

AFRICAN COUNTRIES AND THE WORLD TRADE ORGANISATION DISPUTE
SETTLEMENT MECHANISM; UNDERLYING CONSTRAINTS, CONCERNS AND
PROPOSALS FOR REFORM.

A MINI THESIS SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENT
FOR THE DEGREE OF MASTERS OF LAW (LLM) IN INTERNATIONAL TRADE AND
INVESTMENT LAW IN AFRICA.

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MAY 2010

DECLARATION

I, STELLA MUHEKI declare that this is an original work done by me and has never been submitted for any degree or examination in any university or higher institution of learning for publication as a whole or in part.

All the sources used have been indicated and acknowledged as complete references.

SIGNED

30th May 2010

STELLA MUHEKI.

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Abstract

At the inception of the World trade organization (WTO) in 1995, the organization's provisions for a formal dispute settlement mechanism under the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) stood out as state of the "art", "crown" and "jewels" of the WTO.

Fifteen years later on, an assessment of the Dispute Settlement Body (DSB)'s judicial records shows that the system has indeed reduced the role of international diplomacy, while strengthening the rule of law in dispute settlement.

The WTO-DSU's independent Appellate Body, strict deadlines within which to settle disputes and binding panel recommendations certainly supersede the 1947 General Agreement on Tariffs and Trade (GATT) dispute settlement system.

To date, 400 disputes have been lodged before the Dispute Settlement Body leading to establishment of over 140 panels and adoption of 218 panel/Appellate Body reports.

However, what these statistics fail to show is the fact that the DSM is dominated by leading industrialized countries, notably the European Communities and the United States rather than developing and least developed countries.

The European communities and the United States in particular are said to be employing the DSU to achieve their aspirations in international trade. This arises from their higher

volumes of trade and retaliatory capacity to threaten weaker respondents from pursuing disputes against them among other reasons.

It follows that despite of the uniqueness and widely recognized efficacy, the WTO Dispute Settlement Mechanism has largely failed to address the needs of developing/ least developed countries, especially in Africa.

The system's shortcomings in the pattern and structure which include lack of meaningful remedies, lack of transparency and general insensitivity to the development concerns of African countries have worked to alienate African states from the dispute settlement process.

The above said shortcomings of the DSU have also been noted from all corners of WTO membership including the original architects of the System like India, Brazil and Australia.

In light of the above, this research paper analyzes the process of dispute settlement at the WTO, with special emphasis on the nature of remedies available to parties under the DSU.

The research identifies pertinent areas for reform in the DSU and the DSB as a whole and also arrives at practical measures/alternatives that African countries could adopt in order to enhance participation in dispute settlement at the WTO.

The research points out that WTO law is tailored through interpretation of covered agreements and precedents and that participation in the WTO dispute settlement system is therefore crucial to the shaping of WTO law in the long run.

In the end, African countries (forming a large percentage of WTO Membership) have not made use of the dispute settlement mechanism despite their trade being affected by the protectionist trade policies of their developed counterparts.

If the majority of WTO membership cannot access the DSM, then the WTO objective of enhancing security and predictability of the multilateral trading system remains fictitious.

This research therefore adds to the voice of many that the amendment of the DSU is long overdue.

CHAPTER ONE

AFRICAN COUNTRIES AND THE WORLD TRADE ORGANISATION DISPUTE SETTLEMENT MECHANISM: UNDERLYING CONSTRAINTS, CONCERNS AND PROPOSALS FOR REFORM

1.1 Background to the study

The Understanding on Rules and Procedure Governing the Settlement of Disputes (“DSU”),¹ which sets out the procedure governing the dispute settlement mechanism (DSM) of the World Trade Organization (WTO) is widely regarded as “the bedrock on which the WTO edifice is built.”² It is a central element in providing security and predictability to the multilateral trading system.³

The DSU evolved from rules, procedures and practices of GATT 1947 (General Agreement on Tariffs and Trade) as such, the DSU builds onto and adheres to the principles of management of disputes applied under Articles XXII and XXIII of GATT 1947.⁴ Under Article XXII-GATT, member states settled their disputes through

¹The DSU is embedded under annex 2 to the Marrakesh agreement establishing the WTO 1994.

² Dr. Uché U. Ewelukwa (2005) –Multilateralism and the WTO Dispute settlement mechanism – Politics, Process, Outcomes and Prospects.”Pg 2

³ See Article 3.2 DSU.

⁴ See Article XXII and XXIII of the General Agreement on Tariffs and Trade 1947.

consultations; if this was unsuccessful, the article empowered the whole membership as an organ to consult with the disputing parties to settle the dispute. Article XXIII-specified what constituted a dispute, the article went on to instruct the whole membership to respond to a dispute by investigating and making appropriate recommendations to the disputing parties. It permitted the member states to authorize retaliation in a 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.⁵

The GATT dispute settlement system however was riddled with problems. Thus, 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 led to a consensus among the GATT contracting parties that the dispute settlement system required reform.

⁵ A handbook on WTO dispute settlement (2004), a publication by the WTO secretariat at pg13.

Consequently, the Uruguay Round negotiations of 1989 sought to remedy the said weaknesses. The negotiators sought to ensure that democratic decision-making, special and differential treatment to developing countries and mandatory rulings become part of the dispute settlement procedure. Accordingly, the DSU replaced the GATT 1947 on 1st January 1995.

A major innovation 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.⁶

The negative consensus rule has reduced the threat of unilateralism in international trade. Under the present WTO-DSU dispute settlement system, all WTO member states are equal. Any member (economically weak or strong) can challenge offensive trade measures adopted by another.⁷

⁶ Functions, objectives and key features of the dispute settlement mechanism available at <http://www.wto.org> accessed on 8/12/2009

⁷ Larcate Munro and Gappah (2000) ‘Developing countries and the WTO legal and dispute settlement system: view from the Bench at pg 2.

Compared with other multilateral systems of dispute resolution in international law, the compulsory nature and enforcement machinery of the WTO dispute settlement mechanism certainly stand out.⁸

There is a consensus among some scholars that the WTO- DSU mechanism is a success story compared to the GATT 1947 dispute settlement mechanism.

According to Jackson

*“The relatively large number of settlements that are occurring is one of the more positive indicia of its success”*⁹

The latter in its 48-years existence handled about 306 disputes while the former as of December 2009 had had 400 consultations leading to establishment of 140 panels, adoption of 116 panel reports and 102 Appellate Body reports.¹⁰

The above notwithstanding, 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.

⁸ Supra note 5 at Pg117.

⁹ John Jackson(1998)“Dispute Settlement and the WTO: Emerging Problems”, Journal of International Economic Law 329-351 at 340

¹⁰ See (2009)Appellate Body Annual Report circulated on 17/2/2010 as WT/AB/13 at pg 5 available at <<http://www.wto.org>> accessed on 11/3/2010

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.¹¹

Fourteen years' experience with the system has shown that many developing and least developed countries, most comprehensively those in Africa, are still bystanders. Only two African countries have had limited participation in a small number of disputes as respondents, even then half the disputes were not heard to the final stage whilst fifteen others have appeared as third parties.

A summary of Africa's participation in the Dispute Settlement Mechanism from the years 1995 to 2009 shows that Egypt and South Africa have participated as respondents in six cases while at the same time the two appeared as third parties just like Benin, Burkina Faso, Cameroon, Chad, Côte d'Ivoire, Egypt, Ghana, Kenya, Madagascar, Malawi, Mali, Mauritius, Morocco, Nigeria, Senegal, South Africa, Swaziland, Tanzania and Zimbabwe have appeared in ten cases in a third party status.¹²

The diminutive participation of Africa in the WTO dispute settlement mechanism is best summarized in the tables below.

11 Magezi Tom (2005) "The WTO Dispute settlement mechanism and African Countries: A Prolonged slumber?" University of western cape.pg 5

12 See WTO statistics from <http://www.wto.org/English/tratop_e/dispu_wto_members1_e.htm> accessed on 11/3/2010

Participation of African states as respondents (1995-2009)

Country	Dispute	Appearance as Respondent
Egypt	<i>Egypt-Anti-dumping Duties on Matches from Pakistan (WT/DS327)</i>	1
Egypt	<i>Egypt-Measures Affecting Imports of Textile and Apparel Products from USA (WT/DS305)</i>	1
Egypt	<i>Egypt-Definitive Anti-dumping Measures on Steel Rebar from Turkey (WT/DS211)</i>	1
Egypt	<i>Egypt-Import Prohibition on Canned Tuna with Soybean Oil from Thailand (WT/DS205)</i>	1
South Africa	<i>South Africa -Anti-dumping Duties on Certain Pharmaceutical Products from India (WT/DS168)</i>	1
South Africa	<i>South Africa-Definitive Anti-dumping Measures on Blanketing from Turkey (WT/DS288)</i>	1

Africa's appearance as third party in dispute settlement (1995-2009)

Country	Dispute (participation at panel or Appellate Body Forum)	Total number of African participants
Cameroon, Côte d'Ivoire, Ghana, Senegal	<i>European Communities- Regime for the Importation, Sale and Distribution of Bananas (WT/DS27/R/)</i> (Panel & Appellate Body)	4
Nigeria, Senegal,	<i>United States-Import Prohibition of Certain Shrimp and Shrimp Products (WT/DS58/R)</i> (Panel & Appellate Body)	2
Cameroon, Côte d'Ivoire, Mauritius	<i>European Communities-Regime for the Importation, Sale and Distribution of Bananas (WT/DS27/RW/EEC)</i> (panel)	3
Mauritius	<i>Mexico-Anti-dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States (WT/DS132/R)</i> (Panel)	1
Egypt	<i>European Communities-Antidumping Duties on Imports of Bed Linen from India</i>	1

	<i>(WT/DS141/R)(Panel & Appellate Body)</i>	
Zimbabwe	<i>European Communities-Measures Affecting Asbestos and Asbestos-Containing Products (WT/DS135/R)(Panel & Appellate Body)</i>	1
Mauritius	<i>European Communities-Conditions for of Tariff Preferences to Developing Countries (WT/DS246/R)(Panel & Appellate Body)</i>	1
Benin, Chad	<i>U.S-Subsidies on Upland Cotton, (WT/DS267/R)(Panel)</i>	2
Côte d'Ivoire, Madagascar, Tanzania, Malawi, Mauritius, Swaziland, Kenya	<i>European Communities-Export Subsidies on Sugar (WT/DS265/R)(Panel)</i>	7
Egypt	<i>Turkey – Measures Affecting the Importation of Rice US (WT/DS334) (panel)</i>	1
Egypt	<i>US safeguard measures on the import of certain steel products.EU(WT/DS274)(panel)</i>	1

The above statistics are definitely not impressive for a continent with 53 countries; 46 of which belong to the WTO when compared to other continents whose developing/ least developed countries are active participants namely; Asia and South America.

Countries such as India, Brazil and China have participated as major litigants in more than ten cases and as third parties in more than fifteen cases in the first fourteen years of the DSM.¹³

In terms of Africa's representation in adjudication of disputes, only Egypt, Mauritius, Morocco and South Africa have fielded panellists, to date only South Africa has a national serving as an Appellate Body member.

It also appears that there are no African nationals currently involved in dispute settlement within the WTO Secretariat. This means that Africa misses an important opportunity to build the capacity of its own professionals within the WTO.¹⁴

Yet still, 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 centre, have not been attractive enough for Africa to engage in the dispute settlement process.

¹³ Supra note 12.

¹⁴ Victor Mosoti (2005) "Africa in the first decade of WTO dispute settlement" *Journal of International Economic Law*- pgs 22-23.

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 pledged with far more important issues like budgetary deficits, war, epidemics as such dispute settlement is not a priority.¹⁵

Several implications arise from the absence of African countries in the DSM.

Firstly, through accession to WTO agreements, member states accept to be bound by the Jurisdiction of the WTO dispute settlement process. Consequently, whether African states participate in the DSM or not, they are bound by the decisions of Dispute settlement panels and Appellate Body.

According to the Appellate Body ruling in *Japan – Taxes on Alcoholic Beverages*, “WTO Agreements are the international equivalent of a contract representing carefully drawn balance between members’ rights and obligations.”¹⁶

From the above statement, it is apparent that WTO Member states attach great importance to the DSU and are bound by every precedent set by the DSB.

¹⁵ Kessie and Addo “African Countries and The WTO Negotiations On The Dispute Settlement” available at <<http://www.trapca.org/pages.php?id=88>> accessed on 17/12/09 pg 4, Robert Rogowsky (2003), “The effectiveness of the DSU for Developing and Middle Income Countries”, Berne, Pg 7,

Victor Mosoti (2005) supra note 14 at pg 73

¹⁶ See WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R

Secondly, the WTO is a member driven organization where the practice and jurisprudence of the DSU can only be developed by countries that actively participate in the DSM. As such, the Dispute Settlement Body contributes to the growth of a corpus of international trade Law principles and jurisprudence that will govern multi-lateral trading relations in future.

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.¹⁷

Thirdly, Africa's "comfort zone" under preferential trade arrangements is no more. In the past, a bulk of African exports would enter into major markets of developing countries unhindered under preferential trade arrangements.

This was made possible by the Lomé Convention between the European Economic Community and its former colonies in Africa as well as the United States African Growth

¹⁷ See Kessie and Addo (2005) *supra* note 15 at pg2, Gregory Shaffer (2003), "How to Make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies", ICTSD Paper No.5 pg10. Mosoti (2003) "Does Africa Need the WTO Dispute Settlement System? ICTSD Resource Paper No. 5" pg 73. Calvin Manduna (2003) "Daring to dispute; Are there shifting trends in African participation in WTO dispute settlement" Tralac trade brief no.3 pg4.

Opportunity Act (AGOA); governing trade between the USA and Sub-Saharan African states.¹⁸

Upon the expiry of the Lomé convention in 2000, in order to extend the preferential trade arrangements, the European Union entered into negotiations for Economic Partnership Agreements (EPAs) with Africa, Caribbean and Pacific States (ACP).¹⁹

To this day however, only the Caribbean states have signed an EPA with the EU as a bloc. On the other hand, majority trade arrangements under the AGOA act have since been dissolved. This therefore means that ACP countries especially those in Africa are facing constraints in accessing markets of developed nations.

It would thus be in order for African countries to take part in negotiating markets access for their products by invoking adjudication. African countries could significantly improve market access opportunities for their exports if they address unfair trade practices of developed countries through dispute settlement.

African countries are well aware of the above said repercussions for non participation. It is for that very reason that the countries have been active in the ongoing review of the DSU. The proposals put forward by the African group at Doha negotiations cover all

¹⁸ See <[http:// www.trade.ec.europa.eu](http://www.trade.ec.europa.eu)>accessed on 27/10/2009

¹⁹ See <http://www.acp-eu-trade.org?index.php?loc=epa/agreements.php>> accessed on 21/3/2010. Also see <http://www.agoa.gov>>accessed on 15/3/2010

phases of the dispute settlement process. As such, African states anticipate that these proposals will facilitate their access to the dispute settlement mechanism.²⁰

From the foregoing, it is clear that participation of African countries in the Dispute Settlement Mechanism is important for the fuller integration of Africa into the multilateral trading system.

