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TITLE:

AFRICAN COUNTRIES AND THE WORLD TRADE ORGANIZATION DISPUTE SETTLEMENT MECHANISM; THE CHALLENGES, CONSTRAINTS AND THE NEED FOR REFORMS.

RESEARCH PROJECT SUBMITTED IN PARTIAL FULFILLMENT OF THE MASTER OF LAWS (LLM) PROGRAMME.

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26th November 2014

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DEDICATION

I dedicate my dissertation work to my family and friends. A special feeling of gratitude to my loving parents, Professor Charles Mallans Rambo and Mrs. Margaret Anyango Rambo whose words of encouragement and push for tenacity has led me this far.

I also dedicate this dissertation to all my friends and church family who have supported me throughout the process. I will always appreciate all they have done, especially my brother Mr. Kennedy Onyango Rambo for being there for me throughout the entire Master's program and whose encouragement has always given me renewed vigor to complete this LLM program.

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ABSTRACT

African countries form almost one-third of the membership of the World Trade Organization (WTO) yet their participation in the WTO Dispute Settlement Body (DSB) is quite alarming. Only South Africa and Egypt have ever instituted a case at the DSB. Other African countries have never instituted cases at the DSB and neither have they joined other cases at the DSB as third parties. Is it a case of African countries having no trade disputes to refer to the DSB? The failure by African countries to utilize the WTO dispute settlement mechanism is triggered by factors such as the cost of referring a dispute to the DSB, the inadequacy of the SDT provisions under the DSU, the inadequacy of retaliatory provisions under the DSU and the DSU's lack of a development agenda towards African countries among other factors. The Doha round of negotiations which begun in 2001 has provided a platform for African countries and other WTO members to amend the DSU with an aim of encouraging the participation of African countries in the WTO DSB.

The objective of the paper is to determine whether African countries have an alternative dispute resolution mechanism to the WTO DSB, whether African countries face difficulties in utilizing the DSB and what those difficulties are and whether the DSU is out of touch with African countries and as such African countries tend to shy away from solving their disputes through the DSB.

Understanding the WTO DSU provisions, procedures and its dispute resolution mechanism, its applicability and use by African countries will be the main issue for consideration in this research. The research will concentrate on how African countries have participated in, and utilized the DSU. The focus will be mainly on the challenges encountered by African countries in their quest to settle trade disputes using the DSU, the constraints to their participation, and how the same can be reformed to improve their participation.

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CHAPTER ONE

1.1 BRIEF HISTORICAL BACKGROUND

The World Trade Organization's (WTO's) predecessor, the GATT[1], was established on a provisional basis after the Second World War in the wake of other new multilateral institutions dedicated to international economic cooperation notably the "Bretton Woods" institutions now known as the World Bank and the International Monetary Fund.[2]

The World Bank and International Monetary Fund (IMF) were institutions established after the Second World War to help in the reconstruction and development of economies ravaged by the Second World War. It is in these lines that the suggestion to create an international body to regulate matters of international trade was adopted.[3] This led to the creation of GATT. The GATT came into being in 1947 as a result of the Bretton Woods Agreement, which also created the World Bank and the International Monetary Fund.[4]

The original 23 GATT countries were among over 50 countries that agreed on a draft Charter for an International Trade Organization (ITO) - a new specialized agency of the United Nations (UN).[5] The Charter was intended to provide not only world trade disciplines but also contained rules relating to employment, commodity agreements, restrictive business practices, international investment and services.

In an effort to give an early boost to trade liberalization after the Second World War, and to begin to correct the large overhang of protectionist measures which remained in place from the early 1930s, tariff negotiations were opened among the 23 founding GATT "contracting parties" in 1946. This first round of negotiations resulted in 45,000 tariff concessions affecting $10

[1] General Agreement on Tariffs and Trade 1947.
[2] WTO Publications, Accessed at http://www.wto.org on 21st April 2014.
[3] Ibid.
[4] The WTO History, Accessed at http://www.wto.org/english/thewto_e/cwr_e/cwr_history_e.htm on 21st April 2014
[5] WTO Publications n. 2.

billion or about one-fifth of world trade. It was also agreed that the value of these concessions should be protected by early acceptance of some of the trade rules in the draft ITO Charter.[6] The tariff concessions and rules together became known as the GATT and entered into force in January 1948.

Although the ITO Charter was finally agreed at a UN Conference on Trade and Employment in Havana in March 1948 ratification in national legislatures proved impossible in some cases.[7] When the United States government announced, in 1950, that it would not seek Congressional ratification of the Havana Charter, the ITO was effectively dead. Despite its provisional nature, the GATT remained the only multilateral instrument governing international trade from 1948 until the establishment of the World Trade Organization (WTO).

1.2 INTRODUCTION

The WTO is an international organization dealing with the rules of trade between nations. [8] The WTO officially commenced on 1st January 1995 under the Marrakech Agreement, replacing the GATT, which commenced in 1948. The organization deals with regulation of trade between participating countries; it provides a framework for negotiating and formalizing trade agreements, and a dispute resolution process aimed at enforcing participants' adherence to WTO agreements, which are signed by representatives of member governments and ratified by their parliaments. Most of the issues that the WTO focuses on are derived from previous trade negotiations, especially from the Uruguay Round (1986–1994).[9]

Recognizing that disputes are bound to happen in a rule based system, the WTO during a round of negotiations held in Uruguay in 1994, came up with the Understanding on Rules and Procedures Governing the Settlement of Dispute, which is commonly referred to as the Dispute

[6] Ibid.
[7] Ibid.
[8] Craig VanGrasstek "The History and Future of World Trade Organization" WTO Publication (2013). Accessed at <http://www.wto.org/english/res_e/booksp_e/historywto_e.pdf> Accessed on 19th April 2014.
[9] Ibid.

Settlement Understanding (DSU)[10]. The DSU evolved from rules, procedures and practices of GATT 1947 and builds onto and adheres to the principles of management of disputes applied under Articles XXII and XXIII of GATT 1947. The DSU emphasizes the importance of consultations in securing dispute resolution.[11] The WTO has two roles; the first is legislative, where the WTO is an international organization in which agreements are signed while the other is judiciary, where the WTO is an international adjudicator deciding trade disputes.[12]

Under Article XXII of GATT, member states settled their disputes through consultations; if this was unsuccessful, the article empowered the whole membership as an organ to consult with the disputing parties to settle the dispute. In the early years of GATT 1947, the Chairman of the GATT Council presided over disputes. Later representatives from interested contracting parties (including the parties to the dispute) took over the council's role over disputes. These were soon replaced by panels made up of three to five independent experts who were unrelated to the parties in the dispute. The panellists wrote independent recommendations/rulings to the GATT Council, which became legally binding on the parties upon approval by the GATT council. The GATT panels thus built up a body of jurisprudence that remains important today.[13]

The GATT dispute settlement system however was quite problematic. There was the lack of strict deadlines within which to settle disputes, the ability of a respondent to block establishment of a panel or adoption of a panel report and lack of compliance with panel recommendations which led to a consensus among the GATT contracting parties that the dispute settlement system required reform.[14] The Uruguay Round of 1989 sought to remedy these weaknesses. The negotiators sought to ensure that democratic decision-making, special and differential treatment to developing countries and mandatory rulings become part of the

[10] The WTO DSU Accessed at http://www.wto.org/english/docs_e/legal_e/ursum_e.htm#Understanding> on 19th April 2014.
[11] Ibid.
[12] Bartosz Ziemblicki "The Controversies over the WTO Dispute Settlement System" (2009) p. 196. Accessed at www.bibliotekacyfrowa.pl/Content/32203/0014.pdf Accessed on 21st April 2014.
[13] A handbook on WTO dispute settlement (2004), a publication by the WTO secretariat at p. 13.
[14] Ibid

dispute settlement procedure. Accordingly, the DSU replaced the GATT 1947 on 1st January 1995.[15]

The major feat of the DSU was the "negative" consensus rule wherein all members had a right to agree or disagree on establishment of a panel or adoption of a panel report. Thus, rights of individual members to block the establishment of a panel or the adoption of a report were eliminated. Today, the Dispute Settlement Body (DSB) automatically establishes panels and adopts reports unless there is a consensus amongst the panellists not to do so.[16]

The negative consensus rule has reduced the threat of unilateralism in international trade.[17] Under the present WTO dispute settlement system, all WTO member states are equal. Any member (economically weak or strong) can challenge offensive trade measures adopted by another.[18] The compulsory nature of the WTO dispute settlement system certainly stands out as compared to other international systems of dispute settlement in international law.[19]

The DSU at Article 2(1) establishes the DSB, to administer the rules and procedures contained therein. Article 3(2) of the DSU sets the mandate for the WTO dispute settlement process thus:

> *"The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."*

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[15] Ibid
[16] Functions, objectives and key features of the dispute settlement mechanism available at <http://www.wto.org.> accessed on 21st April 2014
[17] Larcate Munro and Gappah "Developing countries and the WTO legal and dispute settlement system: a view from the Bench" (2000) at p. 2.
[18] Ibid
[19] Ibid

WTO member countries can only take advantage of the WTO dispute settlement mechanism if they can effectively pursue their rights in this complex legal regime. Their ability to do so largely depends on having staff with adequate legal, economic and diplomatic experience and a large network of external experts and private sector representatives.[20] Research by ICTSD,[21] has shown that a lack of such legal capacity has impeded developing countries[22] ability to participate fully in the system.[23]

While developing countries' participation in trade disputes has increased considerably since the days of the old dispute settlement system under the GATT, most disputes are still confined to a small number of 'usual suspects' – countries such as the US, the EC, Canada, Brazil, India, Mexico, Korea, Japan, Thailand and Argentina. So far, 76% of all WTO disputes have been initiated by this group of Members. [24] Given that the countries facing possible undue trade restrictive measures certainly extend beyond this group, it begs the question as to the engagement of other Members, particularly developing countries.[25]

A true multilateral trading system is exemplified by full participation of both large and small economies in both the law-making process and dispute settlement. As such, the success of the WTO Dispute settlement mechanism should not be measured by an increase in the number of cases brought before it but rather by the ability of developing and least developed countries (most of which are African states) to resolve disputes with their developed counterparts.[26]

As at the end of 2013, the USA, EC, Canada and Brazil formed the top four countries that initiated cases at the DSB while USA, EC, China and India formed the countries that defended

[20] Nordstrom, H. and Shaffer, G. "Access to Justice in the WTO: The Case for a Small Claims Procedure: a Preliminary Analysis", ICTSD Dispute Settlement and Legal Aspects of International Trade Issue Paper No. 2, International Centre for Trade and Sustainable Development, Geneva, Switzerland (June 2007).
[21] International Center for Trade and Sustainable Development.
[22] Nordstrom, H. and Shaffer, G. n. 20 use the term developing interchangeably with African countries in their paper.
[23] Ibid p. 2.
[24] See, Marc L. Busch, Eric Reinhardt and Gregory Shaffer "Does Legal Capacity Matter? Explaining Dispute Initiation and Antidumping Actions in the WTO", ICTSD Project on Dispute Settlement, Series Issue Paper No. 4, International Centre for Trade and Sustainable Development, Geneva, Switzerland (2008).
[25] Ibid.
[26] Magezi Tom "The WTO Dispute settlement mechanism and African Countries : A Prolonged slumber?" University of Western Cape (2005) P. 5

the most number of cases as respondents at the DSB.[27] The figure below gives us the ten most active countries using the WTO dispute settlement mechanism.

FIGURE 1: MOST ACTIVE COMPLAINANTS AND RESPONDENTS 2013[28]

Member	No of cases initiated	Member	No of cases defended
US	106	US	121
EC / EU	90	EC / EU	92
Canada	33	China	31
Brazil	26	India	22
Mexico	23	Argentina	22
India	21	Canada	17
Argentina	20	Japan	15
Japan	19	Brazil	15
Korea	16	Mexico	14
Thailand	13	Korea	14

According to Nordstrom and Shaffer[29], the current dispute settlement system of the WTO creates a particular challenge for small WTO Members with limited exports[30] since litigation costs are more or less independent of the commercial stakes involved in a dispute. According to Nordstrom, small Members may therefore find it too costly to pursue legitimate claims. These are some of the challenges and constraints that this research will focus on.

The introduction of the DSU has significantly altered the way in which international trade disputes are processed and resolved. This has created both opportunities and challenges for

[27] WTO, Analysis of the dispute settlement developments; WTO Publication (2013). Accessed at http://www.wto.org/english/tratop_e/dispu_e/jfried_13_e.htm on 19th May 2014.
[28] Ibid
[29] Nordstrom, H. and Shaffer, G. n. 20.
[30] The bulk of African countries fall within this category.

developing countries.[31] However, it can be argued, that it has mostly brought about challenges for African/Developing Countries.

Statistics show that African countries and least-developed countries have rarely made use of the WTO dispute settlement system.[32] Further, African countries have complained, that because of their lack of expertise in WTO matters, high legal costs and other impediments, they have not been able to take full advantage of the improved rules and procedures to enforce their rights under the WTO Agreement.[33]

Africa is hardly mentioned in any literature written about dispute settlement at the WTO. Major players in the WTO dispute settlement and a number of scholars have reached a verdict that Africa has low volumes of trade and is plagued with far more important issues like budgetary deficits, war, epidemics as such dispute settlement is not a priority.[34] Various authors agree that by abstaining from dispute settlement, African countries are losing the opportunity to contribute to the shaping of international principles and practices that will govern their multilateral trade relations for years to come.[35]

Under the WTO dispute settlement system, there is the existence of Special and Differential Treatment provisions available to developing and least developed countries, the good offices of the Director General and the low cost legal services by the advisory body center.[36] Despite these provisions African states are still not participating in the WTO dispute settlement process. This begs the question as to what exactly is the problem with the WTO system.

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[31] Marc L. Busch, Eric Reinhardt and Gregory Shaffer n. 24 p. 8.

[32] Edwin Kessie and Kofi Addo "African Countries and the WTO Negotiations on the Dispute Settlement Understanding" (2005).

[33] Ibid.

[34] Stella Muheki, African countries and the World Trade Organization dispute settlement mechanism; underlying constraints, concerns and proposals for reform (2010).

[35] See Kessie and Addo note 32 at p. 2, Gregory Shaffer, "How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies", ICTSD Paper No.5 (2003) p. 10. Mosoti "Does Africa Need the WTO Dispute Settlement System? ICTSD Resource Paper No. 5" (2003) p. 73. Calvin Manduna "Daring to dispute; Are there shifting trends in African participation in WTO dispute settlement" Tralac trade brief no.3 (2003) p. 4.

[36] A handbook on WTO dispute settlement, a publication by the WTO secretariat at (2004) p. 2.

The dispute resolution mechanism of the WTO, and its applicability, and use by African countries will be the main issue for consideration in this research. The research will concentrate on how African countries have participated in, and utilized the DSU. The focus will be mainly on the challenges encountered by African countries in their quest to settle trade disputes using the DSU, the constraints to their participation, and how the DSU can be reformed to improve participation by African countries under the Doha negotiations.

1.3 STATEMENT OF THE PROBLEM

The WTO-dispute settlement mechanism is founded on principles of non- discrimination, reciprocity and transparency.[37]

Ideally, all WTO member states have "a level playing field" in terms of access and equal rights under the dispute settlement mechanism. Disputes should be resolved in a fair and impartial manner if developing countries and especially the least developed are to secure a share in the growth of international trade commensurate with their economic development needs. The WTO dispute settlement mechanism is viewed as favoring countries with significant exports, and discriminatory towards those with less significant exports.[38] The impartiality in the dispute settlement mechanism is demonstrated by the fact that the system makes no distinction between a claim of 100,000 dollars and a claim of 100,000,000 dollars.[39] This impedes less developed countries' willingness and ability to pursue their trade interests and sustainable development objectives through the existing procedures.[40]

The problem thus, is that the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) is the largest barrier to Africa's participation in dispute settlement. The DSU has Special and Differential Treatment (SDT) provisions that seek to

[37] Ibid.
[38] WTO Publications n. 2 at p. 5.
[39] Ibid
[40] Ibid

advance the participation of developing and least developed countries to take advantage of and use the WTO's dispute settlement mechanism. However, African countries face challenges such as the high cost of litigating in the WTO Dispute Settlement Body (DSB), lack of proper understanding of the DSU, political patronage, the inadequate and inappropriate nature of the retaliation mechanism provided for in the DSU *inter alia*. As such, many African countries find it difficult to participate in dispute settlement at the WTO. There is therefore need to reform the DSU by strengthening the SDT provisions under the DSU in order to enable more African countries access the WTO DSB.

1.4 SIGNIFICANCE OF THE STUDY.

The DSU is a central element in providing security and predictability to the multilateral trading system. It serves to preserve the rights and obligations of states under the covered agreements.[41] The research will offer member states an opportunity to examine the structure of the DSU and the possible reasons behind their lack of participation. This study presents a unique opportunity to examine reasons why despite the equal opportunity availed to all WTO member states under the DSU Africa has continued to play a peripheral role. The research will also identify reforms that will improve participation of African countries in the DSU.

