

THE UNIVERSITY OF THE WESTERN CAPE

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The WTO Dispute Settlement System and African Countries: *A Prolonged slumber?*

A Mini - Thesis submitted in partial fulfillment of the requirements for the LLM Degree, University of the Western Cape.



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TABLE OF CONTENTS.

The WTO Dispute Settlement System and African Countries: *A Prolonged slumber?*

1. Introduction	3
2. The WTO Dispute Settlement Process.....	13
2.1. Procedures for Settling Disputes under the WTO DSU.....	14
2.2. Special and Differential provisions in the DSU.....	28
3. African Country participation in the Dispute Settlement System.....	34
3.1 Why the <i>Prolonged Slumber?</i>	37
4. Reasons for African country participation in the Dispute System.....	44
4.1 Proposals for the reform of the DSU by African countries.....	48
5. Recommendations	58
Conclusion.....	66

CHAPTER ONE

1.0. INTRODUCTION.

"A former Director General of the WTO once described the organisation's dispute settlement mechanism as a 'jewel in its crown'.... This jewel is in for a polish with an on going exercise to amend the dispute settlement undertaking (DSU). [However,] not one African country ...has used the system at all, [as a complainant]."¹

The WTO dispute settlement system was established in 1995 during the Uruguay Round as part of the Marrakesh Agreement. It was incorporated in Annex 2 of the Agreement, as the Understanding on Rules and Procedures Governing the Settlement of Disputes commonly referred to as the Dispute Settlement Understanding (DSU).² It is the central element in guaranteeing security and predictability to the multilateral trading system as enshrined in **Article 3.2 DSU**.

One of the many reasons why the DSU was created was to set aside weaknesses of the GATT 1947 Dispute Settlement System.³ As a result, the DSU is considered to have resulted from the evolution of rules, procedures and practices that developed for almost half a century under GATT 1947.⁴ The nexus between the old dispute settlement system under GATT 1947 and the DSU is recognized under **Article 3.1 DSU** which states that,

¹Eduardo Pérez Motta, Permanent Representative of Mexico to the WTO 7th November, 2003. He was addressing a research conference sponsored by the Geneva International Academic Network, in partnership with the WTO, UNCTAD, the Swiss Mission to the WTO, the Graduate Institute of International Studies (Geneva), and the Universities of Geneva and Southern California.

² A Hand book on the WTO Dispute Settlement System (2004) Pg 1.

³ Ibid Pg 12.

⁴ Beneyto, Jose M. *The EU and the WTO: direct effect of the new dispute settlement system?* (1996) Pg 295.

"...members affirm their adherence to the principles for the management of disputes that applied under Articles XXII and XXIII of GATT 1947..."⁵

Although the cornerstone of the WTO Dispute Settlement mechanism remains **Articles XXII and XXIII** of the GATT, the DSU brought about substantial changes in the workings of the system.⁶ A major improvement was the removal of the consensus requirement at key stages of the process and the creation of "negative consensus" requiring all members to agree not to proceed or not to adopt panel and Appellate Body (AB) recommendations or Rulings.⁷

This reversal of the consensus rule led to a radical change in the dynamics of the dispute settlement mechanism, making it more automatic and less dependent on the power of the countries involved in a dispute⁸ and as such paving the way for the active participation of developing and less developed countries.

Today, the WTO Dispute Settlement System is viewed as a success story especially when contrasted with the GATT 1947 dispute settlement system or with other International dispute settlement tribunals such as the International Court of justice and the International Tribunal for the Law of the Sea.⁹ According to **Jackson,**

"...the relatively large number of settlements that are occurring is one of the more positive indicia of its success..."¹⁰

A comparison between the GATT 1947 dispute settlement system and the WTO Dispute Settlement System shows that the former in its 48 year existence

⁵ Annex 2 of the Marrakesh Agreement.

⁶ Valentina Delich, *Developing Countries and the WTO Dispute Settlement System* (2002) Pg 71.

⁷ Ibid Pg 71.

⁸ Valentina (2002) Pg 71.

⁹ Mosoti Victor, *Does Africa need the WTO Dispute Settlement System* (2003) Pg 2.

¹⁰ John Jackson *Dispute Settlement and the WTO: Emerging Problems* (1998) Pg 340.

handled about 306 disputes while the latter has so far handled over 305 disputes in its 9 year existence.¹¹

It has also been postulated that the unique success of the WTO Dispute Settlement System is in the ability of developing and least developed countries to resolve issues with larger developed countries.¹² For example, Antigua and Barbuda, one of the world's smallest states in the Caribbean, proclaimed victory over the United States on 24th March 2004 in a dispute over internet gambling.¹³

This victory not only portrays the success of the WTO Dispute Settlement System as an effective dispute resolution system but also accentuates the participation of developing countries as confirmed by **Busch and Reinhardt** that;

"...29 percent of the WTO complainants under the DSU are developing countries..."¹⁴



Be that as it may, the African continent that makes up the single largest block of members with 41 of its countries as members of the WTO and which is the second largest world exporter under the ACP grouping of Bananas, is virtually absent in the dispute settlement process.¹⁵

In fact, by October 2004 no African country had ever participated either as a complainant or a respondent despite the fact that the share of trade in the GDP of African countries is much higher than in the case of the United States or the

¹¹ Marongwe Mavis, *African Countries and the WTO Dispute Settlement System* (2004) Pg 1.

¹² Dr Yeboha Dickson, Counsellor, Institute for Training and Technical Cooperation WTO. He was addressing participants of the 1st Annual African Trade Moot, held in Cape Town, South Africa on the 25th October 2004.