Africa's participation is also important for the overall legitimacy of the WTO as an international institution.²¹

1.2 Statement of the problem

The WTO-dispute settlement mechanism is founded on principles of non-discrimination, reciprocity and transparency.²²

Ideally, all WTO member states should have "a levelled 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

²⁰ See the submission by the African group to the Special Session of the Dispute Settlement Body (TN/DS/W/15 25/9/ 2002)

²¹ Robert Howse and Kalypso Nicolaidis(2003),"Enhancing WTO legitimacy: Constitutionalization or Global Subsidiary, Governance, American Journal of international law Vol.16(1) .

²² See supra 5 at pg 2.

among them, are to secure a share in the growth of international trade commensurate with their economic development needs.²³

Statistics have however reflected that the voices of African countries (which account for majority developing/least developed WTO member states) are rarely heard in the dispute settlement arena.²⁴

While many observers have attributed this underutilization of the dispute settlement mechanism to lack of human capacity, financial constraints and low volumes of trade, ²⁵

The truth of the matter 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.

While the DSU contains several provisions which seek to advance the possibility of developing and least developed countries to take advantage of the Dispute Settlement

²³ As stated in the preamble to the Marrakesh agreement See the results of the Uruguay Round of Multilateral Trade Negotiations: The Legal texts (GATT Secretariat Geneva; 1994) p6

²⁴WTO InternationalTradeStatistics2010 available at

<http://www.wto.org/english/tratope/dispute/distabasewtomembers1e.htm> accessed on 15/3/2010

²⁵ See Gregory Shaffer, (2003) "How to Make the WTO Dispute Settlement System Work for Developing Countries" at pg 15-17. Amin Alavi at pg,26-29,Kessie and Addo(2005) "African Countries and the WTO Negotiations on the Dispute Settlement Understanding" at pg 2-8, Calvin Manduna(2005) "Daring to dispute; Are there shifting trends in African participation in WTO dispute settlement." Tralac brief no.3 at pg4

Mechanism, the basic structure and jurisprudence of the DSU never the less renders it difficult such countries to use the system. As such, many African countries find it illogical to participate in dispute settlement.

1.3 Hypothesis of the study.

This research is founded on following hypothesis

1. That all WTO member states are equal before the Dispute Settlement Body as such, African countries should have equal participation in the dispute settlement mechanism like the rest of WTO membership.
2. That the absence of African countries in the WTO Dispute Settlement mechanism is detrimental to the future of their international trade.

1.4 Objective of the study.

The main objective of this research is to analyze the operation and practice of the WTO Dispute settlement mechanism.

(a) Identify the reasons therein that prevent African countries from active participation in the WTO Dispute settlement mechanism.

(b) Highlight the benefits accruing from increased participation by African Countries in the Dispute settlement mechanism and suggest reforms that could render the DSU-DSM more relevant to Africa.

(c) Look at alternative dispute settlement mechanisms that Africa should be considering while awaiting the reforms.

1.5 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.²⁶

However, it is a well-known fact that practice and jurisprudence of the DSU can only be developed by countries that actively participate in the DSM. This study is therefore relevant to all African WTO member states that have not utilized the dispute settlement mechanism to enforce their rights and legitimate expectations.

The research will offer member states an opportunity to examine the structure of the DSU and possible reasons behind the lack of participation.

The research will identify reforms that will improve participation of African countries in the DSU.

For academia, the study presents a unique opportunity to examine reasons why despite the equal opportunity availed to all WTO member states under the DSU Africa has

²⁶ See Article 3.2 of the DSU.

continued to play a peripheral role. The study is of particular interest because the future of Africa's international trade lies in her capacity to negotiate with her WTO counterparts.

The study thus contributes to a growing body of literature that examines obstacles confronting least developed countries in their use of the WTO dispute settlement to self-enforce their legitimate rights and expectations.

1.6 Methodology

This is a desk and library based research. As such, it relies on both published and unpublished material. It 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.

The secondary sources of information include but are not limited to relevant 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 the study. The research also relies greatly on internet public sources.

1.7 Key words.

African group-(African Growth Opportunity Act) AGOA- *Amicus curiae* brief- Appellate Body(AB) - Arbitration -Consultations -Developing Countries -Dispute Settlement Body (DSB)-Dispute settlement mechanism- (DSM)-Dispute settlement understanding (DSU) - Doha round on review of the DSU- Economic Partnership Agreements(EPAs)-GATT 1947 - Implementation and Recommendation- Interim report- Least Developed Countries- International Court of Justice(ICJ)-Lomé Convention -Marrakesh Agreement- Multilateral trading system- Panel Rulings - Panel and Appellate Body reports - Retaliation- - Special and differential treatment (SDT)- Supervision by the DSB- Third party participation - WTO.

1.8 Delineation and limitations of the study.

This research covers the fourteen years of existence of WTO Dispute settlement mechanism from 1995 to 2009.

The research does not attempt to address all the possible factors that account for the under utilization of the DSM by states in Africa, as such, the research is limited to the structure and functioning of the DSU. The research takes into account participation by a few African countries as respondents, complainants or third parties.

The research also analyzes proposals by the Africa Group, circulated as TN/DS/W/15 (September 25, 2002) and TN/DS/W/42 (24 January 2003). (2005) as well as proposals

by the LDC Group circulated as TN/DS/W/17 (17 January 2002) and TN/DS/W/37 (22 January, 2003)

The major limitations to the study have been unavailability of hard copy literature in form of textbooks and journals.

The study would have been enriched with the final judgments handed down by the panel and appellate body of the DSB in cases where African states have participated however very few cases have been pursued to finality.

Interviews from trade and industry departments in selected African countries would have enriched the findings of the paper however due to time and resource constraints this was not possible.

1.9 Chapterization and literature review.

Chapter1.

Provides a general introduction and gives a brief overview to the development of DSU. It outlines the scope and nature of the study, its objectives, significance, methodology and literature review.

Chapter 2:

Underscores adjudication at the WTO; it looks at the four stages of dispute settlement procedure and point outs the injustice therein towards African states.

Chapter 3:

The chapter takes a closer examination of the remedies available to aggrieved parties under the DSU. It highlights the deficiency in the remedies and inadequate implementation of decisions once secured by the complainants.

In general, the chapter looks at the insensitivity of the system to the development concerns of African countries.

Chapter 4:

The chapter covers specific areas for reform in the DSM. Proposals by the African group as tabled at the Doha round 2001-2003 are taken into account. The chapter concludes with a clear message that non-participation in the DSM is not an option for Africa but a necessity.

Chapter 5:

Summarizes the findings of the research and gives alternative recommendations that Africa can adopt while awaiting the outcome of the DSU review at Doha. The chapter draws examples from India to demonstrate that for a country to participate in the DSM it

need not have high levels of GDP, a number of experts in trade law or political advantage.

1.10 Literature review.

A considerable body of excellent literature exists concerning developing and least developed countries participation in the WTO dispute settlement mechanism. The research relies on writings by Busch and Reinhardt,²⁷ Amin Alavi,²⁸ Essays by Horn and Mavroidis²⁹, Susan Esserman and Robert Howse³⁰, Edwini Kessie and Kofi Addo³¹ and Clement Ng'ong'ola³² 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.

More literature touching the subject is consulted in the progress of the research.

²⁷ Marc L. Busch and Eric Reinhardt (2003) "Developing Countries and General Agreement on Tariffs and Trade/World Trade Organization Dispute Settlement" *Journal of World Trade* 37(4): 719-735.

²⁸ Amin Alavi (2007) "African Countries and the WTO's Dispute Settlement Mechanism" *Development Policy Review Journal*, 25 (1): 25-42 Oxford.

²⁹ Horn and Mavroidis (1999) "International Trade Dispute Settlement-Research Handbook In International Law" edited by Andrew T Guzman and Alan O Sykes Delgar publishing House Cheltenham, UK.

³⁰ Susan Esserman and Robert Howse (2003) "WTO on trial" *Foreign Affairs Magazine* January/February, vol.82.

³¹ Kessie and Addo (2005) "African Countries and The WTO Negotiations On The Dispute Settlement" available at <<http://www.trapca.org/pages.php?id=88>> accessed on 17/12/09

³² Clement Ng'ong'ola (2009) African Member states and the Negotiations on Dispute Settlement Reform in the World Trade Organisation. *The WTO-An African perspective, more than a decade later.* Tralac.

Busch and Reinhardt (2003)³³ set out to investigate whether developing countries have secured more favourable trade policy outcomes in the WTO versus the GATT dispute settlement. The authors argue that capacity and development constraints influence a decision by country to initiate a dispute. They demonstrate that rich countries acting as complainants are more likely to extract concessions from defendants at the pre-panel consultation/negotiation phase than poor countries acting as complainants.

According to the authors:

*“The complainant’s level of development speaks directly to its capacity for recognizing, and aggressively pursuing, legal opportunities as a complainant. Having this capacity, a complainant is in a much better position to hit the right legal buttons in the request for consultations, to pressure the defendant on its weakest legal points during consultation...”*³⁴

They also note that “the move to the DSM has not actually reduced a poor complainant’s prospects of inducing concessions from a defendant; it has merely left behind the poorest complainants.”

Much as these views are valid, the authors fail to address problems rooted in the nature of the DSM itself. The authors omit to mention the fact that the current remedy regime

³³ Supra note 27

³⁴ Supra at Pg 372-4

does not restore benefits accruing to the injured Member up to the level that existed before the violation. The regime lacks monetary compensations for economic loss suffered by the respondent, a situation aggravated by inability of weaker winning parties to retaliate.

In his article, **Amin Alavi (2007)**³⁵ analyses the position of sub-Saharan African (SSA) countries in relation to the WTO's Dispute Settlement Mechanism (DSM), especially as participants in the ongoing review of the Dispute Settlement Understanding. He notes that problems facing SSA countries in using the DSM are similar to those of many other developing countries, but the relatively lower level of development and integration of SSA countries in international trade means that these problems are more difficult to overcome.

He agrees to the WTO Africa Group's analysis of the obstacles to participation namely; high entry barriers, a skewed retaliation system and an overall lack of development orientation³⁶

Amin gives reasons for African countries' marginal role in the WTO that is; low level of development and insignificant share of international trade, which has resulted in a lack of expertise on bargaining.

³⁵ Supra note 28 at pg 1

³⁶ *ibid*

He observes that since many of the DSM's and WTO's rules have not been drafted with African countries in mind, they are of little or no value to them, and have in fact alienated them from the organization. He gives an example of retaliation and states that it was designed for those who can retaliate. His solution to this is restructuring of the DSM.

He suggests a more practical option in the DSM negotiations for the African Group that is; to identify their broad interests and specific objectives, and support other countries that have similar goals as was the case at the Hong Kong ministerial meeting in 2005.³⁷

Much as Amin acknowledges that some of the more specific problems facing SSA countries seem to be rooted in the nature of the DSM itself, he fails to identify viable solutions like third-party participation as an effective way of getting involved in the DSU. "Third-party status enables the country to draw on the main thrust of work on the case by joining in support of a principal country"³⁸. This was evident in the *US Upland Cotton case* wherein Benin and Chad did so successfully on the side of Brazil against the USA.

He also fails to take into account the possible use of private counsel and an academic research organization to maximize resources within tight budgetary constraints.

³⁷ African countries supported the G20's position on agriculture negotiations without threatening to block the process or trying to fight on their own.

³⁸ Hilton Zunckel (2005) "The African Awakening in United States Upland Cotton", Kluwer International. *Journal of World Trade* 39(6) pg 20.

Horn and Mavroidis (1999) ³⁹ Point out the intricacies of the DSU from an economic point of view and argue that the role of the DSU is resolving conflict, transparency predictability plus implementation of the agreed trade liberalization agreements.

They observe that these aims conflict with each other for example the desire to ease the resolution of disputes may conflict with the desire to maintain system integrity and while transparency may increase the predictability of the system, it can make settlement and trade liberalization more difficult.

They also argue that trade interests, capacity of participants, membership of a preferential trading arrangement, form of political governance and the ability of a country to retaliate determine participation in dispute settlement.

To some extent, I agree with their findings however, a larger percentage of determinants for participation of developing countries in the Dispute Settlement process lie in the weakness of the Dispute settlement mechanism itself as highlighted in the research.

Susan Esserman and Robert Howse (2003) ⁴⁰ acknowledge that the dispute settlement mechanism is compulsory and binding with each member having equal rights and

³⁹ Supra note 29

⁴⁰ See supra note 30.

obligation to accept the results. They hail the fact that the decisions of the appellate body are subject to correction by member states through consensus.

They take cognizance of the fact that not all countries have equal ability to use the WTO laws to advance their own interests. They observe that litigation draws on different skills, resources, cultural attitudes thus placing certain nations at a real disadvantage.

They criticize the remedy of retaliation through trade restrictions that may be devastating for a poor member state. They also observe that the Dispute settlement Body proceedings are void of transparency.

They note that amendment of laws as a practice for a losing party is unrealistic considering domestic political reasons associated with the amendments in such a country.

The note that the sharpest and most pervasive critique levelled at the WTO's Appellate Body is judicial activism from both the anti globalization advocates and doctrinaire free traders. They state that judicial activism is most apparent during intrusive treaty interpretation by the Appellate Body of anti dumping practices.

They state that WTO's rules are often unclear, which is another reason for the Appellate Body to exercise restraint when indulging into "intrusive" treaty interpretation. To this,

they suggest that compiling a more comprehensive history of WTO negotiations would be a useful way to guide the Appellate Body's approach to ambiguous treaty texts.

They note that the consultation phase of dispute settlement as strategy to encourage settlement is perfunctory and ineffectual. They suggest the use of a professionally trained facilitator schooled in alternative dispute resolution to remedy the said shortfall.

However, the authors are quick to note that much as remedies under WTO are ineffectual, these remedies remain legal under the WTO because they are important safety valves that release political and economic pressures, that might otherwise threaten WTO members' basic commitment to free trade.

Largely I agree to their views.

Edwini Kessie and Kofi Addo (2005) ⁴¹ acknowledge the uniqueness of the WTO-DSU system in comparison to the 1947 GATT. They note that the mechanism is being judged by the frequency with which Members have had recourse to the dispute settlement. They observe that it is mostly the leading trading nations that are making extensive use

⁴¹ See supra notes 15 and 31.

of the dispute settlement mechanism rather than African countries and least-developed countries.

According to the authors, this situation is no different from that under the GATT. They note that African and other developing countries, including those that are now making use of the WTO dispute settlement system, hardly made use of the GATT dispute settlement mechanism. As a group, developing countries accounted for less than 10 per cent of the cases initiated by the GATT contracting parties. This is still the case today.

The authors attribute the lack of use of the dispute settlement mechanism by African and other developing countries to lack of expertise in WTO matters and low market share of African countries in the world trade.

The authors elaborate the consequences of Africa's lack of participation in the development of jurisprudence through dispute settlement.

They look at the proposals by the African group as tabled at the Doha review of the DSU and conclude that the proposals are ambitious and are likely to be disregarded by developed member states.

The authors further suggest proposals that could help African countries to enhance participation. Namely, participation as third parties, feasible involvement of institutions

such as UNCTAD in the dispute settlement process, use the services of the Advisory Centre on WTO Law and other international law firms which are willing to take cases on a *pro bono* basis or at discounted rates.

Above all, the authors conclude that African states should address supply-side constraints which have impeded their efforts to increase and diversify their exports.

However, the above authors fail to mention that the remedies under the DSU account for seventy percent of the reasons as to why African countries do not participate in the dispute settlement mechanism.

The authors are pessimistic about the Proposals tabled by the African Group at Doha. As a result of this, they fail to point out that some of the proposals by the African group have already been included in the Chairman's text of July 2005 and it is highly probable that they will be adopted at the end of the negotiations.