In this age of globalization, interactions between countries are customarily hinged on their trade relations. This study is therefore also quite significant owing to the continued and increasing trade relations between African countries and the more developed countries in the west. Trade related disputes are thus inevitable. As such, in order to secure the trade and development interest of African countries, it is imperative that their participation in the dispute settlement procedures of the WTO is encouraged, in order to avoid a situation where the developed trading partners exploit African countries, owing to their inherent lack of active participation in the WTO dispute settlement mechanism.

[41] See Article 3.2 of the DSU

1.5 OBJECTIVES OF THE RESEARCH

The objectives of this research are;

a. To critically analyze the operation and practice of the WTO dispute settlement mechanism;
b. To identify the challenges and constraints that African countries face in their quest to participate in the WTO dispute settlement mechanism; and
c. To come up with possible reforms on the DSU that African countries can implement, to ensure their active and successful participation in the WTO dispute settlement mechanism.

1.6 HYPOTHESIS

a. African counties have other avenues that they can use to determine any disputes arising between them and their trade partners as opposed to using the WTO dispute settlement mechanism.
b. Factors such as entry barriers to using the WTO dispute settlement mechanism, the cost of referring a dispute to the DSB, inadequate and inappropriate nature of the retaliatory mechanism under the DSU and the lack of a development orientation in the DSU hinders African countries' participation in the WTO dispute settlement mechanism.
c. African countries should actively participate in the WTO dispute settlement mechanism, in order to defend their trade and economic interests in this age of globalization.
d. African countries are disinterested in the WTO dispute settlement mechanism as they feel that it favours the developed countries and the DSU is out of touch with the developing world.

1.7 RESEARCH QUESTIONS

This research will aim to come up with concrete answers to the following questions;

a. What is the current level of African countries participation in the WTO dispute settlement mechanism?
b. What are the challenges and constraints to African countries' active participation in the WTO dispute settlement mechanism?
c. What are the underlying causes of the challenges and constraints to African countries active participation in the WTO dispute settlement mechanism?
d. What reforms can be implemented to ensure increased active participation by African countries in the WTO dispute settlement mechanism?

1.8 THEORETICAL FRAMEWORK

Among other theories of law, this paper is centered on the legal positivist approach, and is concerned with viewing events as they have occurred and discussing the challenges and problems experienced by the African countries within the WTO dispute settlement mechanism and especially of concern are the DSU rules and procedure. Legal positivism is a school of thought of philosophy of law and jurisprudence, largely developed by legal thinkers such as Jeremy Bentham and John Austin. However, the most prominent figure in the history of legal positivism is H. L. A. Hart[42], whose work caused a fundamental re-thinking of the positivist doctrine and its relationship with the other principal theories of law.

According to positivism, law is a matter of what has been posited (ordered, decided, practiced, tolerated, etc.). As we might say in a more modern idiom, positivism is the view that law is a

[42] HLA Hart, The Concept of Law (2nd edn), Clarendon Press (1994).

social construction.[43] The fact that it might be unjust, unwise, inefficient or imprudent is never sufficient reason for doubting its legality.[44] Legal positivism is the thesis that the existence and content of law depends on social facts and not on its merits.[45] The fact that a policy would be just, wise, efficient, or prudent is never sufficient reason to think that it is actually the law.[46]

The reason for adopting the positivist approach to the exclusion of natural law lies in the fact that this research paper is focused on the legislation formulated under international law. This paper is focused upon looking at the written law as it is practiced under the DSU. This paper is more concerned with whether or not the law that has been formulated and practiced is a hindrance to the participation of African countries in the WTO dispute settlement mechanism.

Furthermore, this paper focuses on positive law because positive law is all about the law and its interpretation. Definitions of various terminologies that this paper may seek to define will be the definitions that the law has prescribed.

This paper shall also be centred on the utilitarian theory of law. Utilitarianism is a theory in normative ethics holding that the proper course of action is the one that maximizes utility (usefulness), which is usually defined as maximizing total benefit and reducing suffering or the negatives. This theory is an economic analysis that is human-centered (or anthropocentric) and has a moral foundation.[47] Classical utilitarianism's two most influential contributors are Jeremy Bentham and John Stuart Mill.

Utilitarianism looks into whether a particular law is useful to the populace or it has outlived its usefulness such that the populace cannot derive a benefit out of it. This theory Is quite important in looking at the DSU to determine whether the DSU has outlived its usefulness

[43] Green, Leslie, "Legal Positivism" in the Stanford Encyclopedia of Philosophy accessed at http://plato.stanford.edu/entries/legal-positivism/ <accessed on 27th January 2015>.
[44] Ibid.
[45] Ibid.
[46] Ibid.
[47] Goodstein Eban "Chapter 2: Ethics and Economics". Economics and the Environment Wiley (2011) p. 26.

thereby requiring amendments/changes in order spur African countries into using the DSB to their benefit.

The comparative approach is also quite significant in this paper. Comparative law is the study of differences and similarities between the laws of different countries. More specifically, it involves study of the different legal systems in existence in the world. Montesquieu is generally regarded as an early founding figure of comparative law. His comparative approach is obvious in his book where he discussed the French and English systems for punishment of false witnesses in depth.[48] The modern founding figure of comparative and anthropological jurisprudence is Sir Henry Maine, a British jurist and legal historian.[49] In his 1861 work *Ancient Law: Its Connection with the Early History of Society, and Its Relation to Modern Ideas*, he set out his views on the development of legal institutions in primitive societies and engaged in a comparative discussion of Eastern and Western legal traditions. This work placed comparative law in its historical context and was widely read and influential.

The comparative approach is quite important in looking into the variables amongst various African countries with regard to how they access the WTO DSB.

The historical approach is also of relevance to this paper since it is useful in understanding the history of GATT/WTO and how the DSU has evolved since its inception over two decades ago. This paper is focused on the structure of the dispute settlement system under the previous GATT system and how the same is structured under the WTO. It seeks to understand historical issues that have bedeviled the GATT/WTO since its inception with regard to participation of African countries in its dispute settlement mechanism.

[48] Charles Baron de Montesquieu, "The Spirit of Laws: A Compendium of the First English Edition", 1977

[49] Raymond Cocks ,"Sir Henry Maine: A Study in Victorian Jurisprudence." Cambridge University Press. (2004). p. 34.

1.9 LITERATURE REVIEW

There is an abundance of literature concerning developing and least developed countries participation in the WTO dispute settlement mechanism. The research relies on writings by Nordstrom, H. and Shaffer G[50], Bartosz_Ziemblicki[51], Marc L. Busch, Eric Reinhardt and Gregory Shaffer[52], Edwini Kessie and Kofi Addo[53], Marc L. Busch and Eric Reinhardt[54] and Khalede El-Taweel[55] *inter alia* to illustrate that besides the usual challenges that hinder Africa's participation, there is still a lot of factors under the DSU that inhibit Africa's participation.

Nordstrom, H. and Shaffer, G.[56] in their article puts forth the view that The DSU is in principle blind to the commercial stakes involved in a dispute between its Members in that, it makes no distinction between a claim of 100,000 dollars and a claim of 100,000,000 dollars. From this proposition, their paper outlines a formidable argument for the establishment of a small claims procedure by the WTO, under its DSU. While being cognizant of the legal and political challenges involved in establishing such an institution, the paper posits the need for creative thinking, and poses a series of questions to launch the debate. The paper does not purport to deny that many arguments can be made against the establishment of a small claims procedure under the multilateral trading regime. The main argument the paper outlines, in support of the establishment of a small claims procedure is that, the current dispute settlement system of the WTO creates a particular challenge for small WTO Members with limited exports since litigation costs are more or less independent of the commercial stakes involved in a dispute. The paper will be of much significance to the research, in that it will provide guidance to this research on

[50] Nordstrom, H. and Shaffer, G. note 20.
[51] Bartosz Ziemblicki "The Controversies over the WTO Dispute Settlement System" (2008).
[52] Marc L. Busch, Eric Reinhardt and Gregory Shaffer, "Does Legal Capacity Matter? Explaining Dispute Initiation and Antidumping Action in the WTO" (2008).
[53] Edwini Kessie and Kofi Addo n. 32.
[54] Marc L. Busch and Eric Reinhardt, "Trade Brief on the WTO Dispute Settlement." Published by the Swedish International Development & Co-cooperation Agency (April 2004).
[55] Khalede El-Taweel "The WTO Dispute Settlement Understanding: How Can African Countries Make Better use of the System: A case study of Egypt," an unpublished LL. M dissertation (2006).
[56] Nordstrom, H. and Shaffer, G. note 20.

some of the major challenges that face African countries, which countries, can correctly be assumed to make small claim.

Bartosz Ziemblicki[57] in his paper postulates that forced compliance via binding dispute settlement should, theoretically, ensure that each member of an international organization receives all the benefits to which it is entitled, and that no country is required to make concessions, to which it has not agreed and which have not been paid for. His paper elaborates on the DSU, as well as the functioning of the DSB. It begins by depicting the WTO dispute settlement system as a model and proceeds to elaborate on its functioning. This paper will be of great significance to this research, as the author holds a similar view to the one put forth by this research, that there are imperfections in the WTO disputes settlement system which can be ironed out to allow more participation by African countries.

Marc L. Busch, Eric Reinhardt and Gregory Shaffer's[58] paper is produced under the ICTSD Programme on Dispute Settlement as part of its project on systemic issue papers. They begin by arguing that the dispute settlement system has significantly become more legalized and consequently, more complex given constraining procedures and a fast-growing jurisprudence. The paper acknowledges that most disputes are confined to a small number of countries such as the US, the European Community, and proceeds to question of engagement of other Members and in particular, developing countries that might be encountering undue trade restrictions. It also puts forth reasons for the lack of active engagement by the majority of members. These reasons include a lack of awareness of WTO rights and obligations; inadequate coordination between governments and the private sector; general governance challenges, *inter alia*. The paper concludes that legal capacity affects patterns of dispute initiation and underlying anti-dumping protection among WTO Members, at least, as much as market power. It further shows that greater legal capacity deters such adverse anti-dumping actions in the first place.

[57] Bartosz Ziemblicki n. 51.
[58] Marc L. Busch, Eric Reinhardt and Gregory Shaffer n. 52.

The significance of this paper to this research is mainly due to the fact that it provides direct evidence demonstrating that legal capacity plays a critical role in a WTO member's ability to benefit from the WTO regime. The paper will be useful to this research, in outlining and assessing whether legal capacity, is one of the major challenges that African countries face, and which contributes to their minimal involvement in the WTO dispute settlement mechanism.

Edwini Kessie and Kofi Addo[59] in their paper critically analyze the position of African countries in relation to the dispute settlement system of the WTO. The paper also focuses on the role of African countries in the negotiations that brought about the DSU. It posits that the sharp increase in the number of disputes referred to the DSB should not be confused with confidence in the dispute settlement mechanism.

The paper goes on to argue that, notwithstanding the improvement in the WTO rules and procedures for the settlement of disputes, African countries have complained that because of their lack of expertise in WTO matters, high legal costs and other impediments, they have not been able to take full advantage of the improved rules and procedures to enforce their rights under the WTO Agreement. It further posits that, a quick glance at the cases which have been initiated since the WTO came into force reveals that it is mostly the bigger and the relatively advanced developing countries which have been involved in the process either as complainants or respondents.

The paper asserts that to date, African countries which have participated in the dispute settlement process have done so only as third parties or respondents but not as complainants. This paper will assist the research herein to critically look at the reasons advanced in Kessie and Addo's paper to determine whether those are the challenges faced by African countries explaining their apparent lack of participation in WTO dispute settlement procedures today.

[59] Edwini Kessie and Kofi Addo n 53.

Marc L. Busch and Eric Reinhardt[60] in their paper on trade brief, postulate that Developing countries need access to foreign markets if they are to reap the benefits of globalization. Multilateral negotiations under the WTO play a pivotal role in facilitating market access, especially for African countries. They argue that the WTO dispute settlement mechanism is especially important for developing countries, which typically lack the market size to exert much influence through more power-oriented trade diplomacy. Indeed, some poorer countries have used the WTO dispute settlement system to great effect.

The brief outlines how the WTO dispute settlement mechanism works. The brief will be of much significance to the research, mainly because, it analyses the WTO Dispute Settlement from a development perspective. It will also be of more significance to this research as it analyzes what may be a solution to African countries problems, and argues that developing countries need more access to information on the WTO-legality of the measures employed by their major trade partners. As such, the paper will provide a good basis on which the research can come up with proposals to reform African countries' participation in WTO dispute settlement mechanism.

Khalede El-Taweel's[61] dissertation is of utmost significance to the research as it argues that the low participation of African countries in WTO's dispute settlement understanding, cannot be justified by the degree of development basis only, as, other developing countries have been very successful in this regard and, some African countries' have managed to make use of the system in a positive way. The most significant contribution of the paper to this research is the argument put forth by the author that the effects of internal constraints that hinder African countries participation in WTO dispute settlement mechanism, such as, lack of sufficient financial resources, limited technical expertise and political factors, can be minimized through joint African cooperation, and by developing national strategies to deal with the DSU.

[60] Marc L. Busch and Eric Reinhardt n. 54.
[61] Khalede El-Taweel n. 55.

This paper will go a long way in assisting in this research to critically analyze the challenges faced by African countries under the DSU, with a view to coming up with possible reforms.

George O. Otieno Ochich and Anna C. Konuche[62] propose in their article that the WTO should introduce the concept of loser-pays-costs rule. According to Ochich and Konuche, more than two thirds of the members of the WTO are developing and least developed countries. This group of countries (hereinafter collectively referred to as developing countries) is heterogeneous, as the interests of and challenges facing each member of the group are as diverse as their economic disparities. They further argue that despite their large representation in membership at the WTO, the developing countries are the least represented in the number of cases filed before the DSB.

Statistically, developing and least developed countries have filed negligible trade complaints before the DSB with the exception of the bigger developing countries like Brazil, India, Mexico and Argentina.[63] In the African region for instance, only two countries, Egypt and South Africa have had cases before the DSB and in all the cases, both countries were respondents.

Their paper focuses on the developing countries' participation in the WTO Dispute Settlement Process and focuses on how the weaker economies of those countries affect their participation in the WTO Dispute Settlement Process. The paper proposes that a loser-pays-costs rule as applied in some domestic jurisdictions be introduced into the WTO Dispute Settlement Process as a way of improving the developing countries' access to the Dispute Settlement Process.

The loser-pays-costs rule as the name suggests, provides that the losing party in any civil dispute pays the attorney and legal costs of the winning party. This paper argues that if adopted in the WTO Dispute Settlement Process, the loser-pays-costs rule will improve the developing countries' ability to make use of the Dispute Settlement Process by eliminating the

[62] George O. Otieno Ochich & Annah C. Konuche "Enhancing Small Nations Access to the WTO Dispute Settlement Process: A Case for the Loser-Pays-Costs Rule" Vol. 1 No. 1 L.S.K.J (2009) p. 75-104.
[63] The statistics are available at the WTO Website: www.wto,org <accessed on 27 October 2014>.

financial burden and risk that comes with litigating before the DSB while at the same time making small claims viable.

This paper will assist my research by critically analyzing the ways in which the DSU can be improved in order to enhance the participation of African countries' in the DSB.

Phoenix X. F. Cai[64] argues that there is need for introduction of class suits in the WTO dispute settlement regime. In his proposal, developing nations would be allowed freer rein to exercise existing third party rights in a manner that allows them to pool their complaints in cases against developed nations. The primary mechanism for this is the regular joinder provision of the DSU. However, this strategy would be strengthened by procedural changes to the right to join as a third party, such as making the right automatic, upon notification to the DSB, for least developed nations.

He further states that each nation would play an active role in the dispute settlement process, but one nation, generally either the nation that is most economically powerful or most experienced in WTO litigation, would take a leading role and serve as the representative plaintiff, much in the way a named plaintiff in a class action might. In the remedies stage, all named parties would benefit. However, all parties would get to aggregate their level of harm, such that the threatened trade retaliation can be equal to the sum of all of the harm suffered by the class. The class can then decide to exercise retaliation collectively, allowing, for instance, the representative plaintiff to impose countermeasures on their behalf. The choice to impose countermeasures individually or in the aggregate would lie with the class.

Again, in as much as the proposals by Phoenix are quite radical, the proposal will go a long way in helping this research by critically analyzing the proposal and determining whether the proposals are capable of being implemented to the benefit of the African countries. This

[64] Phoenix X. F. Cai "Making WTO Remedies Work for Developing Nations: The Need for Class Actions" 2010 <accessed at *works.bepress.com/context/phoenix_cai/article/1001/type on 27th January 2015>.*

research will also look into whether the proposals by Phoenix will lead to greater access of the WTO DSB by African countries.

Mosoti Victor[65] answers the question as to whether African countries need the WTO dispute settlement system in the affirmative. He states that the system is not simply or solely about disputes, it is also about the steady evolution of a corpus of important international trade law principles whose effects and applicability will continue long into the future. The system is also a key element in the international architectural framework whose decisions have momentous, if potentially negative, development implications. He urges African countries to be at the forefront in the on-going review of the system and to be more vigorously involved as third parties in various disputes that may be of interest to them.

