfta.html>

xiii. The AfCFTA, the Benefits, the TBTs Challenges, the Opportunities and the role of ARSO. <https://www.arso-oran.org/the-afcfta-the-benefits-the-tbts-challenges-the-opportunities-and-the-role-of-arso/>

xiv. Dispute Settlement Under the African Continental Free Trade Agreement: What Do Investors Need to Know? <http://arbitrationblog.kluwerarbitration.com/2019/09/29/dispute-settlement-under-the-african-continental-free-trade-agreement-what-do-investors-need-to-know/ >

xv. Non-Tariff Barriers-Reporting, Monitoring and Eliminating Mechanism <www.tradebarriers.org>

xvi. USAID East Africa trade and investment hub - working paper on trade information systems in Africa <https://www.tralac.org/images/docs/12174/working-paper-on-trade-information-systems-in-africa-usaid-ea-trade-hub-september-2017.pdf >

Journal articles

i. Robert Hudec, 'The New WTO Dispute Settlement Procedure', (Minnesota Journal of Global Trade, 1999, 4.)
ii. Gregory Shaffer, 'Developing Country Use of the WTO Dispute Settlement System: Why it matters, the barriers posed and its impact on bargaining', Paper prepared for the WTO AT 10: A look at the Appellate Body IN Sao Paulo, Brazil, May 16-17, 2005
iii. Arie Reich, The effectiveness of the WTO Dispute Settlement System: A statistical analysis, European University Institute 2017
iv. Linimose Nzeriuno Anyiwe, Developing countries and the WTO dispute resolution system: a legal assessment and review, Journal of Sustainable Development Law and Policy, Vol. 2 Iss. 1 (2013)
v. Kristin Bohl, Problems of Developing Country Access to WTO Dispute Settlement, 9 Chi.-Kent J. Int'l & Comp. Law 131 (2009)
vi. Akinkugbe, Olabisi D., Dispute Settlement Under the African Continental Free Trade Area Agreement: A Preliminary Assessment (June 13, 2019). Available at SSRN: https://ssrn.com/abstract=3403745 or http://dx.doi.org/10.2139/ssrn.3403745
vii. Clement Ng'ong'ola, Replication of WTO dispute settlement processes in SADC, SADC Law Journal Vol I-2011
viii. Rachel Brewster, Can International Trade Recover? WTO Dispute Settlement: Can we go back again? American Journal of International Law, vol 113, 2019 p 60-66
ix. Professor Joost Pauwelyn, WTO Dispute Settlement Post 2019: What to expect? What choice to make? (7th July 2019)Available at SSRN: https://ssrn.com/abstract=3415964 or http://dx.doi.org/10.2139/ssrn.3415964
x. James Thuo Gathii, "Agreement Establishing he African Continental Free Trade Area', International Legal Materials, 2019
xi. Patrick F. J. Macrory et al, 'The Word Trade Organization Legal Economic and Political Analysis', Volume I, 2005

Unpublished Materials

i. Jimcall Pfumorodze, 'WTO Dispute Settlement: Challenges faced by developing countries in the implementation and enforcement of the dispute settlement body recommendations and rulings' , Post Graduate Degree in Master of Laws Thesis, University of Western Cape Law Faculty,2007.
ii. Shoram Shoraka, 'World Trade Dispute Resolution & Developing Countries Taking a development approach to fair adjudication in the context of the WTO Law', Doctorate Degree in Law, London School of Economies, June 2006.