Examples of these proposals are, strengthening the provisions on special and differential treatment suitable for development needs of WTO member states, transparency in the DSB proceedings and stronger compliance with panel recommendations.

Clement Ng'ong'ola (2009) ⁴² sets out to interrogate some of the contributions and proposals made in the earlier phases of the negotiations by Groups of African Member states to the Doha Ministerial conference on the review of the DSU.

He observes that since the inception of the DSU review, there has not been any substantial outcome. He states that the main challenge for African Member states in the negotiations is to propose or support reforms or clarifications with respect of improving “offensive” African participation in WTO dispute settlement.

He notes that issues like remand, sequencing and post retaliation, third party rights, flexibility, Panel compositions, transparency, special and differential treatment of developing countries are being negotiated in a bottom-up approach by member states.

Ng'ong'ola argues that the following proposals will not yield much. These are;

- (a) A collective fund to finance dispute settlement.
- (b) Holding the dispute settlement process in the capital cities of developing countries as part of the special and differential treatment.
- (c) Collective retaliation by several aggrieved complainants against a single economically strong respondent.

⁴² Supra note 32

He explains that the proposals were not carefully conceived and formulated by the African group in the first place.

He concludes that the negotiations are not likely to impact on levels of African participation in the DSU process.

To this end, he advises Africa to address her small share of the world trade first.

He then urges the African group to concentrate on advocating for stronger third party rights. According to him, this is the most feasible proposal ever tabled by Africa as a group. The proposal will therefore increase Africa's participation in the dispute settlement process.

On a whole, Ng'ong'ola is cynical about the Doha review of the DSU in general and the African group's proposal in particular.

The efforts of the African group cannot be discredited nonetheless. The WTO is member driven organization therefore member states' opinion and voice matter.

African countries may not prevail immediately in their attempt to change the DSU due to strong opposition from both developed and developing countries. Their efforts must however continue in the upcoming negotiations because the DSM is a constantly evolving set of legal interpretations that will continue to form the foundational basis for WTO law in the years to come.

From the foregoing, it is clear that in relation to the needs of developing/ least developed countries, the WTO dispute settlement mechanism calls for institutional reform.

African countries which account for a great percentage of WTO membership are largely absent from the DSM. If majority of WTO membership cannot access the DSM, then the WTO objective of enhancing security and predictability of the multilateral trading system remains theoretical.

CHAPTER TWO

THE OPERATION OF THE WTO DISPUTE SETTLEMENT MECHANISM; RULES AND PROCEDURES.

2.1 Introduction

The WTO dispute settlement mechanism has been described by various academicians and scholars as largely successful.⁴³ This is attributed to the increase in the number of disputes lodged by members' states to the DSB, which has been interpreted by many as a sign of confidence by member states in the new system.⁴⁴

Mosoti and several other authors have however cautioned that for as long as the weakest of the WTO membership remains absent in the dispute settlement process, the success of the system remains questionable.⁴⁵

This chapter therefore underscores adjudication at the WTO; it looks at the four stages of dispute settlement procedure and examines the exact segment in the adjudication process that has made it hard for African states to manoeuvre over disputes.

⁴³ See Mosoti (2003) "Does Africa Need the WTO Dispute Settlement System" ITCSD paper 5 at p 72

⁴⁴ Lacarte-Muro and Gappah (2000) "Developing Countries and the WTO Legal and Dispute Settlement System; A view from the Bench" *Journal of International Economic Law* at pg 369.

⁴⁵ Supra note 43

2.2 The basic features of the WTO dispute settlement mechanism

The Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) regulates dispute settlement at the WTO. The DSU is a multilateral agreement under which WTO members can settle their disputes through a structured and legally binding process.⁴⁶

The Dispute settlement body (DSB) comprising of representatives from WTO members states is mandated by provisions of the DSU to oversee the implementation of the DSU.⁴⁷

The DSU elaborates procedure to be followed when adjudicating over disputes arising under covered agreements namely; the Marrakesh Agreement establishing the WTO, the General Agreement on Trade in Goods, Trade in Services, the Agreement on Trade Related Aspects of Intellectual Property Rights and in certain circumstances plurilateral Trade Agreements annexed to the Marrakesh Agreement.⁴⁸ The application of the DSU to disputes under the plurilateral trade agreements is however subject to the adoption of decisions by the parties to these agreements to be guided by the same.⁴⁹

⁴⁶ See Article 3(2) DSU

⁴⁷ As established under Article -2 DSU

⁴⁸ See Article 1.1 of the DSU

⁴⁹Appellate body annual report 2009,circulated as WT/AB/13 on 17/2/2010 available at <<http://www.wto.org>>accessed on 28/4/2010

2.3 Formal dispute settlement

The primary objective and purpose of the WTO dispute settlement mechanism is to promptly settle disputes through multilateral proceedings.

A WTO member may have recourse to the DSM if it 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 under the following four phases:

- i. Consultations between the parties.
- ii. Establishment of a panel in preparation for adjudication (in case consultations fail to achieve a satisfactory resolution).
- iii. Adjudication by the Appellate Body if applicable.
- iv. Implementation of the rulings and recommendations from the Panel /the Appellate Body.

I) Consultation Process

A request for consultations formally initiates a dispute at the WTO thus triggers the application of the DSU.⁵⁰ Before initiating consultations, a complainant is obliged to exercise judgment as to whether the intended action would be fruitful.⁵¹

⁵⁰ Chapter 6-dispute settlement system training module available at<<http://www.wto.org>> accessed 12/2/2010

The complainant then makes a request for consultations in writing, specifying provisions of the relevant articles of the WTO agreement which have been violated by the respondent.

The respondent upon receipt of request for consultations is obliged to accord sympathetic consideration through a reply to the request within ten days and enter into consultations with the complainant within 30 days after receipt of the request for consultations.⁵²

If the respondent fails to meet any of these deadlines, the complainant may immediately proceed to the adjudicative stage of dispute settlement and request the establishment of a panel.⁵³

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 urgent cases, for example those concerning perishable goods, the parties are obliged to enter into consultations within ten days after the date of receipt of the request.

⁵¹ Article 3.7 of the DSU) expressly entrusts the Members of the WTO with the self-regulating responsibility of exercising their own judgment in deciding whether they consider it would be fruitful to bring a case.

⁵² See Article 4.2 DSU

⁵³ See Article 4.3 DSU

Third parties with a “substantive trade interest” in the dispute may seek to participate in the dispute by notifying the DSB of their intention within 10 days after the complainant’s request for consultation. Third party participation is subject to the respondent’s approval that the claim of ‘substantial trade interest’ is well founded.⁵⁴

It is however worth noting that the DSU does not define the term “substantial trade interest”. A number of countries have had their requests to participate in consultations rejected because they could not demonstrate that they had a “substantial trade interest” in the case.⁵⁵

To demonstrate substantial interest in the matter, a third party has to carry out a preliminary assessment of whether they have a legitimate and sufficient interest in the dispute at hand. Such would require creating a mechanism within government for collecting and analysing trade data, monitoring, reporting and consulting internally and with the affected industry.

Regrettably, such a mechanism is absent in most African economies due to financial and lack of awareness about the WTO. As noted by Thadeous Chifamba (2007),⁵⁶ various stakeholders namely government officials in relevant ministries, business community, labour, farmers’ organizations, civil society, parliamentarians and academia, among others are ignorant about the history, structure and functions of the organisation.

⁵⁴ Third parties are WTO members with an interest in the subject matter who feel similarly aggrieved by the infringing measure or may be parties benefiting from a similar challenged measure with that of the respondent.

⁵⁵ Edwini Kessie and Koffi Ado supra note 31 at pg 10

⁵⁶ Tadeous Chifamba (2007) “Multilateral Trade Negotiations: How sensibly must African Countries and trade negotiators stand?-some lessons from WTO Experience.”The African capacity building foundation. Occasional paper no.7 at pg 10.

This defeats a member state's efforts at consultation because the consultation phase entails stakeholders who should be knowledgeable about the current statistics and affairs in international trade.

Relevance of consultations.

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. As such, consultations trigger off dispute settlement.

Together with good offices of the counsel (conciliation and mediation), consultations are the key non-judicial/diplomatic feature of the dispute settlement system of the WTO.⁵⁷ 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.

Busch and Reinhardt (2005) demonstrate that rich countries acting as complainants are more likely to extract concessions from defendants than poor countries acting as complainants.

⁵⁷ See supra note 5.

“The complainant’s level of development speak directly to its capacity to get a favourable position, developed countries as complainants are in a much better position to hit the right legal buttons in the request for consultations, pressure the defendant on its weakest legal points during consultations.”⁵⁸

It is worth noting in this respect that for as long as Africa’s human capacity to address International trade disputes remains low, consultations like all other stages of dispute settlement will remain a mirage.

ii.) Establishment of a panel.

If the parties fail to settle the dispute through consultations, the complainant may request for the establishment of a panel for adjudication within 60 days.⁵⁹ The request may however be made earlier by the complainant if the respondent does not respect the deadlines for responding to the request for consultations.

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.⁶⁰

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

⁵⁸ See supra notes 26, 32 and 33 at pg 12.

⁵⁹ See Article 4.8 DSU

⁶⁰ Article 6.2 of the DSU

jurisdiction. It is also from the panel's terms of reference that respondents and third parties become aware of the basis of the complaint.⁶¹

The request must be filed at least 11 days in advance to the seating of the DSB in order to be included in the agenda of the DSB meeting.⁶² A panel is then established at the second DSB meeting that usually takes place within a month.⁶³

Ten days after the establishment of the panel, three individuals with expertise in international trade law and policy are proposed to the parties by the WTO secretariat from its indicative list (made up of employees from the diplomatic representations, distinguished professors of international trade law or lawyers).⁶⁴ Parties have a right to oppose the nominations within 20 days from the establishment of the panel.⁶⁵

Submissions by the parties.

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.

⁶¹ Article 7.1 of the DSU

⁶² Rule 3 of the panel rules of Procedure under Appendix 3 to the DSU.

⁶³ Article 6.1 of the DSU.

⁶⁴ Articles 8.1 and 8.10 DSU.

⁶⁵ Article 8.7 of the DSU

Third parties with a substantial interest in the matter also file submissions at this point in time.⁶⁶

Oral Hearing.

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.⁶⁷

The complainants lead evidence, followed by the respondents and third parties through oral presentations.⁶⁸ 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.⁶⁹

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.⁷⁰

Panellists have the power to schedule a third or fourth meeting if necessary.

⁶⁶ A Handbook on the WTO Dispute Settlement System(2004) at Pg 53

⁶⁷ See Paragraph 4, 5 and 6 of the working procedures in appendix 3 DSU.

⁶⁸ Article 10.2 DSU.

⁶⁹ Paragraph 8 of the Working Procedures in Appendix 3 DSU.

⁷⁰ Paragraph 8 and 9 of the working procedures appendix 3 DSU

Panel Reports.

Following 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. Article 11 and Article 19.2 of the DSU emphasize that panels and the Appellate Body must not add to or diminish the rights and obligations set forth in the covered agreements.⁷¹

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.⁷²

Thereafter, the panel issues 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 and must not exceed two weeks.⁷³

⁷¹ See Articles 11 and 19.2 of the DSU

⁷² Article 12.7 of the DSU.

⁷³ Article 15 of the DSU.

Generally, a panel is required to issue the final report to the parties within six months from the date when it was composed or as the case may be, according to the period agreed to in the terms of reference.⁷⁴

In exceptional cases, the panel may seek consent from the DSB to extend the time to nine months.⁷⁵

Once the panel report is issued to the DSB, it has to be adopted after 20 days of its circulation unless a party formally notifies the DSB of its intention to appeal or the DSB decides by consensus not to adopt the report.⁷⁶

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.

As observed, the panel stage of dispute settlement is technical. Preparation and presentation of a case before the panel as well as response to queries from the Panel requires legal expertise, which is a major disadvantage to African countries.

For effective preparation of a case, African countries often bank upon the costly law firms of the developed countries.

Legal experts from the U.S.A and Europe charge fees ranging \$200-\$600 (or more) per hour. It is estimated that Lawyers representing Kodak and Fuji corporation in the

⁷⁴ Articles 12.8 and 9 DSU of the DSU.

⁷⁵ Article 12.9 of the DSU.

⁷⁶ Article 16.1 and 16.4 of the DSU.

Japan-Photographic Film dispute respectively charged their clients fees in excess of \$10,000,000.⁷⁷

Such fees are unimaginable for developing/least developed countries that are already strapped with debt crisis and the like. For such countries, the benefits expected from initiating a dispute are far less than the threshold of litigation costs.

In the circumstances, bringing a dispute before the WTO-DSM is not worthwhile, especially in light of uncertain remedies.

The African Group at the WTO-DSU review has also noted this inhibition and suggested that a pool of funds in the preparation and conduct of cases be availed to least developed countries. Among the problems pointed out by the African Group was that the dispute settlement system is “complicated and overly expensive and that in its operation, the system should not abstract itself from the development fundamentals.”⁷⁸

iii.) Appellate Body Stage

A new and positive feature of the WTO-DSU is the introduction of appellate review of panel decisions. Parties aggrieved by the panel’s decision have a right to appeal against the decision to the appellate body comprised of seven persons; each appeal is however presided over by three Appellate Body Members.⁷⁹

⁷⁷ Gregory Shaffer(2003) “How to Make the WTO Dispute Settlement System Work for Developing Countries” ITCSD paper no.5 at pg 16): <<http://www.ictsd.org/dlogue/2003.02-07/03-02-07/-docuhtm>>

⁷⁸ See Proposal by the African Group TN/DS/W/15 of 25/9/ 2002, Paragraph 8.

⁷⁹ Article 17 DSU

Appellate proceedings are conducted in accordance with the procedures established under the DSU and the Working Procedures for Appellate Review drawn up by the Appellate Body in consultation with the Chairman of the DSB and the Director-General of the WTO.⁸⁰

The scope of appellate review is limited to issues of law covered in the panel report and legal interpretations developed by the panel.⁸¹

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*⁸² where the Appellate Body stated that an appeal could be based on the credibility and weight ascribed to given facts as a legal characterization issue.

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 Appellate Body should arrive at.⁸³

The respondent then files their submissions in response to the allegations of error as pleaded by the appellant within 25 days.⁸⁴

⁸⁰The 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)

⁸¹ Article 17.6 of the DSU.

⁸² WT/DS75/AB/R and WT/DS84/AB/R

⁸³ Rule 21(2) of the Working procedure for Appellate body

⁸⁴ Rule 22(2) *ibid*

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.⁸⁵ 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 Appellate Body is entitled to accept, but not obliged to consider.⁸⁶

Approximately 45 days after the notice of appeal, the Appellate Body holds an oral hearing. The appellant, respondent and third parties make oral submissions, after which the Appellate Body division poses questions to the participants.⁸⁷

Following the oral hearing, the appellate body division exchanges views on the issues raised in the appeal with the four other Appellate Body members from another appellate division. This exchange of views is intended to give effect to the principle of collegiality in the Appellate Body. It also serves to ensure consistency and coherence in the jurisprudence of the Appellate Body.⁸⁸

⁸⁵ Article 17.4 of the DSU

⁸⁶ Supra note 64 at pg 65.

⁸⁷ Rules 27(1) supra note 81. Also see Article 17.10 of the DSU.