Mosoti further argues that there is absolutely no reason why African countries should not be at the forefront in the on-going dispute settlement review process for instance. There is also no reason why African countries have not been third parties in as many disputes as the United States or the European Communities. As long as the whole region, which makes up the single largest block of Members, continues to be absent from the dispute settlement, there will never be an honest talk of a successful and all- inclusive dispute settlement process, which should be the aspiration of a world body such as the WTO. Genuine, effective and full integration of the poorer nations of the world into the WTO should include a spirited effort to ensure that these countries can confidently lodge disputes and litigate them, despite the global political power asymmetries.

Mosoti identifies factors such as the high cost of litigating in the WTO, lack of adequate and skilled trade lawyers, African countries are often subject to the vagaries of global power asymmetries and the inadequacies of the remedies provided for *inter alia.*

[65] Mosoti Victor "Does Africa Need the WTO Dispute Settlement System?" ICTSD Resource Paper No. 5 (2003) p. 71.

Roessler[66] in his article points out to the inadequate SDT provisions under the DSU as not being sufficient to encourage the participation of African countries in the dispute settlement process under the WTO. He states that the SDT provisions do not address the problem of lack of financial resources and the obstinate nature of the retaliation provisions. He suggests that in order to ensure African countries participate in the WTO dispute settlement system, some of the SDT provisions need to be relooked at as well as additional SDT provisions provided for. For instance, changing the word "should" to "shall" whenever the DSU confers an advantage to the developing or least developed countries.

From the foregoing, it is clear that there needs to be an institutional and substantive change in the WTO DSU in order to rope in African countries to participate in the same process. If majority of WTO membership cannot access the Dispute Settlement Mechanism (DSM), then the WTO objective of enhancing security and predictability of the multilateral trading system remains nothing but theoretical.

This research will look into other articles, books and/or journals in addition to the above mentioned articles and papers in depth during the preparation of this project in a bid to demystify the challenges and constraints experienced by African countries in the WTO dispute settlement mechanism.

1.10 RESEARCH METHODOLOGY

This is a desk, library and internet based research. The research relies on published and unpublished material and takes into account significant primary and secondary sources of information on the topic. The primary sources include WTO legal texts dealing with the subject, policies, agreements, decided cases and general literature on the WTO.

[66] Roessler, F. "Special and Differential Treatment of Developing Countries under the WTO Dispute Settlement System." Geneva: Advisory Centre on WTO Law (2005) at p. 5.

The secondary sources of information are *inter alia* journal articles, study reports on the performance of the dispute settlement body after fourteen years of existence, papers /Articles written by academicians and researchers on issues relevant to this study. The research also relies greatly on internet public sources.

The research shall also be conducted through face to face interviews of experts in the field of international trade and specifically WTO dispute settlement system.

1.11 LIMITATIONS OF THE STUDY

It is important to note that this research covers the WTO since its inception in 1994. This is 20 years of WTO existence.

One major limitation is with regard to time and resource constraints. It would have been proper to travel around various states for interviews to get the views on what each country feels are the major stumbling blocks when it comes to the WTO dispute settlement mechanism. Due to time and resource constraints this is not possible to achieve. Attempting to demystify this problem after over 20 years of the existence of dispute settlement system is a lot of literature to go through in a period of 6 months.

Finally, this research is limited in the sense that it doesn't attempt to address all the factors that lead to the underutilization of the WTO settlement mechanism by African countries. This research takes into account the participation of some African countries either as respondents, third parties or complainants.

1.12 CHAPTER BREAKDOWN

Chapter one - Introduction

This research proposal forms chapter one of this research project and is the introductory chapter. It will contain the introduction to the research topic, the historical background of WTO dispute settlement mechanism, the significance of the study, a statement of the research problem, the research questions, the objectives of the research, the hypotheses, methodology, limitations of the study and a chapter summary of the project.

Chapter two – WTO Dispute Settlement Mechanism; Rules and Procedure

This chapter will entail an in-depth look at the provisions of the WTO dispute settlement mechanism and more specifically the DSU. It will contain an in-depth analysis of the DSU and DSB institutions and their rules and procedures.

Chapter three – African Countries and their participation in the WTO dispute mechanism

The chapter will look at the participation of African countries in the WTO dispute settlement mechanism and specifically look into Egypt, South Africa and Kenya as case studies. It will aim to come up with any inherent institutional and/or procedural challenges or internal constraints that inhibit African countries' active participation in the DSU.

Chapter four –Conclusions and Recommendations

This chapter covers specific areas of reforms in the DSU. It seeks to combine the findings under Chapter two and Chapter three to come up with appropriate reforms that hopefully will promote active participation of African countries in the DSU.

The chapter will also be the conclusive chapter of this research.

CHAPTER TWO

WTO DISPUTE SETTLEMENT MECHANISM; RULES AND PROCEDURE

2.1 INTRODUCTION

The creation of the WTO dispute settlement system is hailed as one of the major achievements of the multilateral trading system.[67] It is unique among international tribunals adjudicating disputes among sovereign States in that it is generally able to enforce, in an economically and politically meaningful way, rulings sufficient to compel a violating party to reform its act or omissions.[68] By improving the prospect of compliance with rulings, the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (also known as the Dispute Settlement Understanding (DSU), constitutes an essential element in ensuring the legal certainty and predictability of the multilateral trade system.[69]

With more rigorous disciplines and a growing body of jurisprudence, the dispute settlement system has however become significantly more legalistic and consequently more arduous to navigate. WTO Member countries which are keen to avail of the system to protect or advance their trade rights and objectives face the daunting challenge of grasping and keeping pace with its increased complexity.[70] While developing countries' participation in trade disputes has increased considerably since the days of the old dispute settlement system under the GATT, most disputes are still confined to a small number of 'usual suspects' – countries such as the US, the EC, Canada, Brazil, India, Mexico, Korea, Japan, Thailand and Argentina.[71]

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[67] Nordstrom, H. and Shaffer, G. "Access to Justice in the WTO: The Case for a Small Claims Procedure: a Preliminary Analysis", ICTSD Dispute Settlement and Legal Aspects of International Trade Issue Paper No. 2, International Centre for Trade and Sustainable Development, Geneva, Switzerland (June 2007).
[68] Ibid.
[69] Ibid.
[70] Ibid.
[71] Marc L. Busch, Eric Reinhardt and Gregory Shaffer, "Does Legal Capacity Matter? Explaining Dispute Initiation and Antidumping Action in the WTO" (2008).

One of the key outcomes of the GATT Uruguay Round negotiations was the creation of more effective system of dealing with international trade disputes, the WTO DSU.[72] This entered into force on 1st January 1995. The DSU succeeded the original GATT system for dispute settlement which had become increasingly unable to resolve major trade conflicts between its Member countries.[73]

The law and legal system of the WTO are in principle blind to the commercial stakes involved in a dispute between its Members. As laid down by the WTO DSU, *"the prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members"* (emphasis added).[74] The law makes no distinction between a claim of 100 thousand dollars and a claim of 100 million dollars. In practice, however, it may be difficult to enforce a 100 thousand dollars claim because of the substantial resource commitments involved in a legal dispute.[75] Under the current dispute settlement system it can take up to three years to settle a dispute and cost more than half a million dollars in legal fees, as well as requiring significant time commitment for a bureaucracy that may already be severely under-resourced. Small claims are therefore unlikely to be pursued unless some important principle is at stake.[76]

If there were no implicit "user fees," the dispute settlement system would implode. It has to cost something to keep out nuisance cases of insignificant value.[77] Perhaps this is what the drafters had in mind when they, in one of the first articles of the DSU, wrote: "Before bringing a

[72] Read, R. 'Trade dispute settlement mechanisms: the WTO Dispute Settlement Understanding in the wake of the GATT', in Perdikis, N., and Read, R. (eds.), *The WTO & the Regulation of International Trade: Recent Trade Disputes between the European Union & the United States*, Cheltenham: Edward Elgar, (2005) p. 41-67.
[73] Ibid.
[74] Article 3.3, DSU
[75] Nordstrom, H. and Shaffer, G. n. 1 p. 1.
[76] Ibid.
[77] Ibid.

case, a Member shall exercise its judgment as to whether action under these procedures would be fruitful."[78]

Dispute settlement is the central pillar of the multilateral trading system, and the WTO's unique contribution to the stability of the global economy.[79] Without a means of settling disputes, the rules-based system would be less effective because the rules could not be enforced. The WTO's procedure underscores the rule of law, and it makes the trading system more secure and predictable.[80] The system is based on clearly-defined rules, with timetables for completing a case. However, the point is not to pass judgement. The priority is to settle disputes, through consultations if possible.[81]

This Chapter aims to outline the structure, rules and procedures of the WTO DSU, particularly with respect to the implementation of dispute panel findings and the issues of compensation and retaliation. The first section provides for the origins of the DSU in the context of the shortcomings of the previous GATT dispute settlement system. The second section summarises the key articles and procedures of the DSU. The final section looks into the provisions of the DSU with regard to the developing or least developed countries and in particular the African countries.

2.2 ORIGINS OF THE WTO DSU

Prior to the introduction of the DSU, the GATT system of dispute settlement had been functioning more or less successfully for almost 50 years in spite of its evident shortcomings.[82] The new WTO DSU was the outcome of a thorough overhaul of the GATT system although it

[78] Article 3.7, DSU.
[79] WTO, Understanding the WTO (2011) at p. 60. WTO Publications.
[80] Ibid.
[81] Ibid.
[82] Read, R. n. 6.

mirrored much of the original GATT legal framework and retained the accumulated body of case law and precedent.[83]

The GATT system of dispute settlement was founded upon two principal articles: Consultation (Article XXII) and Nullification or Impairment, i.e. compensation (Article XXIII).[84] Regarding the difference between the two provisions, consultation under Article XXII covers any matter affecting the operation of GATT, while the coverage of consultation under Article XXIII is limited to certain matters.[85] Specifically, Article XXIII provides that a contracting party may make representations or proposals to another contracting party if the former party considers that any benefit accruing to it directly or indirectly under GATT is being nullified or impaired or that the attainment of any objective of GATT is being impeded as the result of:

a. the failure of another contracting party to carry out its obligations under GATT, or
b. the application by another contracting party of any measure, whether or not it conflicts with the provisions of GATT, or
c. the existence of any other situation.[86]

Disputes over "nullification or impairment of any benefit otherwise to accrue under GATT" may be brought to consultation under Article XXIII.[87] Another point of difference between the two concepts of consultation is the participation of a third country. This is permitted only with respect to consultations made under Article XXII. Similar differences can be seen in the relation between Article XXII and Article XXIII of General Agreement in Trade in Services (GATS).[88]

[83] Ibid.
[84] WTO General Agreement on Tariffs and Trade (1994).
[85] Shaffer, G. "How to make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies" *in Towards a Development-Supportive Dispute Settlement System in the WTOS*, ICTSD resource paper no. 5 (2003) p. 5-65.
[86] Ibid.
[87] Ibid.
[88] Ibid.

The linchpin of the GATT system for settling trade disputes was the principle of consensus which required all parties to a dispute to accept the outcome of any investigation.[89] Any findings only became binding if a panel report was accepted by consensus. Respondents in a case could therefore veto this ratification procedure and thereby avoid complying with the findings.[90]

The consensus requirement was one of several weaknesses of the system leading to growing frustration about its failure to resolve trade conflicts among GATT Members. The principal shortcomings of the GATT system were: a lack of clear objectives and procedures; ambiguity about the role of consensus, leading to adverse decisions being blocked; a lack of time constraints, leading to delays and uncertainty; and frequent delays in and partial non-compliance.[91]

The GATT system was, to some extent, a victim of its own success in that it was originally intended to regulate the trade of just 23 countries. Its rules were simply not designed to deal with the massive growth of world trade in the latter half of the 20th Century.[92] This was partly fuelled by trade liberalisation under the GATT Kennedy and Tokyo Rounds, a rapidly growing membership and the increasing volume and complexity of trade conflicts.[93] All of these developments placed increasing stresses and strains on an imperfect dispute settlement system.

The DSU superseded the GATT system from 1 January 1995 and is regarded as being one of the central achievements of the Uruguay Round negotiations.[94] It is a multilateral agreement under which WTO members can settle their disputes through a structured and legally binding

[89] Robert Read (2005), Dispute Settlement, Compensation and Retaliation under the WTO. Published in Handbook on Trade Policy.
[90] Ibid.
[91] Read, R. n. 6.
[92] Ibid.
[93] Ibid.
[94] Nordstrom, H. and Shaffer, G. n. 1 p. 3.

process.[95] The desire for the reform of the GATT dispute settlement system was made very apparent in the Punte del Este Declaration at the commencement of the Uruguay Round.[96] There was however no clear system as to how the system for settling trade disputes should be constructed.[97] The United States sought the creation of a rule-oriented approach ('automaticity'), along the lines of the NAFTA system, with a defined timetable for dispute resolution and the potential for cross-retaliation. In contrast, the primary objective of most other members of the OECD, along with many developing countries, was a system that would constrain unilateral action by the United States.[98] The final outcome of the negotiations was the DSU which dealt with many of the perceived weaknesses of the GATT system as well as, at least partially, satisfying the differing objectives of its leading members.[99]

2.3 RULES AND PROCEDURES OF THE DSU

The DSU establishes the Dispute Settlement Body (DSB) comprising representatives from all WTO members states and the DSB is mandated by provisions of the DSU to oversee the implementation of the DSU.[100] The DSU elaborates on the procedure to be followed when adjudicating over disputes arising under covered agreements namely;[101]

a. the Marrakesh Agreement establishing the WTO,
b. the General Agreement on Tariffs and Trade (GATT);
c. the General Agreement on Trade in Services (GATS);
d. the Agreement on Trade Related Aspects of Intellectual Property Rights; and
e. in certain circumstances, the plurilateral Trade Agreements annexed to the Marrakesh Agreement.

[95] Article 3(2) DSU.
[96] Nordstrom, H. and Shaffer, G. n. 1 p. 3.
[97] Ibid.
[98] Ibid.
[99] Ibid.
[100] Article 2 of the DSU.
[101] Article 1.1 of the DSU.

The application of the DSU to disputes under the plurilateral trade agreements is however subject to the adoption of decisions by the parties to those agreements.[102]

Article XXIII of GATT stood at the center of the GATT dispute settlement system and its paragraphs continue to define the conditions under which violation of the WTO rules permit Members to seek redress and their means of so doing. There are three specific circumstances identified in GATT Article XXIII under which WTO Members are permitted to make a complaint under the DSU.[103] The standard case is where a Member country violates the WTO rules and thereby adversely affects other Members. This is also called the 'violation complaint' pursuant to Article XXIII:1(a) of GATT 1994[104]. The second is 'non-violation complaint' pursuant to Article XXIII:1(b) of GATT 1994 where harm is caused even though there is no specific violation of a GATT provision.[105] Finally, there is a "situation complaint" pursuant to Article XXIII:1(c) of GATT 1994. Literally understood, "situation complaint" could cover any situation whatsoever, as long as it results in "nullification or impairment".

The scope of the application of the article covers all of the component multilateral agreements of the WTO. This means that any Member country may seek redress with respect to any violation of the WTO rules by another. There is no requirement to demonstrate that a violation has resulted in injury since all Members are legally obliged to conform to the WTO rules.[106]

The primary objective of the WTO DSU system is to settle trade disputes between WTO members by means of bilateral consultations and mediation in the first instance. Recourse to the establishment of a formal dispute panel is intended as a last resort when all other avenues of conciliation have been exhausted.[107] A WTO member may have recourse to the DSM if it

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[102] Appellate body annual report 2009, circulated as WT/AB/13 on 17/2/2010 available at http://ww.wto.org>accessed on 4th September 2014

[103] Read, R. n. 6.

[104] This complaint requires "nullification or impairment of a benefit" as a result of the "the failure of another Member to carry out its obligations" under GATT 1994.

[105] A non-violation complaint may be used to challenge any measure applied by another Member, even if it does not conflict with GATT 1994, provided that it results in "nullification or impairment of a benefit".

[106] Ibid.

[107] Nordstrom, H. and Shaffer, G. n. 1 p. 5.

considers that a benefit accruing to it under the covered agreements has been nullified or impaired by a measure taken by another member state. When such a member brings the complaint to the DSB, the matter is dealt with the under the following four phases;

i. Consultations between the parties.
ii. Panel phase (in case consultations fail to achieve a satisfactory resolution).
iii. Adjudication by the AB (if applicable).
iv. Implementation of the rulings and recommendations from the Panel /the AB.

i. Consultations

A request for consultations formally initiates a dispute at the WTO and triggers the application of the DSU.[108] Traditionally, GATT attached significant importance to bilateral consultation, and many disputes actually were settled in this manner.[109] GATT provides for some special consultation and review procedures, such as the one mentioned in Article XIII at paragraph 2[110], as well as in the "1960 GATT decision on arrangements for consultations on restrictive business practices"[111]. However, paragraph 1 of Article XXII and paragraph 1 of Article XXIII of GATT play the central role in prescribing that "formal" consultations to take place prior to panel procedures.

The DSU specifies that it adheres to the principles of the management of disputes applied under Articles XXII and XXIII of GATT.[112] The DSU provides that before bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be

[108] Chapter 6-dispute settlement system training module available at<http://www.wto.org> accessed on 4th September 2014
[109] Read, R. n. 6.
[110] The paragraph specifies that a contracting party shall, upon request by another contracting party regarding fees or charges connected with importation/exportation, review the operation of its laws and regulations.
[111] Which specified that a contracting party shall, upon request by another contracting party regarding the business practice by which international trade competitions would be limited, give sympathetic consideration and provide an adequate opportunity for consultation.
[112] Article 3(1), DSU.

fruitful.[113] The aim of the dispute settlement mechanism is to secure a positive solution to a dispute.[114] A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred. In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements.[115] Compensation as a measure is usually resorted to only if immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement.[116]

The specific guidelines and timetable for consultations to take place are provided under Article 4 of the DSU. Consultations are a mandatory condition for a subsequent request to be made to establish a dispute panel. The DSU provides that each party should give sympathetic consideration to any representations made by another party and should provide adequate opportunity for consultation. It provides that the parties which enter into consultations should attempt to obtain satisfactory adjustment of the matter concerned.[117] According to the DSU, a request for consultations shall be effective when such request is submitted in writing, gives reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint and is notified to the DSB.[118] It provides that the party to which a request for consultations is made (the respondent) is obliged to reply within 10 days after the date of its receipt and shall enter into consultations in good faith within a period of no more than 30 days after the date of receipt of the request, with a view to reaching a mutually satisfactory solution.[119]

WTO Members other than the consulting parties are to be informed in writing of requests for consultations, and any Member that has a substantial trade interest in consultations may

[113] Article 3(7), DSU.
[114] Ibid.
[115] Ibid.
[116] Ibid.
[117] Article 4, DSU.
[118] Article 4(4), DSU.
[119] Article 4(3), DSU.

request to join in the consultations as a third party. It is also provided that the party to which the request for consultations is addressed may reject the said third party's desire to join in the consultations when the party considers that "the claim of substantial trade interest is not well-founded".[120]

If the respondent fails to meet any of the mentioned deadlines, the complainant may immediately proceed to the adjudicative stage of dispute settlement and request the establishment of a panel.[121] If the respondent however engages in consultations without satisfactory results, the complainant may proceed to request for establishment of a panel within 60 days after the request for consultations. In practice however, many parties to disputes often take considerably longer over consultations that the minimum of 60 days.[122] Many trade disputes never go further than the consultation stage, particularly given that WTO Members are under an obligation to resolve their disputes by this means. The parties to a dispute may also make use of arbitration as an alternative method, subject to mutual agreement.[123]

Unlike consultation in which "a complainant has the power to force a respondent to reply and consult or face a panel,"[124] good offices, conciliation and mediation "are undertaken voluntarily if the parties to the dispute so agree."[125] No requirements on form, time, or procedure for them exist.[126] Any party may initiate or terminate them at any time.[127] The complaining party may request the formation of panel, "if the parties to the dispute jointly consider that the good offices, conciliation or mediation process has failed to settle the dispute."[128] Thus the DSU recognized that what was important was that the nations involved in a dispute come to a

[120] Article 49 (11), DSU.
[121] Article 4(3), DSU.
[122] WTO, "A Handbook on the WTO Dispute Settlement System": Cambridge University Press (2004).
[123] Ibid.
[124] Dillon Jr., Thomas J. "The World Trade Organization: a New Legal Order for World Trade?". Michigan Journal of International Law 16 (1995), p. 382.
[125] Article 5(1), DSU.
[126] Article 5(3), DSU.
[127] Ibid.
[128] Article 5(4), DSU.

workable understanding on how to proceed, and that sometimes the formal WTO dispute resolution process would not be the best way to find such an accord. Still, no nation could simply ignore its obligations under international trade agreements without taking the risk that a WTO panel would take note of its behaviour.

Consultations are a prerequisite to the request for establishment of a panel. Parties cannot request the establishment of a panel before the time frame under the DSU in respect of consultations has expired.[129] Consultations are often an effective means of dispute resolution in the WTO as they save time and resources of the parties involved. Consultations however like all other DSU procedures require expertise and financial resources that African countries lack.[130] Busch and Reinhardt (2005) state that rich countries acting as complainants are more likely to extract concessions from defendants than poor countries acting as complainants.[131]

ii. Panel phase

If consultation, good offices, conciliation or mediation fails to settle the dispute, the complaining party may request the formation of panel. The request is made to the Chairman of the DSB in writing, indicating that consultations were held, identifying the specific measures in issue, and a clear summary of the legal basis of the complaint.[132] The content of the request for establishment of the panel is crucial because it defines and limits the scope of the dispute (terms of reference), thereby the extent of the panel's jurisdiction. It is also from the panel's terms of reference that respondents and third parties become aware of the basis of the complaint.[133] The request must be filed at least 11 days in advance to the seating of the DSB in

[129] Article 4(7), DSU.
[130] Marc L. Busch and Eric Reinhardt "Developing Countries and General Agreement on Tariffs and Trade/World Trade Organization Dispute Settlement" Journal of World Trade (2005).
[131] Ibid.
[132] Article 6(2), DSU.
[133] Article 7(1), DSU.

order to be included in the agenda of the DSB meeting.[134] A panel is then established at the second DSB meeting that usually takes place within a month.

The DSB shall form a panel, unless at that meeting the DSB decides by consensus not to establish a panel.[135] Panels shall be composed of well-qualified governmental and/or non-governmental individuals[136] with a view to ensuring the independence of the members,[137] and whose governments are not the parties to the dispute, unless the parties to the dispute agree otherwise.[138] Three panelists compose a panel unless the parties agree to have five panelists.[139]

The Secretariat proposes nominations for panels that the parties shall not oppose except for compelling reasons.[140] If the parties disagree on the panelists, upon the request of either party, the director-general in consultation with the chairperson of the DSB and the chairperson of the relevant council or committees[141] shall appoint the panelists. Such opposition to the nominees must be communicated within 20 days from the establishment of the panel.[142]

When multiple parties request the establishment of a panel with regard to the same matter, the DSU suggests a strong preference for a single panel to be established to examine these complaints taking into account the rights of all members concerned.[143] Once the DSB has established a panel, the complainant files submissions with the Dispute Settlement Secretariat, which then transmits them to respondent to reply accordingly.[144] The DSU gives any member that has a substantial interest in a matter before a panel (and notifies of its interest to the DSB) an opportunity to be heard by the panel and to make written submissions to the panel.[145]

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[134] Rule 3 of the panel rules of Procedure under Appendix 3 to the DSU.
[135] Article 6(1), DSU.
[136] Article 8(1), DSU.
[137] Article 8(2), DSU.
[138] Article 8(4), DSU.
[139] Article 8(5), DSU.
[140] Article 8(6), DSU.
[141] Article 8(7), DSU.
[142] Ibid.
[143] Article 9(1), DSU.
[144] A Handbook on the WTO Dispute Settlement System (2004) at p. 53.
[145] Article 10(2), DSU

The panel convenes an oral hearing following the exchange of written submissions by the parties. This is the first substantive meeting amongst panellists, experts and all parties to the dispute.[146] The complainants lead evidence, followed by the respondents and third parties through oral presentations.[147] The panel may also solicit expert opinion from any individual, expert or body it considers appropriate at this stage. After the oral presentations, the complainant is given four weeks to make rebuttals to the respondent's submissions.[148]

The panel then holds a second hearing wherein the complainant and respondent once again present their factual and legal arguments. At this stage, third parties also present their views and avail the panel a written submissions of their oral statements.[149] Panellists have the power to schedule a third or fourth meeting if necessary.

After submissions by the parties, the panel goes into internal deliberations to review the submissions and reach conclusions as to the outcome of the dispute.

In arriving at judgment, the panel's mandate is to apply existing WTO law to factual questions and legal issues. Article11 and Article 19(2) of the DSU emphasize that panels and the AB must not add to or diminish the rights and obligations set forth in the covered agreements. Following the deliberations, the panel issues a report with two main parts: the "descriptive part" containing a summary of factual and legal arguments of the parties and the "findings part" containing the panel's comprehensive discussion of the applicable law in light of the facts and the evidence presented. [150]

[146] See Paragraph 4, 5 and 6 of the working procedures in appendix 3 DSU.
[147] Article 10(2), DSU.
[148] Paragraph 8 of the Working Procedures in Appendix 3 DSU.
[149] Paragraph 8 and 9 of the working procedures appendix 3 DSU.
[150] Article 12(7), DSU.

As a general rule, it shall not exceed six months from the formation of the panel to submission of the report to the DSB.[151] In exceptional cases, the panel may seek consent from the DSB to extend the time to nine months.[152]

Prior to submission of the Panel report, there are various reports issued to the parties by the panelists. In the interim review stage, the panel submits an interim report to the parties for comment and rectification of any factual mistakes therein. Parties may request a meeting of the panel to further argue specific points raised with respect to the interim report. This is the interim review stage must not exceed two weeks.[153] If no comments are provided by the parties within the comment period, the report shall be the final report and circulated promptly to the members.[154] Within sixty days after the report is circulated to the members, the report shall be adopted at a DSB meeting unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adapt the report.[155]

A panel report that has not been appealed against must be placed on the agenda of the DSB ten days prior to the DSB meeting.[156]

As observed, the panel stage of dispute settlement is quite technical. Preparation and presentation of a case before the panel as well as response to queries from the panel requires special legal expertise, which is a major disadvantage to African countries as not many lawyers in Africa specialize on matters of trade disputes.[157] This is, in my opinion, not a lucrative branch of legal practice in Africa.

[151] Article 12(8), DSU.
[152] Article 12(9), DSU.
[153] Article 15(2), DSU.
[154] Ibid.
[155] Article 17(1), DSU.
[156] Article 16(2), DSU.
[157] Gregory Shaffer n. 19.

Legal experts from the U.S.A and Europe charge fees ranging $200-$600 (or more) per hour.[158] It is estimated that Lawyers representing Kodak and Fuji Corporation in the *Japan-Photographic Film* dispute respectively charged their clients fees in excess of $10,000,000.[159]

iii. Appellate phase

A new and positive feature of the WTO-DSU is the introduction of appellate review of panel decisions. Appellate proceedings are conducted in accordance with the procedures established under the DSU and the Working Procedures for Appellate Review drawn up by the AB in consultation with the Chairman of the DSB and the Director-General of the WTO.[160]

If there is an objection to a panel report, disputing parties may request the Appellate Body (hereinafter "AB") to examine the appropriateness of the legal interpretations employed by the panel.[161] In this case the Report is not submitted to the DSB until the appeal process is completed.[162] The DSB establishes a standing AB that will hear the appeals from panel cases. The AB is composed of seven persons, three of whom shall serve on any one case.[163] Appeals have to be based on points of law such as legal interpretation — they cannot re-examine existing evidence or examine new issues.[164] However, in some instances the appellate panel has the power to re-examine the evidence as was in the case with *Korea - Taxes on Alcoholic Beverages*[165] where the AB stated that an appeal could be based on the credibility and weight ascribed to given facts as a legal characterization issue.

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[158] Ibid.
[159] Ibid.
[160] The Rules of Conduct, as adopted by the DSB on 3 December 1996 (WT/DSB/RC/1), are directly incorporated into the Working Procedures for Appellate Review (WT/AB/WP/5)
[161] Article 17(4), DSU.
[162] Nordstrom, H. and Shaffer, G. n. 1.
[163] Article 17(1), DSU.
[164] A handbook on WTO dispute settlement (2004), a publication by the WTO secretariat at page 57.
[165] WT/DS75/AB/R and WT/DS84/AB/R.

Those persons serving on the AB are to be persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the Covered Agreements generally.[166] The AB's proceedings are confidential, and its reports anonymous.[167] This provision is important because the members of the appellate panel do not serve for life. This means that if their decisions were public, they would be subject to personal retaliation by governments unhappy with decisions, thus corrupting the fairness of the process.[168]

The appellant must file written submission in ten days, setting out in detail their arguments as to why the panel committed an error and specifying the type of ruling the AB should arrive at.[169] The respondent then files their submissions in response to the allegations of error as pleaded by the appellant within 25 days.[170]

WTO Members that were third parties at the panel stage may also participate and file written submissions within 25 days from the notice of appeal.[171] A WTO Member that has not been a third party at the panel stage cannot "jump on board" at the appellate stage. If such a party identifies its interest in the dispute in the light of the content of the panel report. The party may seek to submit an amicus curiae brief, which the AB is entitled to accept, but not obliged to consider.

Approximately 45 days after the notice of appeal, the AB holds an oral hearing. The appellant, respondent and third parties make oral submissions, after which the AB division poses questions to the participants.[172] Following the oral hearing, the AB division exchanges views on the issues raised in the appeal with the four other AB members from another appellate division.

[166] Article 17(3), DSU.
[167] Article 17(10), DSU.
[168] A handbook on WTO dispute settlement (2004), a publication by the WTO secretariat at page 57.
[169] Rule 21(2) of the Working procedure for Appellate body.
[170] Rule 22(2) of the Working procedure for Appellate body.
[171] Article 17(4), DSU.
[172] Rules 27(1) of the Working procedure for Appellate body.

This exchange of views is intended to give effect to the principle of collegiality in the AB. It also serves to ensure consistency and coherence in the jurisprudence of the AB.[173]

The AB may uphold, modify, or reverse the legal findings and conclusions of the panel.[174] Following the exchange of views with the other AB members, the AB concludes its deliberations and drafts a report. In contrast to the panel procedure, there is no interim review at the AB stage. The AB and its divisions are required to make their decisions by consensus.[175]

Both the AB report and the Panel reports must be tabled before the DSB to enable it understand the overall ruling only after reading both reports.[176] The DSB and the parties shall accept the report by the AB without amendments unless the DSB decides by consensus[177] not to adopt the AB report within thirty days following its circulation to the members.[178] Normally appeals should not last more than 60 days, with an absolute maximum of 90 days.

Following the adoption of the panel/AB reports, the DSB gives a recommendation and ruling to the respondent (where the complainant successfully challenges a violation) to bring the measure into compliance with the covered agreement. The respondent must inform the DSB within 30 days after the adoption of the report(s), of its intentions to implement the recommendations and rulings of the DSB.[179] If immediate compliance with recommendations and rulings is not possible, the respondent has a grace period to achieve such compliance. The grace period is agreed upon by the parties or determined by an arbitrator.[180]

[173] Rule 4(1) of the Working procedure for Appellate body.
[174] Article 17(13), DSU.
[175] A handbook on WTO dispute settlement (2004), a publication by the WTO secretariat.
[176] Article 21(3), DSU.
[177] This is what is known as the negative consensus rule. This means that the reports of the Panels or AB are automatically adopted by the DSB unless the DSB decides by consensus not to adopt such a report. This is different from the system under GATT where the report was only adopted at the General Council on consensus.
[178] Article 17(14), DSU.
[179] Article 21(3), DSU.
[180] Articles 21(3) and 21(3) (c), DSU.

iv. Implementation of Panel/AB reports

Once a Final or AB Report has been adopted by the DSB, its recommendations and rulings become binding on the parties to a dispute and the losing respondent is required to bring its trade regime into compliance with the WTO rules. This normally means the disputed measures that were the subject of the original dispute and found to be inconsistent with the WTO are to be withdrawn.[181]

Under DSU losing respondents have 30 days after the adoption of a Report to inform the DSB of their intentions regarding the implementation of Panel or AB recommendations.[182] If it is impracticable to comply immediately with the recommendations, the Member is given a reasonable period of time to do so. Such reasonable period of time may be decided by mutual agreement between the disputing parties concerned. However, in the absence of such mutual agreement, the parties may refer the decision to arbitration. In principle, an arbitrator usually is one of the three AB members who conducted the appellate review of the case concerned. The mandate of the arbitrator is to determine the "reasonable period of time" within 90 days after the date of the adoption of report. Ccompliance is required to be '*within a reasonable time*', normally not exceeding 15 months.[183] The DSB is responsible for the surveillance of the implementation of adopted recommendations and rulings. In the event that there is dissatisfaction or disagreement concerning a respondent's compliance with the recommendations and rulings of the DSB, a plaintiff has further recourse to the dispute settlement procedures and a new Panel Report.[184] Actions under this article are not uncommon and have been used by both plaintiffs and respondents to establish whether any regulatory changes that have been made are WTO-compatible.[185]

[181] Nordstrom, H. and Shaffer, G. n. 1 p. 10.
[182] Article 21, DSU.
[183] Article 21(3), DSU.
[184] Article 21(5), DSU.
[185] Supra n. 109.

The DSU does not usually give any specific instruction on how to implement the recommendations. The issue of implementation is listed on the DSB agenda 6 months after the date of establishment of the AB until it is resolved.[186] At least 10 days before each DSB meeting, the Member concerned is required to provide the DSB with a written status report of its progress in the implementation.

When the parties disagree on how the respondent has implemented the recommendations/rulings, they engage panel procedure to enforce compliance. Compliance panels must consider whether the measure implemented cures the violation as found by the original panel.