⁸⁸ Rule 4(1) of the appellate body Working Procedures

The Appellate Body can uphold, modify or set aside the legal conclusions of a panel. Where the Appellate Body sets aside a panel's finding on a legal issue it must give reasons for doing so.⁸⁹

The Working Procedures also envisage that members of the Appellate Body and its divisions are required to make their decisions by consensus.

Following the exchange of views with the other Appellate Body members, the Appellate Body concludes its deliberations and drafts an Appellate Body report. In contrast to the panel procedure, there is no interim review at the Appellate Body stage.

According to the wording of art 21.3 of the DSU, it is understood that the Appellate Body report must be adopted together with the panel report because one can understand the overall ruling only after reading both reports.⁹⁰ Thus, both reports are placed on the agenda of the DSB for adoption.

The DSB adopts the Appellate Body's report within 30 days of its circulation to Members unless it decides by consensus not to adopt the report. The report is then circulated in three official languages of the WTO and posted on the WTO website.

All parties must unconditionally accept the report as resolution of their dispute without further appeal.

⁸⁹ See Appellate Body Report, Australia "Measures Affecting Importation of Salmon" WT/DS/18/AB/R, adopted 6 November 1999.

⁹⁰ See Article 21.3 of the DSU.

Following the adoption of the panel/Appellate Body report(s), the DSB gives a recommendation and ruling to the respondent (in the cases 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.⁹¹ If immediate compliance with recommendations and rulings is not possible, the respondent has a grace period to achieve compliance. The grace period is agreed upon by the parties or determined by the arbitrator.⁹²

Surveillance by the DSB.

The DSB keeps under surveillance the implementation of the recommendations or rulings it has adopted. The issue of implementation is listed on the DSB agenda six months after the date of establishment of the appellate body until it is resolved.⁹³ At least ten 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.

⁹¹ Article 21.3 of the DSU.

⁹² Articles 21.3 and 21.3(c) of the DSU.

⁹³ Article 21.6 of the DSU.

Compliance review

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.

Compensation

If after a reasonable time a respondent fails to bring an infringing measure in conformity with WTO law, the parties enter into negotiations within 20 days to agree on satisfactory compensation. According to Article 22.2 of the DSU, compensation can be through the imposition of tariff surcharges or supplementary concessions offered for other products.⁹⁴

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.⁹⁵

⁹⁴ Article 22.2 of the DSU.

⁹⁵ *ibid.*

Retaliation

Retaliation is 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 was found.⁹⁶ 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. For this purpose, the multilateral trade agreements are divided into three groups in accordance with the three parts of the WTO Agreement. Annex 1A comprises the General Agreement on Tariffs and Trade of 1994, Annex 1B comprises the General Agreement of Trade and services of 1994, while Annex 1C comprises the Agreement on the Trade Related Aspects of Intellectual Property Rights.⁹⁷

However, if the complainant considers it impracticable or ineffective to apply sanctions within the same sector, she is authorised to imposed sanctions in a different sector under the same agreement.⁹⁸ For example, a violation with regard to patents could be countered with suspension of measures in the area of trademarks.

⁹⁶ Article 22.3(a) of the DSU

⁹⁷ See http://www.wto.D:\ENGLISH\tratop_e\dispu_e\disp_settlement_cbt_e\signin_e.htm accessed on 12/01/2010. Also see Articles 22.3(b), 22.3(g) and 22.3(f) of the DSU.

⁹⁸ Article 22.3(b) of the DSU

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.⁹⁹ This is known as cross-retaliation.

In the *US Upland cotton case*,¹⁰⁰ the USA having given actionable subsidies to its cotton farmers was ordered by the Appellate Body in to compensate Brazil. The USA however ignored the ruling until recently when the compliance Panel authorised Brazil to pursue retaliation against the U.S.A in other sectors namely under intellectual property and services.

In applying these principles, 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.¹⁰¹

If parties disagree on the complainant's proposed form of retaliation for example as to whether the level of retaliation is equivalent to the level of violation. The parties must request for arbitration within 60 days and must accept the arbitrator's decision as final.

⁹⁹ Article 22.3(c) of the DSU

¹⁰⁰ WT/DS267

¹⁰¹ Lucas Eduardo F. A. Spadano (2008) "Cross-Agreement Retaliation in the WTO Dispute Settlement System: An Important Enforcement Mechanism for Developing Countries?" *World Trade Review Journal* (2008), 7: 3, pg 12-13

¹⁰² The complainant must not proceed with the suspension of obligations during arbitration.¹⁰³

Why retaliation is not feasible

In practice, the complaining party submits a list of goods or services to be subjected to the suspension of concessions.¹⁰⁴ Unfortunately, there is no requirement under the DSU for the complaining party to be bound by the list of goods or services submitted.¹⁰⁵

As observed by Lucas Eduardo (2008)

*“The current text of the DSU as interpreted in EC – Hormones results in a virtual authorization for members to practice “carousel” type of suspension once the authorization is granted. A suspending member may rotate at will products or services subject to suspension as long as it observes the level of suspension authorized. In practice, this may result in a much higher level of retaliation since there can be uncertainty and unpredictability as to what goods or services are to be subject to the suspension”.*¹⁰⁶

¹⁰² Article 22.6 and 22.7 DSU

¹⁰³ Article 22.6 DSU

¹⁰⁴ Article 22.2 DSU

¹⁰⁵ See *EC – Hormones (US)* Paragraph 23.WT/DS26. Also see Article 22.6 DSU

¹⁰⁶ supra note 100 at pg 13

Lucas concludes that 'in economic terms, the balancing rationale for retaliation is a fiction. The aggrieved country does not really gain anything by raising trade barriers. The act usually inflicts a net loss upon its own citizens.'¹⁰⁷

Accordingly, retaliation is not a feasible remedy under the DSU. Responding to a WTO-inconsistent trade barrier with another barrier is contrary to the liberalization philosophy underlying the WTO.

As Adam Smith (1776) in the "Wealth of Nations" pointed out over 200 years ago, one should approach with caution the idea of blocking trade in order to promote.¹⁰⁸

2.3 Conclusion

The above chapter has identified that while African WTO member states face difficulty at all stages of dispute settlement, their biggest hurdle is at the consultation and compliance stages.

¹⁰⁷ As quoted by Hudec, R. E. (2000), 'Broadening the Scope of Remedies in WTO Dispute Settlement - Improving WTO Dispute Settlement Procedures: Issues and Lessons from the Practice of other International Courts and Tribunals,' London: pp. 369–400.

¹⁰⁸ Steven Chanovitz (2002) "The WTO's Problematic "Last Resort" Against Non-compliance" *Aussenwirtschaft*, December. pg 28.

CHAPTER THREE

WHY ARE AFRICAN COUNTRIES CONTINUOUSLY ABSENT FROM THE DISPUTE SETTLEMENT MECHANISM?

3.1 Introduction

Following the analysis of the dispute settlement process in the previous chapter, Chapter three seeks to prove that although the WTO-DSU counts among the most visible achievements of the Uruguay Round, a lot still needs to be done if the DSU is to resolve more positively in regard to the needs of all partner states.

The chapter is based upon a background that in comparison to the disputes settlement mechanism under the GATT 1947, the WTO - DSU enhances security and predictability of the multilateral trading system.

The purpose of this chapter is therefore to explain why African countries have participated minimally in the dispute settlement process yet they make up a greater percentage of developing/least developed WTO member countries. It is worth pointing out at this juncture that large economies in Africa with relatively high volumes of trade, have at some instances refrained from raising relatively assured complaints to the DSM.¹⁰⁹

¹⁰⁹ Magda Shahin (2006) "Egypt's challenges and Future Options for Participating in the WTO Dispute Settlement System. ICTSD Mombasa paper pg 14.): <<http://www.ictsd.org/dlogue/2006.02-03/06-11-06/-docuhtm>>accessed on 25/11/2009

Egypt refrained from bringing the European Community to dispute with regard to the ban on Egypt's exports of potatoes. In 1999 according to the Sanitary and Phytosanitary Agreement (SPS), the European Community directives stated that brown rot in the potatoes from Egypt had health-impairing effects and banned their importation thereof. However it was later proved that brown rot was not health impairing and further that organism causing brown rot could only be traced through the import of seed potatoes (which Egypt did not export). In addition, European community parties also had the organism but continued to grow and trade among themselves potatoes with brown rots. However, instead of bringing its case to the DSM, Egypt continued to accept the imposition of the ban on its exports.¹¹⁰

In light of the above, African states are continuously absent from participation in the dispute settlement process due to the following reasons.

3.2 Extensive period of litigation

The function of the WTO dispute settlement mechanism is to settle disputes promptly and satisfactorily within the given time frame.¹¹¹ As discussed in chapter two of this thesis, consultations last 2months with a possibility of extension to 9months while panel proceedings last for 6 months with a possibility of extension to 12months. Appeals last 3 months with appellate reports being adopted after 9months. Coupled to the 3 months

¹¹⁰ supra note 109

¹¹¹ See Article 3.3 DSU

allocated for arbitration and 6 months of surveillance of implementation, dispute settlement lags on for years.¹¹²

According to submissions by Mexico to the special session on the review of the DSU of 4/11/2002.¹¹³ 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 consultation period was included.

It is clear from the above that litigation is lengthy and tedious. This has made the dispute settlement mechanism become lesser attractive to member states

Significant delay occurs when a respondent has to revise the infringing measures (usually its domestic laws) so as to bring them into conformity with the breached covered agreement.¹¹⁴

This lengthy period of the dispute settlement process jeopardizes the litigants' market niches and exporting opportunities. As such, African countries have had to weigh carefully the costs and benefits of litigation.

As Shaffer observes, the lengthy procedure has created an incentive for stronger countries to drag out cases for years. By the time the panel confirms that the said countries violated their WTO obligations, they would have successfully closed the

¹¹² see Article 15,17 and 21 of the DSU

¹¹³ See TN/DS/W/23

¹¹⁴ See *EC-Bananas III*/WT/DS/364

markets that gained from the violating measure. Thus, they will not incur any consequence.¹¹⁵

In conclusion, this protracted period to enforce WTO law has turned into a mechanism to escape the same.¹¹⁶

3.3 Lack of interim relief

The provisions as to remedies under the DSU do not offer any possibility for a complainant to request for an interim measure from the panel for example suspension of the offending measure during the proceedings.

The absence of this remedy is a problem that even the WTO acknowledges as reported by the WTO secretariat in the following words.

“...full dispute settlement procedure takes a considerable amount of time, during which the complainant suffers continued economic harm... no provisional measures (interim relief) are available to protect the economic and trade interests of the successful complainant during the dispute settlement procedure...”¹¹⁷

¹¹⁵ Gregory Shaffer (2003) “How to make the DSU work for developing countries”.ITSCD paper no.5 Pg39 <<http://www.ictsd.org/dlogue/2003.02-07/03-02-07/-docuhtm>> accessed on 21/12/2009

Also See Costa Rica -Restrictions on Imports of Cotton and Man-made Fiber Underwear, WT/DS24/AB/R

¹¹⁶ Magda Shahin supra note 109.

¹¹⁷ A handbook on WTO dispute settlement (2004) at pg117.

Also see “Evaluation of the WTO Dispute Settlement System: Results to Date”, <http://www.wto.org/english/tratop_e/dispu_e/dispu_settlement_cbt_e/c12s3p1_e.htm>accessed on 12/11/2009

The remedy of interim relief in form of injunctions is the cornerstone of litigation. The remedy serves to preserve the status quo of the parties pending a ruling of a case. The remedy puts an infringing measure at hold and prevents a respondent from unjustified enrichment.

It was earlier on noted that litigation at the WTO dispute settlement lasts for four years or even more during which a complainant continues to suffer significant harm from the measure in issue.

It follows that the lack of meaningful remedies like injunctions and interim relief has contributed to the lack of enthusiasm by many WTO member states from lodging disputes at the WTO-DSM.

3.4 Lack of adequate surveillance of implementation of Recommendations and Rulings by the DSB.

As discussed before, the DSB has the responsibility to survey the implementation of adopted recommendations or rulings.¹¹⁸

The Member concerned must provide the DSB with a status report in writing of its progress in the implementation of a recommendation six months following the date of establishment of the reasonable period of time and at each DSB meeting thereafter.

¹¹⁸ Article 21.6 of the DSU

Virachi Plasai (2006) however notes that the system of submitting a status report under Article 21.6 of the DSU has become a mere formality.¹¹⁹

It should also be noted that article 21.6 of the DSU does not elaborate the details to be contained in status reports nor what qualifies as compliance.

As a result of this lacuna, any member required to submit to the DSB a status report can forward one that simply says that she complies with the recommendations and rulings without any further details. With other Parties rarely questioning it, the status report becomes a routine submission that is devoid of any meaning.¹²⁰

Further, According to the language of Article 19 of the DSU, recommendations by the panels / Appellate Bodies to the parties are non-binding. Article 19 of the DSU stipulates that once the panel makes a ruling on a violation or the Appellate Body upholds the same, the panel / Appellate Body Shall recommend that the respondent brings the measure into conformity with the covered agreement. In addition to this, the panel /appellate body "*may suggest*" ways in which the respondent could implement the recommendations.

This language is declaratory in nature and vague. As a result of using such language in panel /Appellate Body reports, parties have more or less considered themselves free to

¹¹⁹ infra

¹²⁰ Virachai Plasai (2006) "Compliance and Remedies against Non Compliance under the WTO System: Toward a more balanced regime for all members". ICTSD pg 9): <<http://www.ictsd.org/dlogue/2006.22-23/22-06-06/-docuhtm>>

adopt any measure that they deem appropriate within the broad universe of such recommendations

For many countries, how to ensure that panel reports are fully implemented is a major source of concern especially where the implementing party is a major economic power.

The above loophole in the WTO Agreement is compounded by the fact that there is no outside force willing or able to carry out enforcement should a deviation from implementation occur.

As noted by Judith Bello

“The WTO has no jail house, no bondsmen, no blue helmets and no tear gas....the WTO initially relies upon voluntary compliance”¹²¹

The above situation confirms the WTO secretariat’s fear that “the best international agreement is not worth very much if its obligations cannot be enforced when one of the signatories fails to comply with such obligations.”¹²²

¹²¹Judith Bello (1997)“The dispute settlement understanding: less is more” American Journal of International Law 416 (1996).

Also see Jackson(1997)“the WTO dispute settlement Understanding-misunderstandings on nature of legal obligation” American journal of international law,vol 91 pg 61

¹²² Supra notes 111 and 117 at pg 1

3.6 Compensation

Compensation under Article 22.1 of the DSU is a voluntary and temporary measure available to a complainant in the event that the recommendations and rulings are not implemented within a reasonable period of time.¹²³

The parties to a dispute arrive at compensation under the DSU through negotiations which take two forms; supplementary concessions offered for other products or increase of customs tariffs on imports from an offending member party.¹²⁴

The said two forms of compensation are not applicable to African countries. This is because African countries neither export a variety of products nor import goods in large quantities from their developed counterparts.

As such, the ability of African countries to negotiate just and fair compensation is highly debatable.