If after a reasonable time a respondent fails to bring an infringing measure in conformity with WTO laws, the parties enter into negotiations within 20 days to agree on satisfactory compensation. According to the DSU, compensation can be through the imposition of tariff surcharges or supplementary concessions offered for other products.[187] If the parties do not reach an agreement on compensation, the complainant must seek authorization from the DSB to suspend existing concessions under covered agreements as well as permission to impose trade sanctions against a respondent that has failed to compensate them. This suspension is applicable to a level commensurate with the trade injury. This is known as retaliation.[188]

Retaliation is usually the final and most serious consequence a non-implementing Member faces in the WTO dispute settlement system. In principle, the sanctions should be imposed in the same sector as that in which the violation is found to have occurred.[189] For example in responding to a violation in the area of patents, a complainant should reattribute an offending respondent with sanctions in the same area; namely patents. This is known as parallel retaliation.

[186] Article 21(6), DSU.
[187] Article 22(2), DSU.
[188] Ibid.
[189] Article 22(3) (a), DSU.

However, if the complainant considers it impracticable or ineffective to apply sanctions within the same sector, the complainant is authorized to imposed sanctions in a different sector under the same agreement.[190] For example, a violation with regard to patents could be countered with suspension of measures in the area of trademarks. In turn, if the complainant considers it impracticable or ineffective to remain within the same agreement, and the circumstances are serious enough to cause them great economic loss, the countermeasures may be taken under another agreement.[191] This is known as cross-retaliation.

A good example is in the *US Upland cotton case*,[192] the USA having given actionable subsidies to its cotton farmers was ordered by the AB to compensate Brazil. The USA however ignored the ruling until the compliance Panel authorized Brazil to pursue retaliation against the U.S.A in other sectors namely intellectual property and services.

In applying the principles of retaliation, the complainant should take into account; the trade in the sector under the agreement where a violation was found, the importance of such trade to that party and the broader economic consequences of the suspension of concessions.[193] If parties disagree on the complainant's proposed form of retaliation (i.e. whether the level of retaliation is equivalent to the level of violation), the parties must request for arbitration within 60 days and the arbitrator's decision as final.[194] The complainant must not proceed with the suspension of obligations during arbitration.[195]

[190] Article 22(3) (b), DSU.
[191] Article 22(3) (c), DSU.
[192] WT/DS267.
[193] Lucas Eduardo F. A. Spadano "Cross-Agreement Retaliation in the WTO Dispute Settlement System: An Important Enforcement Mechanism for Developing Countries?" World Trade Review Journal 7: 3, (2008), p. 12-13
[194] Article 22(6), DSU.
[195] Ibid.

2.4 THE DSU PROVISIONS ON DEVELOPING COUNTRIES

The WTO system and the DSU recognize that developing countries need a high level assistance in order to participate more effectively in trade disputes.[196] To this end, the Advisory Center on WTO Law (ACWL), was established in 2001 to provide legal support to developing countries in their WTO activities, mainly, but not limited to, dispute settlement.[197] The ACWL provides dispute settlement services at rates much lower than those of private law firms, and it also applies a cost ceiling.[198]

To qualify for these services, developing countries must be members of the ACWL and pay a single contribution calculated on the basis of their share of world trade. ACWL services are invoiced by the hour, at a rate which varies in accordance with the member's category. It is however noticeable that there are niche law practices emerging in BRICS countries that are able to litigate WTO disputes at more reasonable rates than their counterparts from developed countries.[199]

The DSU, on the other hand, has explicit provisions on how the DSU is to be applied to developing countries as opposed to the developed countries. For example the DSU requires that during consultations Members should give special attention to the particular problems and interests of developing country Members.[200] Article 8 also requires that when a dispute is between a developing country Member and a developed country Member the panel shall, if the developing country Member so requests, include at least one panelist from a developing country Member.[201] Article 21 also requires that when implementing the recommendations and rulings of the panel or AB, particular attention should be paid to matters affecting the interests

[196] H. E. Zunckel & L. Botha, "The BRICS; South Africa and dispute settlement in the WTO". SAFPI Policy Brief No 9 (2012).
[197] Torres R. "Use of the WTO trade dispute settlement mechanism by the Latin American countries – dispelling myths and breaking down barriers" WTO Staff Working Paper ERSD-2012-03, Geneva (2012) .
[198] Ibid.
[199] Ibid.
[200] Article 4(10), DSU.
[201] Article 8(10), DSU.

of developing country Members with respect to measures which have been subject to dispute settlement.[202]

All the above initiatives have been made possible by the WTO in order to encourage the participation of the developing countries in the WTO dispute settlement mechanism.

2.5 CONCLUSION

Dispute settlement is a central pillar of the multilateral trading system, and the WTO's unique contribution to the stability of the global economy. Without a means of settling disputes, the rules-based system would be less effective because the rules could not be enforced. The WTO's procedure underscores the rule of law, and it makes the trading system more secure and predictable. The system is based on clearly-defined rules, with timetables for completing a case. First rulings are made by a panel and endorsed (or rejected) by the WTO's full membership. Appeals based on points of law are possible.

Dispute resolution under the WTO is a three prong stage; the consultation stage, the Panel/AB review stage and the implementation stage. The consultation stage ensures that the disputes, being economical in nature, are resolved in an amicable and quick manner before handing over the same to the Panel. The Panel is usually constituted by the DSB where consultations have broken down and the complainant has requested the DSB to constitute the Panel. The AB is the appellate body that handles all matters determined by the Panel and such determination is not acceptable to either party. Matters to the AB are usually based on points of law and no new evidence can be admitted at the appeal stage. Finally, the implementation stage which is monitored by the DSB and it is the stage where the DSB implements the decision of the Panel/AB and it requires the offending party to bring its actions in conformity with the WTO

[202] Article 21(2), DSU.

and its agreements. The cases take approximately 1year and 3 months from the consultation stage to the determination of appeal and 1 year if there is no appeal.

The WTO system has in place several incentives to improve the participation of developing countries in the WTO dispute resolution system yet such an improvement is yet to be seen. The next two chapters will look into the factors that have led to the low use of the WTO dispute settlement system by the developing countries and what should be done to improve the same.

CHAPTER TWO

WTO DISPUTE SETTLEMENT MECHANISM; RULES AND PROCEDURE

2.1 INTRODUCTION

The creation of the WTO dispute settlement system is hailed as one of the major achievements of the multilateral trading system.[203] It is unique among international tribunals adjudicating disputes among sovereign States in that it is generally able to enforce, in an economically and politically meaningful way, rulings sufficient to compel a violating party to reform its act or omissions.[204] By improving the prospect of compliance with rulings, the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (also known as the Dispute Settlement Understanding (DSU), constitutes an essential element in ensuring the legal certainty and predictability of the multilateral trade system.[205]

With more rigorous disciplines and a growing body of jurisprudence, the dispute settlement system has however become significantly more legalistic and consequently more arduous to navigate. WTO Member countries which are keen to avail of the system to protect or advance their trade rights and objectives face the daunting challenge of grasping and keeping pace with its increased complexity.[206] While developing countries' participation in trade disputes has increased considerably since the days of the old dispute settlement system under the GATT, most disputes are still confined to a small number of 'usual suspects' – countries such as the US, the EC, Canada, Brazil, India, Mexico, Korea, Japan, Thailand and Argentina.[207]

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[203] Nordstrom, H. and Shaffer, G. "Access to Justice in the WTO: The Case for a Small Claims Procedure: a Preliminary Analysis", ICTSD Dispute Settlement and Legal Aspects of International Trade Issue Paper No. 2, International Centre for Trade and Sustainable Development, Geneva, Switzerland (June 2007).
[204] Ibid.
[205] Ibid.
[206] Ibid.
[207] Marc L. Busch, Eric Reinhardt and Gregory Shaffer, "Does Legal Capacity Matter? Explaining Dispute Initiation and Antidumping Action in the WTO" (2008).

One of the key outcomes of the GATT Uruguay Round negotiations was the creation of more effective system of dealing with international trade disputes, the WTO DSU.[208] This entered into force on 1st January 1995. The DSU succeeded the original GATT system for dispute settlement which had become increasingly unable to resolve major trade conflicts between its Member countries.[209]

The law and legal system of the WTO are in principle blind to the commercial stakes involved in a dispute between its Members. As laid down by the WTO DSU, *"the prompt settlement of situations in which a Member considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members"* (emphasis added).[210] The law makes no distinction between a claim of 100 thousand dollars and a claim of 100 million dollars. In practice, however, it may be difficult to enforce a 100 thousand dollars claim because of the substantial resource commitments involved in a legal dispute.[211] Under the current dispute settlement system it can take up to three years to settle a dispute and cost more than half a million dollars in legal fees, as well as requiring significant time commitment for a bureaucracy that may already be severely under-resourced. Small claims are therefore unlikely to be pursued unless some important principle is at stake.[212]

If there were no implicit "user fees," the dispute settlement system would implode. It has to cost something to keep out nuisance cases of insignificant value.[213] Perhaps this is what the drafters had in mind when they, in one of the first articles of the DSU, wrote: "Before bringing a

[208] Read, R. 'Trade dispute settlement mechanisms: the WTO Dispute Settlement Understanding in the wake of the GATT', in Perdikis, N., and Read, R. (eds.), *The WTO & the Regulation of International Trade: Recent Trade Disputes between the European Union & the United States*, Cheltenham: Edward Elgar, (2005) p. 41-67.
[209] Ibid.
[210] Article 3.3, DSU
[211] Nordstrom, H. and Shaffer, G. n. 1 p. 1.
[212] Ibid.
[213] Ibid.

case, a Member shall exercise its judgment as to whether action under these procedures would be fruitful."[214]

Dispute settlement is the central pillar of the multilateral trading system, and the WTO's unique contribution to the stability of the global economy.[215] Without a means of settling disputes, the rules-based system would be less effective because the rules could not be enforced. The WTO's procedure underscores the rule of law, and it makes the trading system more secure and predictable.[216] The system is based on clearly-defined rules, with timetables for completing a case. However, the point is not to pass judgement. The priority is to settle disputes, through consultations if possible.[217]

This Chapter aims to outline the structure, rules and procedures of the WTO DSU, particularly with respect to the implementation of dispute panel findings and the issues of compensation and retaliation. The first section provides for the origins of the DSU in the context of the shortcomings of the previous GATT dispute settlement system. The second section summarises the key articles and procedures of the DSU. The final section looks into the provisions of the DSU with regard to the developing or least developed countries and in particular the African countries.

2.2 ORIGINS OF THE WTO DSU

Prior to the introduction of the DSU, the GATT system of dispute settlement had been functioning more or less successfully for almost 50 years in spite of its evident shortcomings.[218] The new WTO DSU was the outcome of a thorough overhaul of the GATT system although it

[214] Article 3.7, DSU.
[215] WTO, Understanding the WTO (2011) at p. 60. WTO Publications.
[216] Ibid.
[217] Ibid.
[218] Read, R. n. 6.

mirrored much of the original GATT legal framework and retained the accumulated body of case law and precedent.[219]

The GATT system of dispute settlement was founded upon two principal articles: Consultation (Article XXII) and Nullification or Impairment, i.e. compensation (Article XXIII).[220] Regarding the difference between the two provisions, consultation under Article XXII covers any matter affecting the operation of GATT, while the coverage of consultation under Article XXIII is limited to certain matters.[221] Specifically, Article XXIII provides that a contracting party may make representations or proposals to another contracting party if the former party considers that any benefit accruing to it directly or indirectly under GATT is being nullified or impaired or that the attainment of any objective of GATT is being impeded as the result of:

d. the failure of another contracting party to carry out its obligations under GATT, or
e. the application by another contracting party of any measure, whether or not it conflicts with the provisions of GATT, or
f. the existence of any other situation.[222]

Disputes over "nullification or impairment of any benefit otherwise to accrue under GATT" may be brought to consultation under Article XXIII.[223] Another point of difference between the two concepts of consultation is the participation of a third country. This is permitted only with respect to consultations made under Article XXII. Similar differences can be seen in the relation between Article XXII and Article XXIII of General Agreement in Trade in Services (GATS).[224]

[219] Ibid.
[220] WTO General Agreement on Tariffs and Trade (1994).
[221] Shaffer, G. "How to make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies" *in Towards a Development-Supportive Dispute Settlement System in the WTOS*, ICTSD resource paper no. 5 (2003) p. 5-65.
[222] Ibid.
[223] Ibid.
[224] Ibid.

The linchpin of the GATT system for settling trade disputes was the principle of consensus which required all parties to a dispute to accept the outcome of any investigation.[225] Any findings only became binding if a panel report was accepted by consensus. Respondents in a case could therefore veto this ratification procedure and thereby avoid complying with the findings.[226]

The consensus requirement was one of several weaknesses of the system leading to growing frustration about its failure to resolve trade conflicts among GATT Members. The principal shortcomings of the GATT system were: a lack of clear objectives and procedures; ambiguity about the role of consensus, leading to adverse decisions being blocked; a lack of time constraints, leading to delays and uncertainty; and frequent delays in and partial non-compliance.[227]

The GATT system was, to some extent, a victim of its own success in that it was originally intended to regulate the trade of just 23 countries. Its rules were simply not designed to deal with the massive growth of world trade in the latter half of the 20th Century.[228] This was partly fuelled by trade liberalisation under the GATT Kennedy and Tokyo Rounds, a rapidly growing membership and the increasing volume and complexity of trade conflicts.[229] All of these developments placed increasing stresses and strains on an imperfect dispute settlement system.

The DSU superseded the GATT system from 1 January 1995 and is regarded as being one of the central achievements of the Uruguay Round negotiations.[230] It is a multilateral agreement under which WTO members can settle their disputes through a structured and legally binding

[225] Robert Read (2005), Dispute Settlement, Compensation and Retaliation under the WTO. Published in Handbook on Trade Policy.
[226] Ibid.
[227] Read, R. n. 6.
[228] Ibid.
[229] Ibid.
[230] Nordstrom, H. and Shaffer, G. n. 1 p. 3.

process.[231] The desire for the reform of the GATT dispute settlement system was made very apparent in the Punte del Este Declaration at the commencement of the Uruguay Round.[232] There was however no clear system as to how the system for settling trade disputes should be constructed.[233] The United States sought the creation of a rule-oriented approach ('automaticity'), along the lines of the NAFTA system, with a defined timetable for dispute resolution and the potential for cross-retaliation. In contrast, the primary objective of most other members of the OECD, along with many developing countries, was a system that would constrain unilateral action by the United States.[234] The final outcome of the negotiations was the DSU which dealt with many of the perceived weaknesses of the GATT system as well as, at least partially, satisfying the differing objectives of its leading members.[235]

2.3 RULES AND PROCEDURES OF THE DSU

The DSU establishes the Dispute Settlement Body (DSB) comprising representatives from all WTO members states and the DSB is mandated by provisions of the DSU to oversee the implementation of the DSU.[236] The DSU elaborates on the procedure to be followed when adjudicating over disputes arising under covered agreements namely;[237]

f. the Marrakesh Agreement establishing the WTO,
g. the General Agreement on Tariffs and Trade (GATT);
h. the General Agreement on Trade in Services (GATS);
i. the Agreement on Trade Related Aspects of Intellectual Property Rights; and
j. in certain circumstances, the plurilateral Trade Agreements annexed to the Marrakesh Agreement.

[231] Article 3(2) DSU.
[232] Nordstrom, H. and Shaffer, G. n. 1 p. 3.
[233] Ibid.
[234] Ibid.
[235] Ibid.
[236] Article 2 of the DSU.
[237] Article 1.1 of the DSU.

The application of the DSU to disputes under the plurilateral trade agreements is however subject to the adoption of decisions by the parties to those agreements.[238]

Article XXIII of GATT stood at the center of the GATT dispute settlement system and its paragraphs continue to define the conditions under which violation of the WTO rules permit Members to seek redress and their means of so doing. There are three specific circumstances identified in GATT Article XXIII under which WTO Members are permitted to make a complaint under the DSU.[239] The standard case is where a Member country violates the WTO rules and thereby adversely affects other Members. This is also called the 'violation complaint' pursuant to Article XXIII:1(a) of GATT 1994[240]. The second is 'non-violation complaint' pursuant to Article XXIII:1(b) of GATT 1994 where harm is caused even though there is no specific violation of a GATT provision.[241] Finally, there is a "situation complaint" pursuant to Article XXIII:1(c) of GATT 1994. Literally understood, "situation complaint" could cover any situation whatsoever, as long as it results in "nullification or impairment".

The scope of the application of the article covers all of the component multilateral agreements of the WTO. This means that any Member country may seek redress with respect to any violation of the WTO rules by another. There is no requirement to demonstrate that a violation has resulted in injury since all Members are legally obliged to conform to the WTO rules.[242]

The primary objective of the WTO DSU system is to settle trade disputes between WTO members by means of bilateral consultations and mediation in the first instance. Recourse to the establishment of a formal dispute panel is intended as a last resort when all other avenues of conciliation have been exhausted.[243] A WTO member may have recourse to the DSM if it

[238] Appellate body annual report 2009, circulated as WT/AB/13 on 17/2/2010 available at http://ww.wto.org>accessed on 4th September 2014

[239] Read, R. n. 6.