On a further note, compensation is not an attractive option as it is rarely heard of, even amongst developed WTO member states. Throughout the history of the DSU, compensation has been paid twice; specifically by Japan to Canada, European Communities and the USA in exchange for an extension of the implementation period in

¹²³ See article 22.1 DSU

¹²⁴ See article 22.2 DSU

the *Japan-Alcoholic Beverages II* case and by the United States to the European communities in the *EC-US Copyright* case.¹²⁵

Yet still, compensation as a remedy would not be feasible because in accordance with the cardinal rules of WTO law, parties to the dispute must agree upon the compensation consistent with the covered agreements. It is a well known principle of WTO law under the Most Favoured Nation obligation that a member state should extend similar treatment to all other member states under every covered agreement.¹²⁶

This therefore means that a compensation offered by a respondent to a complainant in form of a tariff reduction would also be extended to the WTO membership at large.

This makes compensation less attractive to both the respondent, for whom this raises the “price”, and the complainant, who does not get an exclusive benefit.

Gregory Shaffer (2003) notes that parties to the dispute take advantage of the Most Favoured Nation obligation to withhold concessions as a bargaining chip for a future negotiating round.¹²⁷ Thus making compensation more difficult than it is already.

¹²⁵ See WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, DSR 1996.

¹²⁶ See Article I of the GATT 1994.

¹²⁷Gregory Shaffer(2003) “How to Make the WTO Dispute Settlement System Work for Developing Countries” - ICTSD Resource Paper No. 5 Pg 37

The above notwithstanding, the DSU does not allocate enough time to the parties to agree on compensation. Article 22.2 of the DSU gives an allowance of 20 days to the parties to agree on compensation before a complainant can request authorization to suspend concessions. This, together with Article 22.6 of the DSU mandating the DSB to authorize the suspension of concessions within 30 days after the expiry of the said 20 days under Article 22.2 render negotiations for compensation impossible.

3.7 The intended period for compliance with panel /Appellate Body rulings is not reasonable.

Once a trade measure is found to be inconsistent with a covered Agreement by the panel /Appellate Body, the complainant is advised to bring such a measure into conformity with the covered agreement.

The complainant must inform the DSB of their intention to implement the recommendations and rulings by the panel /Appellate Body within 30 day after the date of adoption of the panel / Appellate Body report.¹²⁸

If it is impracticable to comply immediately with the recommendations or rulings, the Member concerned is given a reasonable period in which to do so. The reasonable

¹²⁸ See Article 21.3 DSU.

period is proposed by the parties within 45 days or through binding arbitration within 60 days after the date of adoption of the recommendations or rulings.

Practice has shown that States need a great deal of time to amend their respective internal laws in order to withdraw a measure especially where such states are least developed countries that are strapped with financial hardship and lack of legal expertise in international law.

As indicated earlier, the current text of the DSU does not provide for a real possibility for the parties to the dispute to engage meaningfully in the negotiations in view of any compensation.

Article 22.2 of the DSU permits 20 days only to the parties to agree on compensation before a complainant can request authorization to suspend concessions.

This, together with the provision of Article 22.6 of the DSU that the DSB shall grant authorization for a suspension within 30 days after the expiry of the reasonable period for implementation means that a complainant with material possibility to retaliate will request a suspension without trying to reach agreement with the respondent on compensation.

The foresaid situation was highlighted in the European Communities *EC- Bananas dispute III* and is commonly known as the “sequencing problem”.

In 1997, the European Communities (EC) lost a dispute in which USA, Ecuador, Mexico and Guatemala challenged the EC's closure of market access to bananas from the South American region. In 1998, the EC and Ecuador separately requested for establishment of compliance panels under Article 21.5 of the DSU to determine whether measures implemented by the EC were consistent with DSB recommendations. Given that there was (and still is) no requirement for a multilateral determination of non-compliance under Article 21.5 of the DSU before the panels could authorise retaliation under Article 22.6 of the DSU, USA requested for authorization of suspension of concessions under Article 22.6 of the DSU before the compliance of the measures could be determined by the compliance panel under Article 21.5 of the DSU.¹²⁹

The above example clearly indicates that the absence of a reasonable period of time for parties to agree on compensation leaves retaliation as the only meaningful remedy against non-compliance. Retaliation on the other hand has grave consequences as discussed below.

3.8 Retaliation

As earlier discussed in chapter two, the DSU permits a complainant to retaliate through the "suspension" of concessions that were available to the respondent prior to the

¹²⁹ See *EC banana III* (WT/DS27/AB/R)

dispute. In practice, the complainant submits a non binding list of goods or services to be subjected to the suspension of concessions.¹³⁰ As such, a suspending member may rotate at will products or services subject to suspension as long as it observes the level of suspension authorized. The said practice creates a carousel type of suspension which may result in a much higher level of retaliation since there can be uncertainty and unpredictability as to what goods or services are to be subject to the suspension.

According to Sungjoon Cho (2004), retaliation “invites the rule of the jungle” because it allows a losing party to move the conflict outside the legal framework of the WTO into the area of international politics. As such, small, poor, and aid-dependent countries do not stand a chance.¹³¹

Retaliation is tantamount to “shooting oneself in the foot”. Due to interdependence of state economies, a complainant might end up affecting trade benefits or opportunities of her own entrepreneurs through retaliation against a good or service from the respondent, especially in a situation where the complainant is highly dependent on imports from the respondent.

¹³⁰ Article 22.2 DSU

¹³¹ Sungjoon Cho (2004) “The Nature of Remedies in International Trade Law” as referred to by Dr. Uché U. Ewelukwa (2005) “Multilateralism and the WTO Dispute settlement mechanism – Politics, Process, Outcomes and Prospects”, at pg 37.

The above point is best illustrated with a hypothetical situation of a dispute between Japan and Uganda.

Supposing Japan puts in place a measure that increases import duty on coffee from Uganda. Uganda successfully challenges the measure and gets authorization to retaliate against Japan. Uganda being a key motor vehicle importer from Japan imposes a premium tax against car imports from Japan making it impossible for Japanese automobiles to penetrate the Uganda market.

Uganda's move would be meaningless because it would be more difficult for Uganda to find alternative buyers of her coffee, than it would be for Japan to find alternative buyers of her automobiles.

The above example coincides with Shaffer's argument that retaliation is biased in favour of countries with large markets such as the United States, China and the EC.¹³²

Related to the above are the links between retaliation and international politics. African countries trade with bigger partners under preferential arrangements not subject to the DSU. Consequently complaints are often resolved bilaterally under the preferential schemes .

Such trade arrangements make African countries susceptible to any political implications of a trade dispute as such, they would rather solve conflict bilaterally under Generalized System of Preferences and Economic partnership agreements.

¹³² Gregory Shaffer supra note 116 at pg 38.

From the foregoing, it is clear that retaliation has much more consequences than inducing compliance. The remedy is a form of inbuilt discrimination in the DSU against developing and least developed African countries that have low market shares in international trade hence low retaliatory powers and are as well restrained by political implications of a WTO-disputes.

3.9 Traditional rules of treaty interpretation under the DSU obstructs Justice due to developing/least developed countries

Trade agreements are often vaguely drafted with a generality of language that often makes it difficult to determine the precise effect of trade agreements. This is a result of the negotiating process where compromise and the desire to conclude negotiations as fast as possible lead to ambiguous /vague terms. WTO agreements are no exception to the said vice.

Hankan Nordström and Gregory Shaffer (2007) concur that WTO law is very hard to interpret because it has been negotiated among over 100 governments that do not typically agree on what each provision means.¹³³ Given the vague nature of the language of covered agreements, this leaves serious ambiguities. Legal issues thus remain open for the judicial process to consider.¹³⁴

¹³³ Hankan Nordström and Gregory Shaffer (2007) - Access to Justice in the WTO-A case for small claims procedure ICTSD policy paper June issue no.2 at pg 19.

¹³⁴ Ibid

Currently, the jurisprudence of panels and Appellate Body does not reflect the development concerns of states in Africa. This is because of the limitations placed by traditional rules of treaty interpretation used by the panels/Appellate Bodies to interpret the said vaguely drafted agreements.

Traditional rules of treaty interpretation limit the ability of panels/ AB to liberally construe the provisions of WTO agreements relating to development.

The primary responsibility of panels/Appellate Body is to determine whether from the facts of a given case, a violation of a “covered agreement” has occurred. As such, requests for consultations are only made “pursuant to a covered agreement.

As noted in the Appellate Body ruling in the *United States – Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway* and *New Zealand – Imports of Electrical Transformers from Finland*

“ where a WTO Agreement is silent on a given issue, such an issue is left to the discretion of member states.”¹³⁵

Further, in interpreting provisions of the DSU, the panel/appellate body apply the Vienna Convention on the Law of Treaties (Vienna Convention)¹³⁶ and related customary treaty

¹³⁵ See *United States–Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic salmon from Norway*, (SCM/153) Para. 243-46), *New Zealand – Imports of Electrical Transformers from Finland*, L/5815-32S/55,Para.4.2-3

¹³⁶Vienna convention 1969, 1155 UNTS 331; available at <<http://www.untreaties.org>>accessed on 11/3/2010

interpretation rules of public international law before looking into the covered WTO agreement.

Consequently, the panels use a sequential application of customary rules of treaty interpretation first before applying the "permissible" interpretations to the agreement. Much as this endeavour is intended to ascertain the proper meaning of the agreement and narrow down its range of interpretations, it deviates from the context and object of the agreement at the same time.

The Appellate Body has more than once applied the principle of *in dubio mitius* in interpreting treaties in respect to the sovereignty of states.¹³⁷ Under the said principle, the A/B held that if the meaning of a term is ambiguous, a lesser onerous meaning to the party assuming an obligation, or that which interferes less with the territorial and personal supremacy of a party should be adopted.¹³⁸

It has been noted before that many provisions of the DSU pertaining to development are ambiguous and developing countries lack trained personnel to argue their cases. As such, developed countries may take advantage of the said rule to influence panels/ AB to use "a lesser onerous meaning" thus leaving the matter to the discretion of the parties.

¹³⁷ See Appellate Body annual report (2009)-supra note circulated as WT/AB/13 at pg 19 available at <<http://www.wto.org>>accessed on 3/11/2010.

¹³⁸ See EC- Hormones paragraph 165, WT/DS26/AB/R, WT/DS48/AB/R.

Yet another limitation to treaty interpretation is the provisions of Article 3.2 of the DSU which place judicial restraint upon the panel/Appellate Body when faced with ambiguous treaty provisions.¹³⁹

Currently, under Article 12.11, when dealing with cases involving a developing country, panels are required to explicitly indicate the form in which account has been taken of relevant provisions on differential and special treatment for developing member states in the course of the dispute settlement procedures.

This implies that in a request for establishment of a panel, Parties are required to identify the specific provisions on special and differential treatment in a covered agreement, sufficient to make a *prima facie* case.

Consequently, if a party omits to cite specific provisions of a covered agreement relating to its development needs, a panel is not required to examine such provisions.

It is also worth noting that there is single agreement that comprehensively and specifically addresses development issues.¹⁴⁰ References to development under WTO are scattered “here and there” in most of the covered agreements.

The aim of the dispute settlement mechanism *inter alia* is to secure a positive solution to a dispute.¹⁴¹ The panels/ Appellate Bodies however do not strike a balance between the

¹³⁹ Article 3.2 States in particular that recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.

¹⁴⁰ *Supra* notes 2 and 133 at pg 51.

requirements of Article 3.2 of the DSU with the development mandate of the World Trade Organisation.

Panels/Appellate Bodies do not successfully examine and consider all legal claims as advanced by parties. Panels instead restrict themselves to only the claims considered necessary; this defeats their overall objective of developing a meaningful judicial economy.

3.10 Developing Countries' concerns

Despite the fact that special provisions have been put in place to cater for special needs of developing countries and grant differential treatment to the same, African countries have barely invoked the said provisions. Several articles urge the WTO panels/Appellate Bodies to take into consideration special development concerns of developing countries at all stages of dispute settlement when adjudicating over disputes brought by such members.¹⁴²

African Countries have nonetheless shunned the DSM because the said provisions were hastily drafted and are thus limited in scope. The provisions are declaratory rather than obligatory in nature.¹⁴³ (Using the language such as “should” instead of “shall”).The

¹⁴¹ Article 3.7 DSU.

¹⁴² See Articles 3.12, 4.10, 8.10, 12, 24 and 27.2 of the DSU.

¹⁴³Valentina Delich (2003) “Developing Countries and the WTO Dispute Settlement System in Development, Trade- a Handbook.” Edited by Bernard Hoekman et al. World Bank, Washington pgs 62, 71, 72-73.Also see “A hand book on WTO dispute settlement” at pgs 62, 71, 72,73

wording of clauses "shall" and "should" do not impose any legal obligation on developed countries to give special attention to the particular problems and interests of developing country Members.

The irony of the special and differential treatment is seen at the compliance and suspension of concessions stage of dispute settlement. The DSU puts both developed and developing country members in the dispute on an equal footing. It has been noted that the compliance and surveillance stage is most critical to the parties because it is the point in time where panel /Appellate Body decisions gravely affect economies of a developing / least developed if they are parties to the dispute.

This lack of meaningful special and differential treatment to African states during dispute settlement alienates them further from the world trading system.

3.11 Conclusion

The chapter illustrated why the DSU despite being a great achievement of the Uruguay round is nonetheless facing questions as to authenticity.

The chapter illustrated that the DSM is a complex- interconnected maze with a wide set of deficiencies that account for continuing non-recourse by African states.

The chapter also demonstrated that the WTO-DSM is biased towards leading industrialized countries, notably the EU and the United States as seen from the nature of remedies under the DSU. The said member states have greater economic power to fight costly cases and their political advantage to threaten weaker respondents with retaliation.

The emphasis of the chapter was that the WTO-DSM has weak remedies with delay in implementation, retaliation constraints and weak compliance with panels/ AB rulings work to discourage African countries from utilizing the system.

As accurately stated by the south centre trade analysis of the WTO-DSB,

“... a judicial system of dispute settlement is measured not only by the number of cases it decides but also by the effectiveness of the remedies it provides.”¹⁴⁴

The WTO dispute settlement mechanism may be a permanent feature in the multilateral trading system however its future depends upon the redress of its current shortcomings.

¹⁴⁴ South Centre (2005) “Trade analysis of the WTO dispute settlement system: issues to consider in the DSU negotiations” SC/TADP/TA/DS/1 at pg 18 available at <http://www.southcenter.org> accessed on 10/5/2010

CHAPTER FOUR

SPECIFIC CONCERNS FOR REFORM IN THE OF THE DISPUTE SETTLEMENT MECHANISM.

4.1 Introduction

The need to reform the dispute settlement system was underscored in the previous chapter. It is clear that the provisions of the DSU cast doubt to the authenticity of the dispute settlement mechanism. The absence of participation by large sections of the WTO membership, such as African countries, is a danger to the long-term “predictability” function of the WTO, and could undermine the usefulness of the entire process eventually.¹⁴⁵

¹⁴⁵ Mosoti victor (2005)“Africa in the first decade of WTO dispute settlement” Journal of international Economic Law October. pg 10

It is for the said reasons that this chapter covers suggestions to improve the performance of the Dispute Settlement Body in general and areas for amendment in the DSU in particular.

The chapter also looks at specific concerns for reform as advanced by the African group at the Doha round of negotiations 2001-2003.¹⁴⁶

These proposals are vital because they indicate how the WTO dispute settlement system will develop in the future.

4.2 Compensation

The most powerful argument advanced by African countries is the need for monetary compensation to complainants under the DSU. African countries have contended that by the time sanctions are authorized by the DSB (which currently takes more than three years), a developing/least developed member as complainant would have suffered irreparable damage.