[240] This complaint requires "nullification or impairment of a benefit" as a result of the "the failure of another Member to carry out its obligations" under GATT 1994.

[241] A non-violation complaint may be used to challenge any measure applied by another Member, even if it does not conflict with GATT 1994, provided that it results in "nullification or impairment of a benefit".

[242] Ibid.

[243] Nordstrom, H. and Shaffer, G. n. 1 p. 5.

considers that a benefit accruing to it under the covered agreements has been nullified or impaired by a measure taken by another member state. When such a member brings the complaint to the DSB, the matter is dealt with the under the following four phases;

v. Consultations between the parties.
vi. Panel phase (in case consultations fail to achieve a satisfactory resolution).
vii. Adjudication by the AB (if applicable).
viii. Implementation of the rulings and recommendations from the Panel /the AB.

v. Consultations

A request for consultations formally initiates a dispute at the WTO and triggers the application of the DSU.[244] Traditionally, GATT attached significant importance to bilateral consultation, and many disputes actually were settled in this manner.[245] GATT provides for some special consultation and review procedures, such as the one mentioned in Article XIII at paragraph 2[246], as well as in the "1960 GATT decision on arrangements for consultations on restrictive business practices"[247]. However, paragraph 1 of Article XXII and paragraph 1 of Article XXIII of GATT play the central role in prescribing that "formal" consultations to take place prior to panel procedures.

The DSU specifies that it adheres to the principles of the management of disputes applied under Articles XXII and XXIII of GATT.[248] The DSU provides that before bringing a case, a Member shall exercise its judgement as to whether action under these procedures would be

[244] Chapter 6-dispute settlement system training module available at<http://www.wto.org> accessed on 4th September 2014
[245] Read, R. n. 6.
[246] The paragraph specifies that a contracting party shall, upon request by another contracting party regarding fees or charges connected with importation/exportation, review the operation of its laws and regulations.
[247] Which specified that a contracting party shall, upon request by another contracting party regarding the business practice by which international trade competitions would be limited, give sympathetic consideration and provide an adequate opportunity for consultation.
[248] Article 3(1), DSU.

fruitful.[249] The aim of the dispute settlement mechanism is to secure a positive solution to a dispute.[250] A solution mutually acceptable to the parties to a dispute and consistent with the covered agreements is clearly to be preferred. In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements.[251] Compensation as a measure is usually resorted to only if immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measure which is inconsistent with a covered agreement.[252]

The specific guidelines and timetable for consultations to take place are provided under Article 4 of the DSU. Consultations are a mandatory condition for a subsequent request to be made to establish a dispute panel. The DSU provides that each party should give sympathetic consideration to any representations made by another party and should provide adequate opportunity for consultation. It provides that the parties which enter into consultations should attempt to obtain satisfactory adjustment of the matter concerned.[253] According to the DSU, a request for consultations shall be effective when such request is submitted in writing, gives reasons for the request, including identification of the measures at issue and an indication of the legal basis for the complaint and is notified to the DSB.[254] It provides that the party to which a request for consultations is made (the respondent) is obliged to reply within 10 days after the date of its receipt and shall enter into consultations in good faith within a period of no more than 30 days after the date of receipt of the request, with a view to reaching a mutually satisfactory solution.[255]

WTO Members other than the consulting parties are to be informed in writing of requests for consultations, and any Member that has a substantial trade interest in consultations may

[249] Article 3(7), DSU.
[250] Ibid.
[251] Ibid.
[252] Ibid.
[253] Article 4, DSU.
[254] Article 4(4), DSU.
[255] Article 4(3), DSU.

request to join in the consultations as a third party. It is also provided that the party to which the request for consultations is addressed may reject the said third party's desire to join in the consultations when the party considers that "the claim of substantial trade interest is not well-founded".[256]

If the respondent fails to meet any of the mentioned deadlines, the complainant may immediately proceed to the adjudicative stage of dispute settlement and request the establishment of a panel.[257] If the respondent however engages in consultations without satisfactory results, the complainant may proceed to request for establishment of a panel within 60 days after the request for consultations. In practice however, many parties to disputes often take considerably longer over consultations that the minimum of 60 days.[258] Many trade disputes never go further than the consultation stage, particularly given that WTO Members are under an obligation to resolve their disputes by this means. The parties to a dispute may also make use of arbitration as an alternative method, subject to mutual agreement.[259]

Unlike consultation in which "a complainant has the power to force a respondent to reply and consult or face a panel,"[260] good offices, conciliation and mediation "are undertaken voluntarily if the parties to the dispute so agree."[261] No requirements on form, time, or procedure for them exist.[262] Any party may initiate or terminate them at any time.[263] The complaining party may request the formation of panel, "if the parties to the dispute jointly consider that the good offices, conciliation or mediation process has failed to settle the dispute."[264] Thus the DSU recognized that what was important was that the nations involved in a dispute come to a

[256] Article 49 (11), DSU.
[257] Article 4(3), DSU.
[258] WTO, "A Handbook on the WTO Dispute Settlement System": Cambridge University Press (2004).
[259] Ibid.
[260] Dillon Jr., Thomas J. "The World Trade Organization: a New Legal Order for World Trade?". Michigan Journal of International Law 16 (1995), p. 382.
[261] Article 5(1), DSU.
[262] Article 5(3), DSU.
[263] Ibid.
[264] Article 5(4), DSU.

workable understanding on how to proceed, and that sometimes the formal WTO dispute resolution process would not be the best way to find such an accord. Still, no nation could simply ignore its obligations under international trade agreements without taking the risk that a WTO panel would take note of its behaviour.

Consultations are a prerequisite to the request for establishment of a panel. Parties cannot request the establishment of a panel before the time frame under the DSU in respect of consultations has expired.[265] Consultations are often an effective means of dispute resolution in the WTO as they save time and resources of the parties involved. Consultations however like all other DSU procedures require expertise and financial resources that African countries lack.[266] Busch and Reinhardt (2005) state that rich countries acting as complainants are more likely to extract concessions from defendants than poor countries acting as complainants.[267]

vi. Panel phase

If consultation, good offices, conciliation or mediation fails to settle the dispute, the complaining party may request the formation of panel. The request is made to the Chairman of the DSB in writing, indicating that consultations were held, identifying the specific measures in issue, and a clear summary of the legal basis of the complaint.[268] The content of the request for establishment of the panel is crucial because it defines and limits the scope of the dispute (terms of reference), thereby the extent of the panel's jurisdiction. It is also from the panel's terms of reference that respondents and third parties become aware of the basis of the complaint.[269] The request must be filed at least 11 days in advance to the seating of the DSB in

[265] Article 4(7), DSU.
[266] Marc L. Busch and Eric Reinhardt "Developing Countries and General Agreement on Tariffs and Trade/World Trade Organization Dispute Settlement" Journal of World Trade (2005).
[267] Ibid.
[268] Article 6(2), DSU.
[269] Article 7(1), DSU.

order to be included in the agenda of the DSB meeting.[270] A panel is then established at the second DSB meeting that usually takes place within a month.

The DSB shall form a panel, unless at that meeting the DSB decides by consensus not to establish a panel.[271] Panels shall be composed of well-qualified governmental and/or non-governmental individuals[272] with a view to ensuring the independence of the members,[273] and whose governments are not the parties to the dispute, unless the parties to the dispute agree otherwise.[274] Three panelists compose a panel unless the parties agree to have five panelists.[275]

The Secretariat proposes nominations for panels that the parties shall not oppose except for compelling reasons.[276] If the parties disagree on the panelists, upon the request of either party, the director-general in consultation with the chairperson of the DSB and the chairperson of the relevant council or committees[277] shall appoint the panelists. Such opposition to the nominees must be communicated within 20 days from the establishment of the panel.[278]

When multiple parties request the establishment of a panel with regard to the same matter, the DSU suggests a strong preference for a single panel to be established to examine these complaints taking into account the rights of all members concerned.[279] Once the DSB has established a panel, the complainant files submissions with the Dispute Settlement Secretariat, which then transmits them to respondent to reply accordingly.[280] The DSU gives any member that has a substantial interest in a matter before a panel (and notifies of its interest to the DSB) an opportunity to be heard by the panel and to make written submissions to the panel.[281]

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[270] Rule 3 of the panel rules of Procedure under Appendix 3 to the DSU.
[271] Article 6(1), DSU.
[272] Article 8(1), DSU.
[273] Article 8(2), DSU.
[274] Article 8(4), DSU.
[275] Article 8(5), DSU.
[276] Article 8(6), DSU.
[277] Article 8(7), DSU.
[278] Ibid.
[279] Article 9(1), DSU.
[280] A Handbook on the WTO Dispute Settlement System (2004) at p. 53.
[281] Article 10(2), DSU

The panel convenes an oral hearing following the exchange of written submissions by the parties. This is the first substantive meeting amongst panellists, experts and all parties to the dispute.[282] The complainants lead evidence, followed by the respondents and third parties through oral presentations.[283] The panel may also solicit expert opinion from any individual, expert or body it considers appropriate at this stage. After the oral presentations, the complainant is given four weeks to make rebuttals to the respondent's submissions.[284]

The panel then holds a second hearing wherein the complainant and respondent once again present their factual and legal arguments. At this stage, third parties also present their views and avail the panel a written submissions of their oral statements.[285] Panellists have the power to schedule a third or fourth meeting if necessary.

After submissions by the parties, the panel goes into internal deliberations to review the submissions and reach conclusions as to the outcome of the dispute.

In arriving at judgment, the panel's mandate is to apply existing WTO law to factual questions and legal issues. Article11 and Article 19(2) of the DSU emphasize that panels and the AB must not add to or diminish the rights and obligations set forth in the covered agreements. Following the deliberations, the panel issues a report with two main parts: the "descriptive part" containing a summary of factual and legal arguments of the parties and the "findings part" containing the panel's comprehensive discussion of the applicable law in light of the facts and the evidence presented. [286]

[282] See Paragraph 4, 5 and 6 of the working procedures in appendix 3 DSU.
[283] Article 10(2), DSU.
[284] Paragraph 8 of the Working Procedures in Appendix 3 DSU.
[285] Paragraph 8 and 9 of the working procedures appendix 3 DSU.
[286] Article 12(7), DSU.

As a general rule, it shall not exceed six months from the formation of the panel to submission of the report to the DSB.[287] In exceptional cases, the panel may seek consent from the DSB to extend the time to nine months.[288]

Prior to submission of the Panel report, there are various reports issued to the parties by the panelists. In the interim review stage, the panel submits an interim report to the parties for comment and rectification of any factual mistakes therein. Parties may request a meeting of the panel to further argue specific points raised with respect to the interim report. This is the interim review stage must not exceed two weeks.[289] If no comments are provided by the parties within the comment period, the report shall be the final report and circulated promptly to the members.[290] Within sixty days after the report is circulated to the members, the report shall be adopted at a DSB meeting unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adapt the report.[291]

A panel report that has not been appealed against must be placed on the agenda of the DSB ten days prior to the DSB meeting.[292]

As observed, the panel stage of dispute settlement is quite technical. Preparation and presentation of a case before the panel as well as response to queries from the panel requires special legal expertise, which is a major disadvantage to African countries as not many lawyers in Africa specialize on matters of trade disputes.[293] This is, in my opinion, not a lucrative branch of legal practice in Africa.

[287] Article 12(8), DSU.
[288] Article 12(9), DSU.
[289] Article 15(2), DSU.
[290] Ibid.
[291] Article 17(1), DSU.
[292] Article 16(2), DSU.
[293] Gregory Shaffer n. 19.

Legal experts from the U.S.A and Europe charge fees ranging $200-$600 (or more) per hour.[294] It is estimated that Lawyers representing Kodak and Fuji Corporation in the *Japan-Photographic Film* dispute respectively charged their clients fees in excess of $10,000,000.[295]

vii. Appellate phase

A new and positive feature of the WTO-DSU is the introduction of appellate review of panel decisions. Appellate proceedings are conducted in accordance with the procedures established under the DSU and the Working Procedures for Appellate Review drawn up by the AB in consultation with the Chairman of the DSB and the Director-General of the WTO.[296]

If there is an objection to a panel report, disputing parties may request the Appellate Body (hereinafter "AB") to examine the appropriateness of the legal interpretations employed by the panel.[297] In this case the Report is not submitted to the DSB until the appeal process is completed.[298] The DSB establishes a standing AB that will hear the appeals from panel cases. The AB is composed of seven persons, three of whom shall serve on any one case.[299] Appeals have to be based on points of law such as legal interpretation — they cannot re-examine existing evidence or examine new issues.[300] However, in some instances the appellate panel has the power to re-examine the evidence as was in the case with *Korea - Taxes on Alcoholic Beverages*[301] where the AB stated that an appeal could be based on the credibility and weight ascribed to given facts as a legal characterization issue.

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[294] Ibid.
[295] Ibid.
[296] The Rules of Conduct, as adopted by the DSB on 3 December 1996 (WT/DSB/RC/1), are directly incorporated into the Working Procedures for Appellate Review (WT/AB/WP/5)
[297] Article 17(4), DSU.
[298] Nordstrom, H. and Shaffer, G. n. 1.
[299] Article 17(1), DSU.
[300] A handbook on WTO dispute settlement (2004), a publication by the WTO secretariat at page 57.
[301] WT/DS75/AB/R and WT/DS84/AB/R.

Those persons serving on the AB are to be persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the Covered Agreements generally.[302] The AB's proceedings are confidential, and its reports anonymous.[303] This provision is important because the members of the appellate panel do not serve for life. This means that if their decisions were public, they would be subject to personal retaliation by governments unhappy with decisions, thus corrupting the fairness of the process.[304]

The appellant must file written submission in ten days, setting out in detail their arguments as to why the panel committed an error and specifying the type of ruling the AB should arrive at.[305] The respondent then files their submissions in response to the allegations of error as pleaded by the appellant within 25 days.[306]

WTO Members that were third parties at the panel stage may also participate and file written submissions within 25 days from the notice of appeal.[307] A WTO Member that has not been a third party at the panel stage cannot "jump on board" at the appellate stage. If such a party identifies its interest in the dispute in the light of the content of the panel report. The party may seek to submit an amicus curiae brief, which the AB is entitled to accept, but not obliged to consider.

Approximately 45 days after the notice of appeal, the AB holds an oral hearing. The appellant, respondent and third parties make oral submissions, after which the AB division poses questions to the participants.[308] Following the oral hearing, the AB division exchanges views on the issues raised in the appeal with the four other AB members from another appellate division.

[302] Article 17(3), DSU.
[303] Article 17(10), DSU.
[304] A handbook on WTO dispute settlement (2004), a publication by the WTO secretariat at page 57.
[305] Rule 21(2) of the Working procedure for Appellate body.
[306] Rule 22(2) of the Working procedure for Appellate body.
[307] Article 17(4), DSU.
[308] Rules 27(1) of the Working procedure for Appellate body.

This exchange of views is intended to give effect to the principle of collegiality in the AB. It also serves to ensure consistency and coherence in the jurisprudence of the AB.[309]

The AB may uphold, modify, or reverse the legal findings and conclusions of the panel.[310] Following the exchange of views with the other AB members, the AB concludes its deliberations and drafts a report. In contrast to the panel procedure, there is no interim review at the AB stage. The AB and its divisions are required to make their decisions by consensus.[311]

Both the AB report and the Panel reports must be tabled before the DSB to enable it understand the overall ruling only after reading both reports.[312] The DSB and the parties shall accept the report by the AB without amendments unless the DSB decides by consensus[313] not to adopt the AB report within thirty days following its circulation to the members.[314] Normally appeals should not last more than 60 days, with an absolute maximum of 90 days.

Following the adoption of the panel/AB reports, the DSB gives a recommendation and ruling to the respondent (where the complainant successfully challenges a violation) to bring the measure into compliance with the covered agreement. The respondent must inform the DSB within 30 days after the adoption of the report(s), of its intentions to implement the recommendations and rulings of the DSB.[315] If immediate compliance with recommendations and rulings is not possible, the respondent has a grace period to achieve such compliance. The grace period is agreed upon by the parties or determined by an arbitrator.[316]

[309] Rule 4(1) of the Working procedure for Appellate body.
[310] Article 17(13), DSU.
[311] A handbook on WTO dispute settlement (2004), a publication by the WTO secretariat.
[312] Article 21(3), DSU.
[313] This is what is known as the negative consensus rule. This means that the reports of the Panels or AB are automatically adopted by the DSB unless the DSB decides by consensus not to adopt such a report. This is different from the system under GATT where the report was only adopted at the General Council on consensus.
[314] Article 17(14), DSU.
[315] Article 21(3), DSU.
[316] Articles 21(3) and 21(3) (c), DSU.

viii. Implementation of Panel/AB reports

Once a Final or AB Report has been adopted by the DSB, its recommendations and rulings become binding on the parties to a dispute and the losing respondent is required to bring its trade regime into compliance with the WTO rules. This normally means the disputed measures that were the subject of the original dispute and found to be inconsistent with the WTO are to be withdrawn.[317]

Under DSU losing respondents have 30 days after the adoption of a Report to inform the DSB of their intentions regarding the implementation of Panel or AB recommendations.[318] If it is impracticable to comply immediately with the recommendations, the Member is given a reasonable period of time to do so. Such reasonable period of time may be decided by mutual agreement between the disputing parties concerned. However, in the absence of such mutual agreement, the parties may refer the decision to arbitration. In principle, an arbitrator usually is one of the three AB members who conducted the appellate review of the case concerned. The mandate of the arbitrator is to determine the "reasonable period of time" within 90 days after the date of the adoption of report. Ccompliance is required to be '*within a reasonable time*', normally not exceeding 15 months.[319] The DSB is responsible for the surveillance of the implementation of adopted recommendations and rulings. In the event that there is dissatisfaction or disagreement concerning a respondent's compliance with the recommendations and rulings of the DSB, a plaintiff has further recourse to the dispute settlement procedures and a new Panel Report.[320] Actions under this article are not uncommon and have been used by both plaintiffs and respondents to establish whether any regulatory changes that have been made are WTO-compatible.[321]

[317] Nordstrom, H. and Shaffer, G. n. 1 p. 10.
[318] Article 21, DSU.
[319] Article 21(3), DSU.
[320] Article 21(5), DSU.
[321] Supra n. 109.