The African Group in its tentative draft has suggested that Article 21.8 of the DSU on compensation be amended to include a monetary award calculated to reflect the level of

¹⁴⁶ See TN/DS/W/15 (September 25, 2002), TN/DS/W/42 (24 January 2003), (2005), proposals by the LDC Group circulated as TN/DS/W/17 (17 January 2002) and TN/DS/W/37 (22 January 2003). Available at <http://www.wto.org> accessed on 12/12/2009

nullification, especially in disputes involving measures taken by a developed country against a developing/ least developed member state.¹⁴⁷

Monetary compensation would be a viable option for a respondent state if it cannot comply with the DSB recommendations or rulings within a reasonable period considering that the DSU does not offer injunctory relief to complainants.

In addition to that, where a developed country Member loses a case to a developing/least developed country or withdraws the complaint at the consultation stage, the former should reimburse legal costs incurred by the latter in defending the dispute.

The proposal is premised on the fact that African economies are small and bound to face serious injury from measures restricting their exports by developed economies even if the measures are imposed for short periods.

The current remedy regime does not restore benefits accruing to the injured Member up to the level that existed before the violation. Given that, benefits are quantifiable in nature; monetary compensation would transfer a true benefit to the complainant if the reward were to be distributed to the injured domestic industry.

¹⁴⁷ The current text of Article 21.8 DSU reads as follows “In considering what appropriate action to take in a case brought by a developing country Member, the DSB has to consider not only the trade coverage of the challenged measures, but also their impact on the economy of developing country Members concerned “.

Monetary compensation is undoubtedly an attractive option because it would not be subject to the Most Favoured Nation principle because WTO agreements relate to Most Favoured Nation treatment of goods or services of Member states but not monetary reparation between Members.¹⁴⁸

4.3 Collective retaliation

As noted in the previous chapter, African countries are discouraged from lodging complaints due to limited retaliatory power and political implications like the cutting off development assistance or preferential market access.

For an African state to induce compliance through retaliation, such has to be massive and disproportional to the level of nullification/ impairment.¹⁴⁹

To this end, the African Group has proposed that Article 22.6 of the DSU should be amended to reflect *“Collective” suspension*. The group advocates for an additional subsection which will read as Article 22.6 (d)

“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

¹⁴⁸ Valachai Plasai (2006) “Compliance and Remedies against Non Compliance under the WTO System: Toward a more balanced regime for all members”. ICTSD dialogue Brazil. supra note 122 at pg 6

¹⁴⁹ See TN/DS/W/17 (9 /10/2002) and TN/DS/W/42 (24/01/2003) respectively.

developing/ least-developed Member and any other Members to suspend concessions or other obligations within 30 days”

It is upon that premise that collective retaliation is advised. The right to suspend concessions/other obligations could be transferred to joint complainants with systemic interest in a case for instance in the *cotton* and *banana* disputes¹⁵⁰.

Ng'ong'ola however states that collective retaliation is "too revolutionary" and impracticable to implement. He argues that collective retaliation is a blunt instrument aimed at terrorizing a wrong doer into compliance with covered agreement. He states that collective retaliation might allow a WTO member to buy the right to wage a proxy trade war.¹⁵¹ 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 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

¹⁵⁰Burkina Faso, Chad, Mali and Benin participated as third parties in the cotton dispute (WT/DS267/AB/R) while Cameroon, Côte d'Ivoire; Ghana and Senegal participated as third parties in the EC banana regime (WT/DS/27/R).

¹⁵¹ Ng'ong'ola clement(2009) “African member states and the negotiations on dispute settlement reform in the world trade organization” Tralac at pg 128

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.

The authors however fail to mention that retaliation under the current regime has failed to induce compliance and justice. It should be remembered that suspension of concessions must be equivalent to the level of nullification/ impairment. African countries have low trade volumes and export few products to developed countries and as such, a single weak African economy cannot cause a sufficiently negative economic impact on a stronger developed state hence the necessity for collective retaliation.

4.4 The sequence between compliance and retaliation.

The lack of coherence between Article 21.5 of the DSU and Article 22.6 of the DSU has been termed as sequencing problem between compliance and retaliation.¹⁵² The issue has always been whether a compliance panel under Article 21.5 must first review the compliance measures undertaken by a respondent before the DSB authorizes a

¹⁵² Merite Janow et al (2008) "WTO dispute settlement" WTO Governance, Dispute Settlement and Developing Countries" Juris publishing inc, New York. pg118

complainant to retaliate under Article 22.6 on grounds of the respondent's alleged noncompliance.¹⁵³

Article 21.5 is to the effect that if there is disagreement as to consistency of compliance measures with a covered agreement, the dispute shall be referred back to the panel and a report shall be circulated within 90 days after the date of referral.

Article 22.6 on the other hand states that if the Member concerned fails to bring the measure found to be inconsistent with a covered agreement into compliance with the recommendations within the reasonable period of time, the members shall enter into negotiations with a view to developing mutually acceptable compensation.

If no satisfactory compensation has been agreed upon by the parties, the DSB, upon request, shall grant authorization to suspend concessions within 30 days of the expiry of the reasonable period of time. This shows that a complainant with means to retaliate will do so before a compliance panel report is issued.

Proceedings by a compliance panel under Article 21.5 are parallel to arbitration trial under Article 22.6. This is a conflicting course compounded by the fact that there is no appeal from the arbitration. As stated previously in Chapter two of this thesis, retaliation is the final and most serious consequence a non-implementing Member faces in the WTO dispute settlement system.

¹⁵³ See Articles 21.5 and 22.6 of the DSU.

It must be remembered that the current text of the DSU does not provide for a real possibility for the parties to the dispute to meaningfully engage in negotiations in view of compensation, this means that a complainant with material possibility to retaliate will request a suspension of concessions without trying to reach agreement with the respondent on compensation.

This aspect of the DSU must be amended to give parties sufficient time to engage in compliance proceedings and to provide a logical sequence where Article 22.6 is invoked only after the close of a compliance panel under Article 21.5.

4.5 Development concerns of African states

This is yet another obstacle to a pro-development interpretive culture of the DSU as seen from chapter three of this thesis is the fact that most special and differential treatment provisions are vague, hortatory and do not specifically impose legal obligations on WTO Members or the WTO as an institution.¹⁵⁴ As noted by the Appellate Body in *US – Carbon Steel*¹⁵⁵

¹⁵⁴See Dr. Ewelukwa supra notes 2 and 134 at pg 58

¹⁵⁵ See *US -Carbon Steel*, Para. 104, (WT/DS213/AB/R,WT/DS213/AB/R/Corr.1)

“When a provision refers, without qualification, to an action that a Member may take, this serves as an indication that no limitation is intended to be imposed on the manner or circumstances in which such action may be taken.”

Without amending the existing Special and Differential Treatment wording of Article 4.10, it may be difficult for African states to rely on the differential provisions in the DSU and covered agreements.

The African group has proposed replacing of the phrase “shall” with “should” in the special and differential treatment clause and insertion of the phrase “least developed country” in all clauses that refer to developing countries as beneficiaries of special and differential treatment.

Following the discussion in the previous chapters, the foresaid proposal should be given maximum attention. The wording of the DSU (especially that dealing with rulings/recommendations) ought to be revised and written in future tense. Affirmative words such as “hereby”, “with effect from”, “must” will give the provisions of the DSU a better meaning.

In enhancing practical benefits of special and differential treatment, the African Group has also proposed that special and differential treatment should be extended to panellists.¹⁵⁶

It is the expectation of African countries that this proposal will oblige developed countries to engage in good faith consultations with them regarding development needs, instead of treating consultations as a mere perfunctory exercise.¹⁵⁷

4.6 Enhancement of third party participation in dispute settlement.

The African Group advocates the replacement of Article 17.4 with the following language:

"Third parties in the panel proceedings upon request shall have a right to attend the proceedings and have an opportunity to be heard and to make written submissions to the Appellate Body." The current text of Article 17.4 of the DSU is to the effect that "only parties to the dispute, not third party, may appeal a panel report".¹⁵⁸

¹⁵⁶ "When a dispute is between a least-developed country Member and a developing or developed country Member, the panel shall include at least one panellist from a least-developed country Member and if the least-developed country Member so requests, there shall be a second panellist from a least-developed country Member. See TN/DS/W/15, 15 /09/ 2002

¹⁵⁷ See chairman's text of July 2005 (job (03)/55)

¹⁵⁸ See Article 17.4 of the DSU

If this amendment is adopted, systemic interests of member states who “jump on board” at the appellate stage will be taken into consideration. This provision would also allow Members with limited resources to participate in the DSM process.

Kessie and Ado agree that third party participation at the appellate stage would help build and strengthen the capacity of African countries in this highly complex area.¹⁵⁹

4.7 Permanent appellate body panels

It was noted in the previous chapter that the litigation period is extensive with strict deadlines. The workload of the Appellate Body is heavy yet none of the members is employed as full time judge.¹⁶⁰

There is need to introduce permanent Judges with each panel having a member from a developing/ least developed African country because they are liable to show greater appreciation of the prevailing conditions in the least developed country.

Even if such a panellist does not influence the outcome of the dispute, his/her appointment would help build and strengthen their capacity to participate more

¹⁵⁹ Kessie Edwini & Addo Kofi (2005) “African Countries and the WTO Negotiations on the Dispute” Trapca available at <<http://www.trapca.org/pages.php?id=88>> accessed on 17/12/09 at pg 15

¹⁶⁰ The appellate body deals with 7-8 cases per year according to the AB annual report of 2009.see WT/AB/13

effectively in the dispute settlement system, as earlier noted Africa lacks trained personnel in WTO law.

Permanent Panellists on a roster basis could lead to faster procedures and increase the quality of the panel reports in the face of a much more sophisticated DSM.¹⁶¹

4.8 Interim relief

The lack of interim relief during panel and Appellate Body proceedings largely renders the WTO dispute settlement system less secure and predictable than it should have been.¹⁶²

The current remedies create an incentive for defendants to drag out a case for years. The remedies only cover losses commencing from expiration of the compliance period with panel rulings as opposed to the date of violation or the date of filing a complaint. By the time a panel issues a ruling against an offending measure, the respondent would have already ripped benefits from this measure and successfully closed her market.

Once a case is brought to the DSB, there should be a possibility for the panel/AB to issue a preliminary remedy to preserve the *status quo* of the parties and to prevent any irreparable damage to the parties.

¹⁶¹ Communication from the European Union TN/DS/W/1(13/3/2002) and TN/DS/W/38, (23/01/2003).

¹⁶² Virachai Plasai supra note 151 at Pg 42

Gregory Schaffer warns that before advocating major changes in WTO remedies, regard should be had to the fact that the WTO legal system is an intergovernmental and not a simplistically national system.

Shaffer however omits to mention that other intergovernmental judicial bodies like the Statute of the International Court of Justice allows interim measures under Article 41.¹⁶³

Article 41 of the International Court of Justice states that

"...the Court shall have the power to indicate, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of either party".(emphasis mine)

Virachai suggests that an interim measure should protect the rights that are the subject matter of the proceedings before the Court, and not merely those that would be affected by the possible outcome of those proceedings.¹⁶⁴

To this end, I agree. Interim measures are long established principles of law. An interim measure would constitute an important step towards ensuring certainty and predictability of the multilateral trading system especially in urgent cases such as those

¹⁶³ See ICJ statute available at <<http://www.untreaties.org>>

¹⁶⁴ Supra note 167

concerning Subsidies and Countervailing Measures, Sanitary and Phytosanitary measures

Mexico as well identified the need for interim relief as reflected in her proposal to the Doha review of the DSU. Mexico suggested actions to be taken by either the respondent or the complainant to stop or counteract the damage or threat thereof.¹⁶⁵

If the interim remedy has worked for member states to the International Court of Justice, there is no reason why it would not work for WTO member states.

4.9 Adequate surveillance of implementation of recommendations

Early monitoring of implementation of panel rulings by the DSB brings about effectiveness and compliance by a respondent.

In order to have prompt compliance and a more meaningful surveillance of implementation by the DSB, a member concerned should give the status of implementation of panel ruling six months after the date of adoption of a DSB ruling instead of six months after establishment a reasonable period of time.

The Member concerned should submit to the DSB a written notification of compliance with a detailed description of the relevant measures it has taken, or those it expects to have taken by the expiry of the reasonable period of time.¹⁶⁶

¹⁶⁵ See proposal by Mexico, TN/DS/W/23

In order to ensure adherence to recommended implementations, the DSB should have a “policing” committee to monitor compliance.

Related to the above, pursuant to a ruling on a violation, the panel/appellate body should issue a compulsory binding measure to be carried out by a respondent. This would give the DSM credibility.

4.1.0 Transparency in WTO dispute settlement proceedings

This is yet another systemic area for reform if the DSU is to develop more positively in response to needs of member states. Panel/Appellate Body working procedures require that panels sit in closed sessions.¹⁶⁷ Documents and deliberations circulated during the process remain confidential with only final reports issued to the public. Even then, these reports are not promptly made to provide meaningful opportunity to public engagement of issues under discussion.

Much as the African group in the review of the DSU has not been concerned with external transparency of the DSB proceedings to the public, transparency is vital for the credibility of the dispute settlement mechanism. Publicity and transparency would contribute to better understanding of the WTO by the public and civil society because

¹⁶⁶ Proposal by the EC and Japan See *EC, TN/DS/W/1, Japan, TN/DS/W/32*,

¹⁶⁷ See Article 17.10 DSU

submissions by the parties and outcomes affect a much wider community than that directly involved in the dispute.¹⁶⁸

Mitsuo Matsushita notes that

*“The Panel and Appellate Body have an obligation to WTO membership at large to allow outsiders observe the hearing, the DSM is meant to serve the WTO membership and if the parties want the system open, the panel/Appellate Body should not stand in their way”.*¹⁶⁹

Openness would rebut the presumption that the WTO is adversarial in nature, stake holders would be able to observe and participate in a more transparent DSM.

4.1.1 Treaty interpretation

In interpreting covered agreements, Panels/Appellate Bodies are guided by Articles 3.2 and 19.1 of the DSU¹⁷⁰. This means that citation of rules other than those contained in the covered agreements is inherently outside the power of panels and the appellate body.

¹⁶⁸ Clement N’gon’gola (2009) “African Member States and The Negotiations on Dispute Settlement Reform in the World Trade Organization”-The WTO-an African perspective, More than a decade later” Tralac, by Rashid Cassim, Calvin Manduna et al, Tralac pg 115.

¹⁶⁹ Mitsuo Matsushita (2006) “A review of major WTO Jurisprudence”, The World Trade Organization, law, practice and policy”, second edition by Matshushita et al -Oxford University Press at pg 506

¹⁷⁰ The current text of Article 19.1 DSU reads that “recommendations and rulings of the DSB cannot add or diminish the rights and obligations provided in the covered agreement”

According to Frieder Roessler, international law is developed by tribunals and not draftsmen of treaties. Ideally, the judicial organs of the WTO should be freed from the strictures of Articles 3.2 and 19.1 of the DSU and be given the possibility to develop jurisprudence providing for remedies that go beyond the cessation of illegal act.¹⁷¹ Panels should liberally construe sources of WTO law extending it to other international agreements.

While scholars like Kelley look at WTO rules as primarily comprised of specific agreements that sovereign states agree to be bound to and see no room for the application of public international law norms,¹⁷² Others like Palmetier and Mavroidis make a case for a broad interpretation of the sources of WTO law including relevant sources of international law. According to them, sources of WTO law include:

Prior practices under GATT, including reports of GATT dispute settlement panels; WTO practices, particular reports of dispute settlement panels and the Appellate Body; custom; the teaching of highly qualified publicists, general principles of law; and other international agreements.”¹⁷³

¹⁷¹ Frieder Roessler (2006) “The scope of WTO law enforced through WTO dispute settlement procedures” pg 336.

¹⁷² Patrick J. Kelley (2002) “Judicial Activism at the World Trade Organization: Developing Principles of Self-Restraint,” *Journal of international law and business*. 353-358

¹⁷³ David Palmetier and Petros C. Mavroidis (1998) “The WTO Legal System: Sources of Law,” *Journal of International Trade Law*, 398-399.

To this end, the use of precedents in dispute settlement as embedded under the Marrakesh Agreement in Article XVI: I ought be taken into consideration by the panels to enhance meaningful treaty interpretation.¹⁷⁴

The African group has suggested that panels and the appellate body should refer all questions relating to gaps or conflicts between covered agreements to the general council to correct erroneous interpretations.¹⁷⁵

Dr. Ewelukwa suggests that the panels should use Preambles as an Interpretive Tool. Preambles will allow panels/ Appellate Body to factor in development as an objective of the WTO as an institution especially where agreements silent on development issues.

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From the above findings, the DSU is not a self-sustaining legal regime therefore it should not be restrictive in treaty interpretation; accordingly panellists and the Appellate Body should rely on other statutes of international law to broaden treaty interpretation.

4.1.2 Collective fund

African countries agree with many scholars that access to the WTO Dispute Settlement System is overly expensive.¹⁷⁷

¹⁷⁴Article XVI:I spells out that the WTO shall be guided by decisions, procedures and customary practices followed by contracting parties to GATT 1947 and the bodies established in the framework of GATT 1947.

¹⁷⁵ African group supra note 154.

¹⁷⁶ Dr Ewelukwa supra notes 2 at pg 55

¹⁷⁷ See Paragraph 3(a) of the proposal by the African group, TN/DS/W/15, (25/09/2005).

The cost of hiring a foreign law firm is estimated to cost at least US \$ 400,000¹⁷⁸. According to Chad Bown and Hoekman, a conservative estimate of attorney fees in trade litigation cases is \$350 per hour. This means that the bill for hourly legal services could run from \$89,950 for a “low” complexity case to \$247,100 for a “high” complexity case.¹⁷⁹

Hitherto, these fees do not include the cost of data collection, economic analysis, hire of expert witnesses for testimony, travel and accommodation, which lead to another estimate of \$100,000 to \$200,000.

Clearly, the stated figures are exorbitant for a single African state already strapped with budget deficits and debt.

It would therefore make sense to have supplementary resources and means to develop institutional and human capacity for utilization of the DSM. This can be achieved through a pool of funds from well off WTO member states.

The trust fund would complement services of WTO advisory body centre.

¹⁷⁸ Gregory Shaffer(2005) “Weaknesses And Proposed Improvements to the WTO Dispute Settlement System: An Economic And Market-Oriented View” A Look at the Appellate Body, Sao Paulo at pg 18.

¹⁷⁹ Chad Bown and Hoekman (2005)“WTO Dispute Settlement and The Missing Developing Country Cases; Engaging The Private Sector,” Journal of international Economic Law, issue no.8, 861-890 at pg II

4.13 Strengthening the consultation stage as an alternative dispute settlement procedure.

India, Guatemala, Egypt, Venezuela, Japan and later the African group as part of the LDC caucus on the review of the dispute settlement mechanism noted that the most complex stage of the WTO dispute settlement mechanism is the consultation process.

They further noted that most developing countries are constrained by resources and expenditure disbursed by the parties at the consultation stage.¹⁸⁰

The countries consequently proposed the following improvements of the provisions concerning consultations.

The LDC group proposed an amendment to article 4.10 of the DSU to clear the ambiguities therein noting that the present language of Article 4 is merely per functional with the use the words like “should” instead of “shall” thus does not impose any legal obligation on developed countries to pay special attention to the particular development concerns and interests of developing country Members.

To this end, the LDC group proposed an amendment to Article 4.10 to reflect as follows.

¹⁸⁰ See communication from Egypt 5/11/1998,(WT/GC/W/109), paragraph 85; proposal by Guatemala 26/10/1998, paragraph II.B, discussion paper by India paragraph1,Venezuela 24/02/1998 and Japan, 29/05/1998) paragraph 44.

“During consultations, Members shall take into account the particular problems and interests of developing country Members especially those of least developed country Members.”

The group further proposed that during consultations, developing and least developed country members should request the Dispute settlement body for a possibility of holding consultations in the capital cities of least developed country Members.¹⁸¹

The above proposal was premised on grounds that it is not enough for a developed country to merely assert that it has taken into account the interests of a developing country Member, and later turns around to pursue the matter by requesting for the establishment of a panel to examine the consistency of measures of the developing country Member with a covered agreement.¹⁸²

Some of the above proposals have been reflected in the Chairman’s Text of July 2005 which states *inter alia* the tightening up of the language of article 4.10 by replacing “should” with “shall”.

India as well proposed that during consultations and at the establishment of a panel stage if a complainant being a developed country member lodges a dispute against a developing counterpart, the latter shall explain in its request for establishment of a panel

¹⁸¹ LDC Group, TN/DS/W/37 17/7/2002

¹⁸² Supra note 127

as well as in its submissions to the panel and the Appellate Body ways in which it took into account the particular problems and interests of the developing country Member concerned.

Vice versa if a developed country Member is a respondent, it shall explain in its submissions to the panel as to how it had taken into account the particular problems and interests of the developing country Member concerned;

India further proposed that the panel while adjudicating over such a matter shall make a ruling on this issue of the special and differential treatment.¹⁸³

As earlier discussed, the main objective of the DSU draftsmen was to encourage and promote mutually satisfactory resolution of disputes without the necessity of recourse to a panel.¹⁸⁴

Statistics show that a number of disputes are resolved through alternative mechanisms to litigation especially by means of consultations without the parties resorting to the panel. Since the inception of the WTO in 1995, 61 disputes have been solved through consultations.¹⁸⁵

¹⁸³ Proposal by India TN/DS/W/47

¹⁸⁴ A hand book on the WTO dispute settlement system pg 3

¹⁸⁵ See update of WTO Dispute Settlement Cases WT/DS/OV/34. 26/1/2009 Available at <<http://www.wto.org>> accessed on 3/11/2010-supra

In the face of Africa's lack of expertise and financial resources to pursue matters through the formal WTO dispute settlement system. The above proposals if adopted will lead to a large number of disputes to be resolved faster and cheaply thus realising the objective of the DSU Drafts team.

4.14 Conclusion

The chapter identified remedies that will make the DSU more responsive to the needs of African member states. The African group at Doha should focus on issues of transparency, third party rights, and compliance, special and differential treatment among others. The above suggestions will bring real improvement to the settlement of disputes at the WTO.

The chapter also illustrated that most proposals by the African group track the evolution Africa's interests in the dispute settlement mechanism namely agriculture and textile.

If adopted, the proposals will go a long way in promoting the ultimate participation of African countries in the dispute settlement process.

CHAPTER FIVE

RECOMMENDATIONS AND CONCLUSION

The goal of this paper was to examine the reasons why Africa has shunned participation in the DSM despite having the majority of its countries as WTO member states.

The research identified the shortcomings of the DSU as one of the key factors that inhibit African countries from lodging disputes at the WTO-DSM. To this end, the research highlighted an oversight in the drafting of remedies available to litigants under the DSU as a major restraint to African states.

The research has shown that the DSM is not serving the tangible interests of African countries in the Multilateral trading system. African countries are aware of this and it upon that background that they proposed reform of the DSU; however, most of their proposals according to the findings have not found favour with developed countries.

The purpose of this chapter is therefore to look at alternative strategies that African countries can adopt while awaiting the outcome of the review of the DSU.

5.1 Third party participation

Owing to the endless challenges African states face in accessing the WTO dispute mechanism, African states should participate regularly as third parties to gain legal expertise in procedural, substantive and systemic operation of the DSU. African countries should borrow a leaf from China, Japan, the European communities and the United States, which have participated in almost every case as third parties for exposure. These countries have not only managed to defend their systemic interests but have also shaped the interpretation of WTO law over time.

Mosoti notes that

*“...a lawyer that appears before a particular judge develops certain judge-friendly skills that eventually endear the lawyer to the particular judge. The lawyer becomes aware of the idiosyncrasies of the judge, and that way becomes a better and more effective pleader for his clients”.*¹⁸⁶

Chad and Benin’s Victory over the USA in the *US upland cotton case* is a clear example that third party participation is useful at all times.

South Africa’s third party participation in the *United States — Subsidies and Other Domestic Support for Corn and Other Agricultural Products* is also worth noting.¹⁸⁷ On 8th January 2007, Canada and Brazil requested consultations with the USA under the DSU with respect subsidies to corn (maize) exports from the USA. A panel was established on 17/12/2007. South Africa having maximum interest in the success of matter submitted a request to participate as a third party to the dispute. The two primary complainants however decided not to continue with the dispute. South Africa as a third party went ahead and completed its third party submission as a capacity building exercise, even after Brazil/Canada stopped pursuing the case.

To date, South Africa has a fully functional submission prepared. She would thus be ready if Brazil and Canada choose to proceed with the case at any time under the DSU.

¹⁸⁶ Victor Mosoti (2003) “Does Africa need the WTO dispute settlement system.”ITCSD paper no.5 at pg 83

¹⁸⁷ See WT/DS357

As third parties, African countries should fully use all the rights that are accorded to them under the DSU to attain the necessary skills and confidence for future litigation at the WTO.

5.2 Bargaining in the shadow of the law

The DSU encourages the parties to resolve their disputes amicably using Alternative dispute settlement mechanisms namely; good offices, conciliation and mediation.¹⁸⁸ The DSU also provides for arbitration at the will of the parties to ensure a faster and less costly dispute settlement under Article 25.

It has been observed that over fifty per cent of all disputes are resolved by mutual agreement reached by parties during the first consultation stage. To this end, disputes negotiated within the shadow of the contractual bargain are cost effective and timely.

The case in point is the *European Communities-Definitive Safeguard Measures on Salmon* where Chile withdrew its request for consultations after the European Communities removed the safeguard measure in contention.¹⁸⁹ This and related disputes resolved similarly reveal that it is not always necessary for disputes to proceed beyond consultations.

¹⁸⁸ See Article 5 DSU

¹⁸⁹ See WT/DS98/AB/R

Africa ought to utilize the consultation stage and the good offices or mediation by the Director-General, as provided in Article 5 of the DSU to amicably resolve disputes and avoid lengthy and financially constraining litigation.

Through amicable settlement of disputes, African states will dodge “ruffling the feathers” of developing countries on whose financial aid they heavily rely.

5.3 Capacity building.

Related to the above is the fact that a large number of African country governments lack trained personnel with functional knowledge of WTO agreements, processes and procedures.

The technicalities of the WTO dispute settlement system and growing jurisprudence of WTO panels and AB have become too complex to be digested in the course of short regional seminars or special trade policy course that the WTO currently convenes in Geneva.¹⁹⁰

To this end, African countries are advised to train and equip its young generation of trade lawyers with knowledge that will increase Africa’s chances of securing favourable rulings from the Dispute Settlement Body and early dispute resolution of cases at the consultation stage.

¹⁹⁰ Dr. Uché U. Ewelukwa (2005)-Multilateralism And The WTO Dispute settlement mechanism – Politics, Process, Outcomes And Prospects pg at 67

Through the building of domestic capacities sufficient to understand and comply with a myriad of technicalities at the WTO especially those relating to standards, health and safety requirements, Africa will not only engage in the DSM but will also be able to beat the technical barriers to trade namely; Sanitary and Phyto-sanitary measures like testing procedure standards and labelling to meet international standards and regulations.¹⁹¹

Conclusively, international trade law and dispute settlement should be taught regularly on every curricular of Universities in Africa to train a strong network of African trade experts.

Institutions like the Trade Law Centre for South Africa (Tralac) that build capacity in the southern Africa region should be given optimal support.¹⁹²

Further to this, African states should take advantage of the WTO technical assistance and capacity building Initiatives aimed at assisting developing countries implement their WTO obligations (e.g. preparing legislation, regulations and notifications).

The WTO attempts at building capacity through committees like the Doha Development Agenda Trade Capacity Building, United Nations committee on Trade and Development, and the World Trade Organisation Technical Assistance committee for selected LDCs and other African countries.

¹⁹¹ id

¹⁹² See < <http://www.tralac.org>.> accessed on 30/4/2010

African states must utilize this is move made directly to equip developing /least developed countries with knowledge in the complexities of global trade rules and protection of their trade interest.

5.4 Coordination between the Government and the private sector

Although the WTO's dispute settlement mechanism is a purely government-to-government process, governments cannot litigate successfully without input from the private sector.

A public-private partnership in a developing country through which small and medium enterprises, professional associations, consumer groups, importers, exporters and chambers of commerce raise issues, seek for investigation and bring them to the attention of the legal service providers, aids responsible government bodies to litigate at the WTO.

By working more consistently with the private sector, national officials can foster development of reflexes in firms and trade associations to view the WTO as an opportunity to ensure market access, thereby more effectively using the WTO system to their advantage.¹⁹³

¹⁹³ Gregory Shaffer (2006) "The challenges of WTO law: strategies for developing country adaptation" World Trade Review. 5: 2, 177–198 United Kingdom

Dr Michael S. Matsebula notes that with appropriate prioritization of public expenditure and fiscal discipline, a government can augment its limited resources through cooperation with the business community to pursue disputes at the WTO.¹⁹⁴

For a country to be able to lodge a dispute with the WTO, a lot depends on timely information and data from the private sector to the government as was the case with South's third party attempts in the *Canada -US Corn* dispute where the Department of Agriculture, Directorate International Trade (Coordinator on the part of government), Legal Division ; Department of Trade and Industry, International Trade & Economic Development Division were greatly aided by the Maize Trust and trade law chambers.

It is crucial to address all weak linkages between the private and public sectors if the private sectors are to provide meaningful assistance to government, financially and technically.

Brazil is yet another example where the private sector has played a great role in litigation. For over twenty two complaints brought by Brazil before the WTO dispute settlement system, private companies and trade associations have been hired to work with a law firm to prepare the legal submissions.¹⁹⁵

¹⁹⁴ Dr Michael s Matsebula (2006) "Involvement of the private sector in the WTO dispute settlement process: Participation of the Swaziland in the sugar Industry in the EC sugar subsidies case" ICTSD Mombasa at pg 6

¹⁹⁵ Marcelo D. Varella (2009) "The effectiveness of the Dispute Settlement Body of the World Trade Organization" Journal of international law and policy vol8 at pg 111

The last but not least example is the USA where the government and private counsel give full support to the private sector. A good example is drawn from USA's involvement in the *EC -banana dispute III*¹⁹⁶ where USA was quick to challenge the European Communities' quota tariffs on Bananas from Ecuador, Guatemala, Honduras and Mexico.

It should be noted that the USA does not grow or export Bananas. Her involvement as a complainant was purely in support of her private sectors namely *Chiquita*-an American corporation which has investments in the "banana business" of the Southern America.

5.5 The role of Nongovernmental organizations (NGOs)

Through identifying the foreign market access interests of local stakeholders, mobilizing the public-private partnership required to use the DSU more effectively, working with economic think tanks and researchers. NGOs are more adept at constructing economic evidence to support potential litigation.