The DSU does not usually give any specific instruction on how to implement the recommendations. The issue of implementation is listed on the DSB agenda 6 months after the date of establishment of the AB until it is resolved.[322] At least 10 days before each DSB meeting, the Member concerned is required to provide the DSB with a written status report of its progress in the implementation.

When the parties disagree on how the respondent has implemented the recommendations/rulings, they engage panel procedure to enforce compliance. Compliance panels must consider whether the measure implemented cures the violation as found by the original panel.

If after a reasonable time a respondent fails to bring an infringing measure in conformity with WTO laws, the parties enter into negotiations within 20 days to agree on satisfactory compensation. According to the DSU, compensation can be through the imposition of tariff surcharges or supplementary concessions offered for other products.[323] If the parties do not reach an agreement on compensation, the complainant must seek authorization from the DSB to suspend existing concessions under covered agreements as well as permission to impose trade sanctions against a respondent that has failed to compensate them. This suspension is applicable to a level commensurate with the trade injury. This is known as retaliation.[324]

Retaliation is usually the final and most serious consequence a non-implementing Member faces in the WTO dispute settlement system. In principle, the sanctions should be imposed in the same sector as that in which the violation is found to have occurred.[325] For example in responding to a violation in the area of patents, a complainant should reattribute an offending respondent with sanctions in the same area; namely patents. This is known as parallel retaliation.

[322] Article 21(6), DSU.
[323] Article 22(2), DSU.
[324] Ibid.
[325] Article 22(3) (a), DSU.

However, if the complainant considers it impracticable or ineffective to apply sanctions within the same sector, the complainant is authorized to imposed sanctions in a different sector under the same agreement.[326] For example, a violation with regard to patents could be countered with suspension of measures in the area of trademarks. In turn, if the complainant considers it impracticable or ineffective to remain within the same agreement, and the circumstances are serious enough to cause them great economic loss, the countermeasures may be taken under another agreement.[327] This is known as cross-retaliation.

A good example is in the *US Upland cotton case*,[328] the USA having given actionable subsidies to its cotton farmers was ordered by the AB to compensate Brazil. The USA however ignored the ruling until the compliance Panel authorized Brazil to pursue retaliation against the U.S.A in other sectors namely intellectual property and services.

In applying the principles of retaliation, the complainant should take into account; the trade in the sector under the agreement where a violation was found, the importance of such trade to that party and the broader economic consequences of the suspension of concessions.[329] If parties disagree on the complainant's proposed form of retaliation (i.e. whether the level of retaliation is equivalent to the level of violation), the parties must request for arbitration within 60 days and the arbitrator's decision as final.[330] The complainant must not proceed with the suspension of obligations during arbitration.[331]

[326] Article 22(3) (b), DSU.
[327] Article 22(3) (c), DSU.
[328] WT/DS267.
[329] Lucas Eduardo F. A. Spadano "Cross-Agreement Retaliation in the WTO Dispute Settlement System: An Important Enforcement Mechanism for Developing Countries?" World Trade Review Journal 7: 3, (2008), p. 12-13
[330] Article 22(6), DSU.
[331] Ibid.

2.4 THE DSU PROVISIONS ON DEVELOPING COUNTRIES

The WTO system and the DSU recognize that developing countries need a high level assistance in order to participate more effectively in trade disputes.[332] To this end, the Advisory Center on WTO Law (ACWL), was established in 2001 to provide legal support to developing countries in their WTO activities, mainly, but not limited to, dispute settlement.[333] The ACWL provides dispute settlement services at rates much lower than those of private law firms, and it also applies a cost ceiling.[334]

To qualify for these services, developing countries must be members of the ACWL and pay a single contribution calculated on the basis of their share of world trade. ACWL services are invoiced by the hour, at a rate which varies in accordance with the member's category. It is however noticeable that there are niche law practices emerging in BRICS countries that are able to litigate WTO disputes at more reasonable rates than their counterparts from developed countries.[335]

The DSU, on the other hand, has explicit provisions on how the DSU is to be applied to developing countries as opposed to the developed countries. For example the DSU requires that during consultations Members should give special attention to the particular problems and interests of developing country Members.[336] Article 8 also requires that when a dispute is between a developing country Member and a developed country Member the panel shall, if the developing country Member so requests, include at least one panelist from a developing country Member.[337] Article 21 also requires that when implementing the recommendations and rulings of the panel or AB, particular attention should be paid to matters affecting the interests

[332] H. E. Zunckel & L. Botha, "The BRICS; South Africa and dispute settlement in the WTO". SAFPI Policy Brief No 9 (2012).
[333] Torres R. "Use of the WTO trade dispute settlement mechanism by the Latin American countries – dispelling myths and breaking down barriers" WTO Staff Working Paper ERSD-2012-03, Geneva (2012) .
[334] Ibid.
[335] Ibid.
[336] Article 4(10), DSU.
[337] Article 8(10), DSU.

of developing country Members with respect to measures which have been subject to dispute settlement.[338]

All the above initiatives have been made possible by the WTO in order to encourage the participation of the developing countries in the WTO dispute settlement mechanism.

2.5 CONCLUSION

Dispute settlement is a central pillar of the multilateral trading system, and the WTO's unique contribution to the stability of the global economy. Without a means of settling disputes, the rules-based system would be less effective because the rules could not be enforced. The WTO's procedure underscores the rule of law, and it makes the trading system more secure and predictable. The system is based on clearly-defined rules, with timetables for completing a case. First rulings are made by a panel and endorsed (or rejected) by the WTO's full membership. Appeals based on points of law are possible.

Dispute resolution under the WTO is a three prong stage; the consultation stage, the Panel/AB review stage and the implementation stage. The consultation stage ensures that the disputes, being economical in nature, are resolved in an amicable and quick manner before handing over the same to the Panel. The Panel is usually constituted by the DSB where consultations have broken down and the complainant has requested the DSB to constitute the Panel. The AB is the appellate body that handles all matters determined by the Panel and such determination is not acceptable to either party. Matters to the AB are usually based on points of law and no new evidence can be admitted at the appeal stage. Finally, the implementation stage which is monitored by the DSB and it is the stage where the DSB implements the decision of the Panel/AB and it requires the offending party to bring its actions in conformity with the WTO

[338] Article 21(2), DSU.

and its agreements. The cases take approximately 1year and 3 months from the consultation stage to the determination of appeal and 1 year if there is no appeal.

The WTO system has in place several incentives to improve the participation of developing countries in the WTO dispute resolution system yet such an improvement is yet to be seen. The next two chapters will look into the factors that have led to the low use of the WTO dispute settlement system by the developing countries and what should be done to improve the same.

CHAPTER FOUR

4.0 RECOMMENDATIONS AND CONCLUSIONS

4.1 RECOMMENDATIONS

The need to reform the DSU has been underscored in the previous chapter. The highlighted shortcomings of the DSU and the apparent lack of participation of African countries is a problem that could eventually undermine the entire WTO DSM.[339]

As earlier noted, it is important that African countries, which form the majority of the membership of the WTO from one region, to participate in the development of jurisprudence at the DSB. This also ensures that they are active participants in international trade law developments.[340]

This chapter, therefore, aims at providing practicable suggestions to reform the DSU in order to encourage the participation of the African countries in the DSB. The chapter will also look at the proposals[341] forwarded by the African countries in the early stages of the Doha negotiations in making recommendations hereunder. The chapter suggests how to tackle the various problems faced by African countries as highlighted in the previous chapter.

[339] Mosoti Victor "Africa in the first decade of WTO dispute settlement" Journal of international Economic Law October. (2005) page 10.

[340] Amin Alavi "African Countries and the WTO's Dispute Settlement Mechanism"; (2007) Development Policy Review.

[341] These are; one stand-alone proposal (by Kenya, TN/DS/W/42), one joint proposal (TN/DS/W/15), and three proposals with other countries, one of which bore the name of the least developed (LDC) group (TN/DS/W/17, TN/DS/W/18 and TN/DS/W/19)

4.1.1 CREATION OF A LEGAL ASSISTANCE AND AN ADVISORY CENTER ON WTO UNDER THE AFRICAN UNION

Currently there is an advisory center on WTO issues located in Geneva. This center helps in advising Least Developing Countries (LDCs) and DCs. According to Mr. Nelson Ndirangu[342] it was specifically created to provide legal services to LDCs and DCs at a nominal cost. This center has however, been deemed insufficient by various scholars.[343] Amin Alavi sees it as not capable of addressing the issues of LDCs and DCs sufficiently due to the fact that it is not capable of providing legal services to all the LDCs and DCs owing to a lack of adequate financing. He also argues that the center is quite backlogged with matters due to understaffing and the fact that they charge fees on advisories (however minimal) is a step back in encouraging the LDCs and DCs use of the DSB.[344]

The creation of an African Union (AU) Advisory Center on WTO will go a long way in encouraging the use of the DSB by the African countries. In the center at Geneva, only one DC can be assisted at any given time. If two DCs approach the center on the same issue, assistance is provided of a first come first serve basis.[345] This anomaly can be rectified by creating an advisory center under the AU to serve African countries.

The advisory centers should not only be created to assist the LDCs and DCs, but should also be properly funded to eliminate the issue of charging fees (however minimal) because what is minimal to one country might be quite substantial to another country depending on their economic powers. The creation of the AU Advisory Center will tackle the problems experienced by African countries in the 'upstream' stage of dispute resolution under the DSB.

[342] Mr. Nelson Ndirangu is the Director of Economic and International Trade in the Ministry of Foreign Affairs and International trade in Kenya.
[343] Amin Alavi n. 2.
[344] Ibid.
[345] Ibid.

4.1.2 PROVISION FOR INTERIM RELIEFS

As discussed in the previous chapter, under the current DSU, there is no possibility for a complaining party to request that an interim measure be ordered by the panel to, *inter alia*, suspend the measure at issue during the proceedings.[346] The concept of interim relief is well-established in the major legal cultures and under domestic court proceedings and is perceived as a common temporary relief pending a final ruling on the merits of the case. In international trade, where a government measure is alleged to be inconsistent with international law, it would be desirable to provide for a mechanism to alleviate the impact of such measure on private parties during dispute settlement proceedings.[347]

In absence of the rule allowing interim relief, States would be more inclined to take measures that are or can be inconsistent with their international obligations, knowing that it will be able to apply such practices/trade measures with impunity until it is found by a third party adjudication to be in violation of its international obligations.[348] In addition, where the available remedy is only of a prospective nature such as under the DSU, the State is even more emboldened to behave in this manner because there is no possibility of sanctions for the period starting from the adoption of the measure to the moment when implementation of an inconsistency ruling is due. During that period, the measure may have caused significant injury to private parties. In international trade context, this could possibly result in commercial loss as well as worker lay-off.[349]

The arguments put forward to counter this view, revolves primarily around questions of possible abuse and State sovereignty.[350] In fact, it has been argued that if States were to be provided with the possibility of obtaining interim relief for wrongful trade measures, they

[346] Virachai Plasai "Compliance and Remedies against Non Compliance under the WTO System: Toward a more balanced regime for all members" (2006). ICTSD page 8. Accessed at http://www.ictsd.org/downloads/2008/05/compliance-and-remedies-against-non-compliance-under-the-wto-system.pdf on 1st October 2014.
[347] Ibid.
[348] Ibid.
[349] Ibid.
[350] Ibid.

would be encouraged to bring frivolous cases and hope for a possible window during which their private operators can evade a legitimate trade measure by another State regardless of whether such measure is consistent with international law. In my opinion, this is a frivolous argument as the Panel has the discretion to determine on a balance of probabilities, whether or not an interim relief is warranted in any situation. If the country seeking the relief is also not forthright with facts at that point, the same can be rectified by issuing financial compensation to the respondent payable by the complainant for interfering with its trade, once the case is complete.

I believe that the lack of interim relief during panel and Appellate Body proceedings, to a large extent, renders the WTO dispute settlement system less secure and predictable than it should have been.[351] Once a case is brought to the DSB, there should be a possibility for the panel, pending decision on the merits of the case, to issue a decision of preliminary nature to prevent the Member concerned from taking steps or doing something which would change factual situations and thus affect future decision of the panel on the merits of the case.[352] The purpose would be to protect the rights of the parties as of the time of commencement of proceedings, without allowing the panel to pass an interim judgment on the substance.[353]

4.1.3 PROVISION FOR MONETARY COMPENSATION

To enhance the remedy aspect of the DSU, we believe that trade compensation must be made a viable option, in particular where the responding party finds it impracticable to comply immediately or within a reasonable period of time with the DSB recommendations or rulings.[354]

Compensation in the context of the WTO is generally understood as further trade concessions accorded by the responding party in addition to its WTO bound concessions. To allow flexibility,

[351] Article 3.2 of the DSU.
[352] Virachai Plasai n. 8 p. 42.
[353] Ibid.
[354] Virachai Plasai n. 8 p. 43.

however, the DSU should make it clear that monetary compensation is also possible.[355] WTO disputes relate to trade benefits. According to normal practice and relevant WTO jurisprudence, these benefits are of quantifiable nature.[356] In this context, it is thus feasible that nullified or impaired benefits can be compensated in monetary terms. There is therefore no justification in preventing a responding party to pay monetary compensation to the complaining party, if both sides so agree.[357] Proposals have been tabled to amend the DSU in this sense in cases brought by a least developed country,[358] or a developing country[359] against a developed country.

As a remedy option, compensation may be combined with the procedure for determining the level of the nullification or impairment, which under the current DSU is available only for suspension of concessions or other obligations. The idea is to allow the level of nullification or impairment to be determined prior to or during the period of compensation negotiations between the parties.[360] The EC proposed along these lines that the parties to the dispute may agree at any time before the submission of a request for suspension, to request an arbitration to determine the level of the nullification or impairment caused by the WTO-inconsistent measure. The arbitration must complete its work within 45 days of the request. Subsequent negotiations on compensation, if requested, must be conducted on the basis of a proposal made consistent with the level of the nullification or impairment determined by the arbitrator.[361]

To render compensation more meaningful as an option, Members may need to re-think the MFN requirement under Article 22.1.[362] In the absence of such MFN requirement, any Member that suffers nullification or impairment of benefits as a result of a measure by another Member

[355] Ibid.
[356] See EC, TN/DS/W/1, pp. 17-18 at paras 25-26. Compensation was considered by the EC in the *EC – Hormones* cases. At the DSB meeting on 28 April 1999, the EC informed the DSB that it would consider offering compensation in view of the likelihood that it may not be able to comply with the recommendations and rulings of the DSB by the deadline of 13 May 1999. However, compensation did not happen.
[357] Virachai Plasai n. 8 p. 46.
[358] See LDC Group, TN/DS/W/37, paragraph VII.
[359] See African Group, TN/DS/W/42, paragraph VIII.
[360] Virachai Plasai n. 8 p. 46.
[361] See EC, TN/DS/W/1, pp. 16-17 at paras 24-25.
[362] Virachai Plasai n. 8 p. 47.

can bring a case against the latter and, if successful, can request compensation on its own right. This should render compensation a more attractive remedy both for the responding party – for whom the "price" of compensation is lower – and the complaining party – who does not have to share the benefits with non- disputing party.[363]

Monetary compensation arguably, is not subject to MFN requirement, as MFN obligations under WTO covered agreements relate only to treatment of products or services of other Members and not to monetary reparation between Members.[364] Australia has proposed an amendment to Article 22.2 so that in case where mutually acceptable compensation is not available to third parties to the dispute, the responding party agrees to an expedited arbitration under Article 25 to determine the right of a third party to compensation. This suggests that not all WTO Members would necessarily receive compensation or receive the same level of compensation as the parties in the dispute.[365] Under this thinking, monetary compensation would become more attractive as an option.[366]

The case for monetary compensation, in my view, is based on the fact that an infringement having occurred and determined as such, the infringing party and the complainant should be allowed to agree on the proper form of compensation, whether monetary, tariff reductions or subsidies or all of these forms of compensation. Allowing this will encourage those who do not participate in the DSB to participate as they will be will see it as an opportunity to discuss the best form of compensation depending on the circumstances of each case. Monetary compensation is the only appropriate remedy where a member has suffered irreparable damage to its trade.

[363] Ibid.
[364] Ibid.
[365] See Australia, TN/DS/W/49, p. 4.
[366] Virachai Plasai n. 8 p. 47.

4.1.4 CROSS-RETALIATION AND COLLECTIVE RETALIATION AS A REMEDY

Most African countries view the remedy of retaliation as that which was created for countries that can retaliate and not for all members of the WTO.[367] According to Mr. Ndirangu, retaliation is only possible where the party retaliating is stronger economically. Weaker countries can't afford to retaliate against stronger countries as they are the one that will end up losing in terms of trade. He therefore argues that retaliation as a mechanism to ensure compliance is a measure that needs to be adjusted to fit the African states. The problem is that, as small countries with an insignificant share of international trade, most African nations cannot meaningfully retaliate against their bigger trading partners since their resulting losses would exceed any possible gains.[368]

The reform of the DSM's retaliation mechanism is on the Doha agenda. Some key players have raised the need for time limits at this stage. Others have suggested introducing an automatic provision for cross-retaliation, whereby the winning party could freely choose which sectors it might target. A third group of countries proposes that members should be able to auction their retaliation rights. The main point of the African Group's proposal is that the right to retaliate against a country losing a case should be extended to all members and not only the winning party.[369] To this end, the African Group proposed that Article 22.6 of the DSU should be amended to reflect "Collective retaliation"[370]. The group advocates for an additional subsection which will read as follows;

> *"Where the case is brought by a developing or least-developed country against a developed Member… the DSB, upon request, shall grant authorization to the developing/ least-developed Member and any other Members to suspend concessions or other obligations within 30 days"*

[367] Amin Alavi n. 2 p. 39.
[368] Ibid p. 34.
[369] Ibid.
[370] See TN/DS/W/17 (9 /10/2002) and TN/DS/W/42 (24/01/2003).

This proposal could be implemented either as a general amendment to the DSU or applied to African/LDC countries only as a SDT provision – although up to now the DSM's retaliation system does not operate with any SDT provision.[371]

Ng'ong'ola however states that collective retaliation is "too revolutionary" and impracticable to implement.[372] He argues that collective retaliation is a blunt instrument aimed at terrorizing a wrong doer into compliance with a covered agreement. He states that collective retaliation might allow a WTO member to buy the right to wage a proxy trade war. In his view, W TO members might use the guise of collective retaliation and ally with one another to "fight" their opponents for other causes other than breach of covered agreements.

Kessie and Ado[373] are of the view that collective retaliation would fundamentally alter the DSU because it is up to every Member to ensure that its rights and legitimate expectations are not being impaired. They note that it is a cardinal WTO principle that suspension of concessions must be equivalent to the level of nullification/ impairment. Accordingly, while Members may have an interest in a particular case, they should not have the right to take action reserved exclusively for the parties to the dispute.

Currently, retaliation under the DSU has failed to ensure compliance with DSB recommendations and rulings.[374] Cross-retaliation may just be the light at the end of the tunnel for the WTO.

[371] Amin Alavi n. 2 p. 34

[372] Ng'ong'ola Clement "African member states and the negotiations on dispute settlement reform in the world trade organization" (2009) Tralac at p.128

[373] Edwin Kessie and Kofi Addo "African Countries and The WTO Negotiations on Dispute Settlement" (2005) available at <http//:www.trapca.org/pages.php?id=88> accessed on 21st May 2014.

[374] Amin Alavi n. 2 p. 34.

4.1.5 AMENDMENT OF SDT PROVISIONS

The DSU contains some special and differential treatment provisions for developing countries. Article 21.2 provides for that particular attention be paid to "matters affecting the interest of a DC Member" concerning a measure subject to dispute settlement. Article 21.7 provides that for a matter raised by a DC Member, the DSB must consider what further action it might take "which would be appropriate to the circumstances". If the complaining party is a DC, in considering appropriate action to be taken, the DSB must under Article 21.8 take into account the trade coverage of the measures at issue and their impact on the economy of the complaining party.

These provisions, however, have proven to be inadequate to address concerns and interests of developing-country Members.[375] The obligations contained therein are loosely termed and remain vague. Article 21.2 indeed has only a recommendation value and Article 21.7 and 21.8 only set forth the principle without specifying in concrete terms how the DSB can address problems of disadvantageous position of developing country Members in the litigations.[376]

In addition, the DSU does not provide for a specific SDT in one area that is most crucial to developing country Members: compliance and suspension of concessions or other obligations.[377] Whether a developing country is on the complying end or the suspending end of the equation, the DSU puts the parties to the dispute on an equal footing.

For compliance and retaliation matters, the size of the economy concerned and its ability to withstand sanctions and adapt itself will always make a difference.[378] Most developing countries lack the ability to make use of many DSU provisions regarding suspension of concessions or other obligations. They are more likely to find themselves in a situation where it is not realistic or possible to suspend concessions or other obligations against a Member

[375] Virachai Plasai n. 8 p. 16.
[376] Ibid.
[377] Ibid.
[378] Ibid

concerned, be it a developed or a developing country.[379] In fact, the smaller the size of the economy and the volume of trade, the slimmer the chance of finding a good or a service sector to be subject of suspension that would not produce some kind of adverse effects for the suspending Member.[380]

African countries themselves identify the problem in terms of the failure of the DSM's SDT provisions to address 'lack or shortage of human and financial resources, and little practical flexibility in selection of sectors for trade retaliation'.[381] The solutions proposed in response vary in scope and ambition. Some aim at making existing non-binding SDT provisions legally binding, for example changing 'should' to 'shall' in the provisions concerning assistance and thereby presumably making them mandatory and operational.[382] Others propose the inclusion of similar provisions in the DSU, for example requiring the WTO to establish a 'Fund on Dispute Settlement' that could be used by DCs.[383]

A good example here is the African Group's aim of amending the SDT provisions on the composition of panels (Art. 8.10 of the DSU). It is proposed that, in future, it should be automatic for at least one panelist to be from a developing country in cases involving a DC. Furthermore, if the DC concerned so requests, another panelist from a DC should be added.[384]

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[379] Ibid.

[380] Cases in which a developing country requests for suspension are: *EC – Bananas III (Ecuador)* and *Canada – Aircraft Credits and Guarantees* – both of which actual suspension did not occur. See *EC – Bananas III (Ecuador) (Article 22.6 – EC)*; Decision by the Arbitrator, *Canada – Export Credits and Loan Guarantees for Regional Aircraft – Recourse to Arbitration by Canada under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement* ("*Canada – Aircraft Crdits and Guarantees (Article 22.6 – Canada)*"), WT/DS222/ARB, 17 February 2003.

[381] See TN/DS/W/15, para. 8

[382] See TN/DS/W/17.

[383] See TN/DS/W/42.

[384] Mosoti, V. "Does Africa Need the WTO Dispute Settlement System?" (2003) in V. Mosoti (ed.), Towards A Development-Supportive Dispute Settlement System in the WTO. Geneva: International Center for Trade and Sustainable Development p. 83.

4.1.6 ADEQUATE SURVEILLANCE OF IMPLEMENTATION OF RECOMMENDATIONS

As earlier indicated in chapter three of this thesis, failure to ensure that the DSB recommendations are implemented is a major issue not only to African countries but to all members that use the DSB for dispute settlement.

The current surveillance mechanism based on status reports is certainly useful, but improvement is possible to make it stronger and more meaningful.[385] First, as suggested by the EC and Japan, surveillance process under Article 21.6 should start earlier. Under their proposals, the Member concerned would be required to report on the status of its implementation beginning six months after the date of adoption of the recommendations or rulings of the DSB, instead of six months following the date of establishment of the reasonable period of time.[386] This should bring about more effectiveness to the process since early monitoring will help encourage compliance.

In addition, to make the status reports more informative and the mechanism more effective, there should be a requirement in the DSU for a detailed status report on the implementation progress. Mandatory information should include details such as the steps taken under domestic law, the progress in comparison to the last status report (where applicable) and the expected date of completing the next phase of implementation.[387]

Where there is no compliance and compensation has been provided or concessions or other obligations have been suspended, a detailed status report would be even more necessary for effective surveillance. Pursuant to Article 22.8, the Member concerned should also give detailed explanation in its status report as to why it has not complied.[388] Since compensation

[385] Virachai Plasai n. 8 at page 41.
[386] See EC, TN/DS/W/1, p. 14; Japan, TN/DS/W/32, p. 4.
[387] Virachai Plasai n. 8 at page 41.
[388] Ibid.

and suspension of concessions are only temporary measures, the Member concerned should be required to regularly provide reasons for their continued existence.[389]

Proposals have also been made for a specific report in case the Member concerned considers that it has complied with the recommendations or rulings of the DSB. Under these proposals, upon compliance with the recommendations and rulings of the DSB, the Member concerned has to submit to the DSB a written notification on compliance, which would include a detailed description as well as the text of the relevant measures the Member concerned has taken.[390] It has also been proposed that if the Member concerned expects that it cannot comply at the expiry of the reasonable period of time, it has to submit a written notification on compliance including the measures it has taken, or the measures that it expects to have taken by the expiry of the reasonable period of time.[391] Such requirements would allow the Member concerned to provide detailed reason why it cannot comply with the DSB recommendations or rulings at the expiry of the reasonable period of time.[392] These proposals are in the right direction for making a stronger surveillance system, and should be seriously considered by the Members

4.1.7 REDUCTION OF LITIGATION PERIOD

The length of litigation is of importance to the litigants. It takes approximately not less than three years to reach the retaliation stage of the DSB process.[393] According to submissions made by Mexico to the special session on the review of the DSU on the 4/11/2002, the average period between the establishment of a panel and the expiry of the reasonable period to comply was 775 days, or over two years, which grew to 1507 days or over 4 years once the extended

[389] Ibid.
[390] See EC, TN/DS/W/1.
[391] Ibid.
[392] Ibid.
[393] Virachai Plasai n. 8.

periods were included.[394] This has made the dispute settlement mechanism become lesser attractive to member states, especially African states.

In my opinion, given the nature of the disputes brought before the DSB, the resolution of trade disputes should be dealt with promptly. The length of the dispute resolution process coupled with the lack of retroactive compensation under the DSU is a discouragement, not only for African countries, but also for member states towards the use of the DSB. These extended periods should be dispensed with to make the WTO DSM a quick and proper means for determining trade disputes. This will go a long way in encouraging the use of the DSB.

4.1.8 EDUCATING THE CITIZENS

As earlier stated in chapter three, most African governments do not invest in education of their citizens. This is because, as earlier stated by Gregory Shaffer and Mr. Ndirangu, African governments have far much serious problems to deal with than to educate experts in the field of WTO/International trade.

Understanding the WTO agreements and the DSU and the dispute resolution process in particular is cumbersome. It needs proper training of personnel to understand all the WTO agreements. African countries have a lot problems but the DSB is not a priority to them. Ochieng and Majanja state that raising awareness and direct training regarding the functioning of the system and the inbuilt flexibilities will go a long way towards promoting a better understanding of the WTO Agreements and is likely to facilitate a stronger engagement by developing countries in their negotiation and reform.[395]

African countries should train personnel in matters of WTO in order to save on legal costs associated with seeking legal advice on disputes that may arise out of any WTO agreements.

[394] See TN/DS/W/23

[395] David Ouma Ochieng and David S. Majanja, "Sub-Saharan Africa and WTO Dispute Settlement: The Case Study of Kenya" (2007).

4.1.9 INTRODUCTION OF LOSER-PAYS-COSTS RULE

George Ochich and Annah Konuche[396] proffer in their article for the need to introduce the loser-pays-costs rule in the WTO dispute settlement process. They argue that the loser-pays-costs rule would entitle the winner in a dispute at the DSB to have all costs incurred in the litigation, right from investigation of the complaint through to the implementation stage reimbursed or paid by the losing party.[397]

They further aver that the loser-pays-costs rule has the potential of specifically improving the developing nations' access to the Dispute Settlement Process while also improving their economic standing as well as promoting the WTO objective of promoting free trade. The loser pays rule has the advantage of flexibility in that it gives the adjudicating body the discretion to allocate costs and to exempt an indigent losing party if it deems necessary. Also notable in this system is that the adjudicating body has the final word on how much costs a party is entitled to and may make adjustments where necessary to curb extravagant litigation and to ensure that costs are not used as a punitive measure especially against the weak and poor complainants.

The rule would encourage the small countries to file complaints that are small but viable because it guarantees the recouping of costs incurred during the whole dispute settlement process.[398] The system would make the WTO Dispute Settlement Process a more viable option of dispute settlement for developing countries when a trade violation occurs. The system would also enhance the interest of private sector in the developing countries in being more vigilant in monitoring market access rights and in sponsoring litigation before the DSB. This would in turn make trade vibrant and enhance the WTO objective of promoting free trade and good trade relations among its members.

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[396] George O. Otieno Ochich & Annah C. Konuche "Enhancing Small Nations Access to the WTO Dispute Settlement Process: A Case for the Loser-Pays-Costs Rule" Vol. 1 No. 1 L.S.K.J (2009) p. 94.
[397] Ibid.
[398] Ibid.

I agree with the sentiments of Ochich and Konuche in that if the loser-pays-costs rule is introduced it will encourage participation in the DSB by DCs and LDCs who are certain that once they win their cases they are to be reimbursed of the costs expended in winning the cases. This rule coupled with the availability to retrospective compensation the party whose trade was nullified or impaired by the conduct of the other, will in my opinion, cure the lack of participation by LDCs and DCs.

4.1.10 THE NEED TO LEGISLATE ON DISPUTE SETTLEMENT UNDER RTAs AND DSU

Owing to the conflict arising out of the proliferation of RTAs as discussed in the previous chapter, there is need to amend the DSU and provide for a clause on the choice of forum. The DSU should provide that a matter that infringes on the provisions of both an RTA and the WTO agreements can only be initiated in one of the available choices of forum and after initiation of the procedure none of the parties can use the mechanism available under a different forum.[399] For instance, the NAFTA provides that, once dispute settlement procedures have been initiated under Article 2007, or the dispute settlement proceedings have been initiated under the GATT, the forum selected shall be used to the exclusion of the others.[400]

The WTO DSU should also introduce the concept of *res judicata* in its dispute resolution system.[401] Introduction of this principle/concept will mean that parties cannot refer a matter, already subject of an RTA dispute settlement body determination, to the DSB where the parties, the subject matter and the legal claims are the same.[402]

These amendments to the DSU will deter the idea of forum shopping.

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[399] Gaurav Jain, "The Luxury of Forum Shopping in International Trade Disputes: Problems and Solutions" Briefing Paper No. 8 (2007).
[400] Ibid.
[401] Ibid.
[402] Ibid.

4.2 CONCLUSION

The story of African countries and the DSU illustrates their marginal role and position in the WTO in general. This research was guided by the hypotheses that;

a. African counties have better avenues that they can use to determine any disputes arising between them and their trade partners as opposed to using the WTO dispute settlement mechanism.
b. Factors such as entry barriers to using the WTO dispute settlement mechanism, the cost of referring a dispute to the DSB, inadequate and inappropriate nature of the retaliatory mechanism under the DSU and the lack of a development orientation in the DSU hinders African countries' participation in the WTO dispute settlement mechanism.
c. African countries should actively participate in the WTO dispute settlement mechanism, in order to defend their trade and economic interests in this age of globalization.
d. African countries are disinterested in the WTO dispute settlement mechanism as they feel that it favours the developed countries and the DSU is out of touch with the developing world.

Upon that background, this paper set out to analyze the functioning and operation of the DSU *vis-a-vis* the utilization of the dispute settlement mechanism by African states. Although there has been a shift from politics to legality, the dispute settlement process is still far from ideal. Recourse to the WTO dispute settlement mechanism is not for every member states because it is costly, time-consuming with intricate rules and procedures that lack attention to development concerns of African countries. Overall, African countries have not properly benefited from the WTO DSB.

This paper also highlighted the benefits of using the WTO DSB. It stresses the importance of African countries to contribute to the jurisprudence of the DSB. This paper has elaborated that

amendment of the DSU to permit collective retaliation, interim relief pending a ruling on a dispute, monetary compensation, strengthened provisions on special and differential treatment to developing countries *inter alia* will improve access and use of the DSU by African countries.

Yes, RTAs provide better avenues for dispute resolution between African states and their trade partners. This is because the RTAs are usually quite flexible in their implementation as they are entered into by states with a common goal and despite their different economic strengths, their ideologies are accommodated into the RTA. This is usually different from the WTO agreements where the majority takes the day. However, I opine that African states should not shy away from the DSB as it gives them an opportunity to shape international trade law. As Amin Alavi[403] states, currently international trade law is being developed without the participation of the majority of the WTO members which is a shame. This however, should be rectified under the on-going Doha negotiations to ensure the LDCs and DCs participate in this major area of legal development.

Under the current negotiations, African countries should continue pushing for favorable rules under the DSU. These changes may not take effect immediately but their efforts must however continue in the forthcoming negotiations because the DSM is a constantly evolving set of legal principles and interpretations that will continue to form the foundational basis for WTO law in the years to come.

[403] Amin Alavi n. 338.

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