NGOs are useful at the pre-litigation collection of information and evidence of the effects of WTO-inconsistent policies; they provide assistance with *amicus curie* briefs and economic evidence, they lobby for support from the public and induce political momentum to generate compliance.¹⁹⁷

¹⁹⁶ See EC-Bananas III,(WT/DS/27)

¹⁹⁷ Chad brown and Bernard Hoekman supra note at pg 28

African governments should work with renowned think tank NGOS like Oxfam and Green peace to devise cost-effective and sustainable ways of engaging in the DSM. The mentioned groups are effective in mobilizing grassroots constituencies and can bear considerable pressure on a recalcitrant nation to institute a dispute.¹⁹⁸

5.6 Increased use of the WTO Advisory Body Centre (ACWL)

Evidence from the ACWL from 2001-2009 shows that the Advisory Centre is a repeat player in dispute settlement.¹⁹⁹ The advisory body centre as established under Articles 22 and 27.2 of the DSU provides qualified legal experts to assist any developing country Member which so requests.

At the moment there are two part-time consultants at the advisory centre to assist developing countries that may want to have recourse to the DSU.²⁰⁰

The ACWL's most prominent role is to supply low-cost legal support to developing countries when they act as complainants, respondents, or third parties in WTO dispute-settlement proceedings.

The centre is mandated to assist least developed countries strapped with scarcity of administrative resources and costs. In lieu of this, the centre provides technical

¹⁹⁸ See Ewelukwa Supra note 176 at pg 68.

¹⁹⁹ Advisory Centre on WTO law Report on operations 2009 at pg 6 available at <<http://www.acwl.ch/e/dispute/wto>> accessed on 28/4/2010

²⁰⁰ See <<http://www.acwl.ch>> accessed on 28/4/2010

assistance to least developed countries with two academic experts on part-time basis and training of government officials.²⁰¹

Statistics show that Chad is the only African country that has used the services of the centre during a dispute, in particular the *cotton dispute*. African countries are hereby advised to make use of available resources at the Advisory Centre on WTO Law (ACWL), UNCTAD and other WTO training institutes to attain advice and training in handling WTO disputes.

5.7 Availability of statistics and information to Stakeholders and the public at large.

A country's participation in the WTO dispute settlement process goes beyond awareness of WTO complexities and agreements. Research has shown that most stakeholders in a "would be dispute" do not have an informed position about the current statistics and affairs in international trade.

Tadeous Chifamba acknowledges that

"Most developing countries in general and African countries in particular have very weak data management systems. As a result, statistics on economic and

²⁰¹ See report on operations 2009 of the Advisory centre available at <http://www.acwl.ch/e/index_e.aspx> accessed on 28/4/2010

*trade performance is very scarce and mostly outdated, thus failing to give a true reflection of current trends.”*²⁰²

Ignorance about the latest trade statistics makes it cumbersome for “would be” African trade negotiators to face opponents from developed and technologically advanced countries.

Such information asymmetry often diminishes the confidence of well-meaning negotiators at the negotiating committees.²⁰³

At a recent conference held by the ministry of Trade, Tourism and Industry in Uganda, Emmanuel Mutahunga while addressing a conference on the “East African Common Market protocol: Legal and Regulatory Effects” pointed out that Uganda like majority African countries lack a rich resource base on recent WTO activities, legal rules and procedure.²⁰⁴

It was thus revealed that African governments lack resource centres and databanks. They simply rely on information available at the WTO website. This information in my view is basic and inadequate for purposes of conducting meaningful litigation.

²⁰² Tadeous Chifamba (2007) “Multilateral Trade Negotiations: How sensibly must African Countries and trade negotiators stand?-some lessons from WTO Experience.”The African capacity building foundation. Occasional paper no.7 at pg 10.

²⁰³ *ibid*

²⁰⁴ Emmanuel Mutahunga ,a trade officer with the ministry of trade, tourism and industry, Kampala Uganda in his speech to the East African Common Market Protocol: legal and regulatory Effects” Hotel Triangle 18/5/2010

Accordingly, it is advisable that African member states should subscribe to data banks like trade law.net, Trade Policy Training Centre in Africa (trapca), The African Capacity Building Foundation among others to keep abreast of all developments in the field of trade and related matters.²⁰⁵

5.7 Need to address Africa's low market share of world trade.

It has been observed that Africa's trade accounts for only 2% of global trade.²⁰⁶ Low market share inevitably limits Africa's capacity to influence international trade law and policy. A complainant's size of economic market in a respondent country determines the complainant's capacity to retaliate using DSU-authorized sanctions. This market share significantly impacts their chance of bringing a dispute to the WTO-Dispute Settlement Mechanism.

African countries should alleviate their domestic supply-side constraints; improve competitiveness of their "one export industries" through diversification and strengthening the price of primary commodities in order to gain retaliatory power.

²⁰⁵ See <<http://www.tradelawnet.org>>. <<http://www.trapca.org>> and <<http://www.acbf-pact.org>>

²⁰⁶ According to statistics from Tralac available at <[http:// www.tralac.org](http://www.tralac.org) >accessed on 12/12/2009

5.8 Need for alliance amongst African states.

As observed by Amin Alavi, lack of internal coherence and co-operation of African countries undermines their participation in the DSM and reflects a vicious circle in which they further marginalize themselves.²⁰⁷

African countries should forge geographical alliances to get a better bargain at the WTO especially in the areas where they produce and export a similar product. The coalition amongst Benin, Burkina Faso, Chad and Mali during the *United States: Subsidies on Upland Cotton* illustrates that alliances made to deal with specific issues are more successful. This is because countries adopt common positions to their common problems.

Amin Alavi also recommends that African countries in the DSU review should identify their broad interests and some specific objectives and support other countries that have similar goals, as was the case at the Hong Kong ministerial meeting in 2005. African countries supported the G20's position on agriculture without threatening to block the process or trying to fight on their own.²⁰⁸

Alliance puts countries in a much better position to put feasible proposals on the table since they are faced with common problems. To this end, the efforts of the African countries as a group in the ongoing review of the DSU are applauded.

²⁰⁷ Amin Alavi pg 39

²⁰⁸ See Supra note 190 at pg 40

African countries are further encouraged to bring joint disputes whenever the opportunity arises to cut down litigation costs.

5.7 Enforcement of market access through Regional Economic Agreements as an alternative to litigation.

Regional Economic Agreements are well known exceptions to the Most Favoured Nation principle of the WTO. Trade arrangements like the General System of Preference, Preferential Trade Area guarantee free trade amongst the signatories.

They allow parties thereto to take full advantage of the opportunities and flexibilities offered by Article XXIV of the General Agreement on Tariffs and Trade (GATT).²⁰⁹

Bilateral and regional economic agreements forge strategic and long term relationships amongst countries. Through economic partnership agreements by African countries with developed member states such as the EU, African countries will be able to secure and maintain market access in the said developed countries. Trade as a tool for development has a faster pace to integrate Africa into the multilateral trading system under regional economic integration than litigation.

Regional economic integration thus leads to the specialisation, better productivity and increased competitiveness of a country which in turn leads to the more equitable integration of Africa into the global economy.

²⁰⁹ See article XXIV of the GATT 1994.

5.9 India as a shining example to African WTO member states.

According to World Bank classification, India is a low-income developing economy that has attempted to overcome barriers to effective utilization of the DSM. India ranks fourth most frequent user of WTO dispute settlement mechanism after US, EC and Canada. She has had 5 complaints against the EC and defended 9 others from the EC. She has had 6 complaints against the US and defended 3 disputes against the US. She has also encountered Australia, Bangladesh, Canada, Switzerland, Taiwan, Argentina, Brazil, Poland, South Africa and Turkey.²¹⁰

Altogether, India has lodged 18 complaints challenging other member states' trade restrictions in the textile sector, automobile, shrimp exports, Generalised System of Preferences and dumping practices, defended 20 complaints against her quantitative restrictions on agriculture, textile and industrial products imports, patent policies, and dumping practice and appeared over 30 times as third party in similar disputes.²¹¹

²¹⁰ See http://www.WTO.org/english/tratop_e/dispu_e/dispu_by_country_e.htm. accessed on 28/4/2010

²¹¹ See *EC - Bed Linen*, (WT/DS141)1998) *EC -Tariff Preferences*, (WT/DS246) 2002, *Poland India - Autos*, (WT/DS146) 1998, (WT/DS243); *U.S. -Textiles Rules of Origin*, (WT/DS306) 2002, *India - Measure on Batteries from Bangladesh*, (WT/DS309) 2004, (. WT/DS339, *Poland Autos* (WT/DS19); *Turkey Textiles* (WT/DS34); *US Shrimp* (WT/DS58); *EC Tariff Preferences* (WT/DS246).*US Wool Coats* (WT/DS32); *US Wool Shirts and Blouses* (WT/DS33); *EC Cotton Fabrics* (WT/DS140); *EC Bed Linen* (WT/DS141); *EC Steel Products* (WT/DS313); *South Africa Pharmaceuticals* (WT/DS168); *US Steel Plate* (WT/DS206); *US Offset Act (Byrd Amendment)* (WT/DS217); *US Customs Bond* (WT/DS345); *Brazil Jute Bags* (WT/DS229), *EC Rice Duties* (WT/DS134), *Argentina Pharmaceutical Products* (WT/DS233). *US Patents* (WT/DS50 & 79), *Quantitative Restrictions* (WT/DS90), *Autos* (WT/DS146 & 175).(WT/DS96), as did the four other complainants –Australia (WT/DS91), *Canada* (WT/DS92), *New Zealand* (WT/DS93) and *Switzerland* (WT/DS94),*Export Commodities* (WT/DS120), *Import Restrictions* (WT/DS149), *Customs*

According to the WTO Secretariat Report and a policy statement by the Government of India,

“Analyzing the present relationship with the promising economic growth of India, one can be sure that India is going to enjoy a very candid and bright relationship with WTO and associated member nations by 2025.

India is expected to snatch most of the business deals that are presently available to developed nations in major service based industries like telecom, financial services, transport and power.”²¹²

India has tried to overcome the challenges of participation in the WTO-DSM in the following ways.

Administrative structure

India has single statutory authority to deal with the trade matters as they arise. This statutory authority clearly defines the responsibility of a government department involved for example the department of agriculture, trade and industry, thus the single

Duties (WT/DS150), Import Restrictions (WT/DS279), Antidumping Duties (WT/DS304), Taiwan (WT/WT/DS318)

²¹² Manik Kinra, Parag Kulkarni & Nitin Prabhakar “Role of India in WTO - 2025” at pg 1 available at http://www.coolavenues.com/know/gm/manik_wto_1.php – India> accessed on 21/5/2010

statutory authority prevents territorial squabbles, rivalries or differences of opinion among the departments that would result into long delays and inaction.²¹³

Private-public cooperation

India's effort in the *shrimp -turtle* case is evidence that public-private cooperation is vital for successful litigation in the DSM. During the initial stages of the *Shrimp- turtle* case where India participated as a complainant, the Indian department of commerce and the Marine Products Export Development Authority (MPEDA) closely coordinated to explore the possibilities of avoiding the anti-dumping action by the US, a delegation was sent to Washington in September 2003, and after discussions in various quarters, decided to sign an agreement with the law firm, Garvey Schubert and Barer, to be the counsel in the United States for the anti-dumping investigations.²¹⁴

The MPEDA bore more than 50% of the total costs from its internal resources and the rest of the contribution came from a number of shrimp exporters.

²¹³ M. A. Taslim (2006) "Dispute Settlement in the WTO and the Least Developed Countries: the Case of India's Anti-Dumping Duties on Lead Acid Battery Import from Bangladesh" ICTSD at pg 10.

²¹⁴ B. Bhattacharyya "The Indian Shrimp Industry Organizes to Fight the Threat of Anti-Dumping Action" Managing the challenges of WTO participation: case study 17 available at http://www.wto.org/english/res_e/booksp_e/casestudies_e/case1_e.htm accessed on 21/5/2010

In the same light, MPEDA with the help of the central government developed contact with counterpart bodies in Vietnam, Thailand and China and to forge an alliance among the Asian exporters and raise resources.

Clearly the government's steadfast support for the domestic industries and the multidimensional stakeholder participation are a good recipe for WTO-DSM participation.

India in the review of the DSU at Doha

India being one of the founding members of the WTO is overly concerned about how the DSU will evolve in the future. India along side, Egypt, Guatemala, Venezuela and Japan identified the importance of consultations in the Dispute settlement process.²¹⁵ India suggested more practical means of ensuring that the interests of developing countries are taken into account by developed countries during consultations as follows;

“During consultations, Members shall give special attention to developing country Members’ particular problems and interests in the following manner;”

- (a) If the complaining party is a developed country Member and if it decides to seek the establishment of a panel, it shall explain in the request for establishment of a panel as well as

²¹⁵ See communication from Egypt (5 /11/1998), WT/GC/W/109 paragraph. 85; proposal by Guatemala 2610/1998, paragraph II.B. Discussion paper by India, paragraph 1, Venezuela 24/02/1998 and Japan 29/51998, paragraph 44.

in its submissions to the panel and the Appellate Body as to how it had taken into account or paid special attention to the particular problems and interests of the developing country Member concerned.

- (b) If the developed country Member is a defending party, it shall explain in its submissions to the panel as to how it had taken into account or paid special attention to the particular problems and interests of the developing country Member concerned;
- (c) The panel while adjudicating the matter referred to it shall make a ruling on this issue.²¹⁶

This proposal by India is of great value towards solving the problems faced by developing /least developed countries at the consultation stage of dispute settlement. The proposal is likely to be adopted as indicated in the chairman's text of July 2005. If adopted; the proposal will go a long way to enhance Developing countries' participation.

Use of the WTO Advisory Centre

On a further note, India has been a relatively frequent user of the WTO Advisory Centre that offers low priced legal services to developing and least developed countries.

²¹⁶ See proposal by India TN/DS/W/47

CONCLUSION

This research was guided by a hypothesis that;

1. All WTO member states are equal before the Dispute Settlement Body as such African countries should actively participate in the WTO Dispute Settlement mechanisms at all costs.
2. The absence of African countries in the WTO Dispute Settlement mechanism is detrimental to the future of their international trade.

Upon that background, the research paper set out to analyze the functioning and operation of the DSU Vis-a Vis the utilization of the dispute settlement mechanism by of African states.

The research pointed out that unlike the GATT dispute settlement, the WTO dispute settlement mechanism is based on adjudicatory model and thus more timely, automatic and binding.

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, Africa has not benefited from the judicialised dispute settlement system ushered in by the DSU.

The research also highlighted the benefits of active participation in the DSU. However until the system is reviewed to meet the aspirations of least developed/developing countries, Africa's efforts even as a third party participant remains bleak.

This paper has elaborated that amendment of the DSU to permit collective retaliation, collective monetary fund, transparency of the DSM proceedings to the public, interim relief pending a ruling on a dispute, monetary compensation, strengthened provisions on special and differential treatment to developing countries, extension a reasonable time to implement DSB recommendations and a development friendly interpretive culture of covered agreements , will improve access and use of the DSU by Africa.

African countries must therefore negotiate for favourable rules under the DSU while putting into practise the above suggested solutions. African countries may not prevail immediately in their attempt to change the DSU due to strong opposition from both developed and developing countries. 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. (23,853 /25,446 words)

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