¹³ Ibid.

¹⁴ Busch and Reinhardt *Testing International Trade Law: Empirical Studies of GATT/WTO Dispute Settlement, in the Political Economy of International Trade Law* (2002) Pg 457.

¹⁵ Marongwe Mavis, *African Countries and the WTO Dispute Settlement System* (2004) Pg 2.

European Union.¹⁶ Only two African countries South Africa and Egypt have ever had consultation requested at the DSU.¹⁷

Even the existence of Special and Differential Treatment provisions for developing and least developed countries under the DSU, such as longer time limits, assistance by the WTO Secretariat and the use of the good offices of the Director - General have not been of much attraction to African countries.¹⁸

The participation by African countries ever since the establishment of the DSU has been limited to Third party status for example Benin and Chad in the ***Upland Cotton dispute***¹⁹, Nigeria in the ***United States Shrimp dispute***²⁰, the African Caribbean Pacific grouping in the ***European Communities Banana dispute***²¹ and the ***European Communities Sugar challenge***. Recently Morocco became the first WTO member to present an *amicus curiae* brief, in the ***EU- Trade Description of Sardines Case***.²²



Other developing countries, especially from Latin America and Asia, are however actively involved in the dispute settlement process.²³ For example, India, Brazil and Mexico by August 2002 had participated as third parties in more than eight of the first 273 WTO cases.²⁴ It therefore goes without saying that the participation of African countries in the dispute settlement process is greatly lacking.

¹⁶ Eduardo Perez, *Making WTO's Dispute Settlement practicable for Developing countries*, Paper presented at the Graduate Institute of International studies(Geneva) 7th March 2003.

¹⁷ http://www.wto.org/english/tratop_e/dispu_e/distabase_wto_members1_e.htm accessed on 21/03/05.

¹⁸ A Hand book on the WTO Dispute Settlement System (2004) Pg 111.

¹⁹ WTO Document: WT/DS267/2 15th October 2002.

²⁰ See *United States - Import Prohibition of Certain Shrimp and Shrimp Products*, AB-1998-4 (WT/DS58/AB/R).

²¹ See *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, AB-1997-3 (WT/DS27/AB/R).

²² Mosoti, (2003) Pg 14.

²³ Shaffer Gregory, *How to make the WTO Dispute Settlement System work for Developing Countries: Some proactive Developing Country strategies*. (2003) Pg 10-13.

²⁴ Ibid Pg 14.

According to **Shaffer** countries that actively participate in the WTO Dispute Settlement System are best positioned to effectively shape the law's application and interpretation over time to their advantage.²⁵ **Mosoti** also argues that the WTO Dispute Settlement System is not solely about disputes, but also about the steady evolution of a corpus of important international trade law principles and jurisprudence that will govern multi-lateral trade relations for years to come.²⁶

It is for this reason, that the United States and the European Community remain by far the predominant users of the system.²⁷ The United States, from 1948 to the end of June 2000, was either a complainant or a respondent in 340 GATT/WTO disputes, thereby constituting 52% of the total number of 654 disputes.²⁸

The European Community on the other hand was a party in 238 disputes.²⁹ Both the United States and the European Community have been third parties in most cases that have gone before the WTO Appellate Body, where the impact of defining WTO law is the greatest.³⁰ As such, Africa's non active participation is simply to its disadvantage.

This thesis therefore seeks to investigate the lack of participation by African countries in the WTO Dispute Settlement System by first providing an overview of the DSU system and, secondly by explaining the reasons that forestall the participation of African countries. To that end, the procedures in practice of the DSU and the benefits that accrue from its use will be outlined. Finally, a review of the proposals of the DSU in reference to African participation will be outlined.

²⁵ Shaffer, (2003) Pg 5-7.

²⁶ Mosoti, (2003) Pg 5.

²⁷ Bourgeois Jacques *Some reflections on the WTO Dispute Settlement System* 4(1) Journal of International Economic Law 145-54 (March 2001).

²⁸ Shaffer, (2003) Pg 5-7.

²⁹ Ibid Pg 12.

³⁰ Shaffer (2003) Pg 12.

STATEMENT OF THE PROBLEM.

The DSU has been hailed as a new development in international economic relations in which law, more than power, might reign.³¹ The DSU has also been instrumental in the steady evolution of a *corpus* of important international trade law principles whose effects and applicability will continue long into the future.³²

However while these developments have accelerated the number of disputes initiated by developed and developing countries before the DSU panels, the participation of African countries still remains *petite*. Many African countries do not even consider bringing cases or otherwise participating as a third party in the dispute settlement system.³³ The issue therefore meriting investigation is why the prolonged slumber?³⁴

HYPOTHESIS.

This research is founded on following premise;

- 1) That African countries ought to actively participate in the WTO Dispute Settlement System that is; they should lodge complaints or acquire third party status.
- 2) That the active participation of African countries in the WTO Dispute Settlement System will yield worthwhile benefits.

OBJECTIVE OF THE RESEARCH.

The objective of this research is to,

- a) Explain how the WTO Dispute Settlement System operates in practice.

³¹ Lacarte-Muro and Gappah Petina , *Developing countries and the WTO Legal and Dispute Settlement System: A View from the Bench* (2001) Pg 401.

³² Mosoti (2003) Pg 5.

³³ Valentina Delich *Developing Countries and the WTO Dispute Settlement System*. World Bank Hand Book on *Development, Trade and WTO* (2001) Pg 76.

³⁴ Refers to the non active participation by African countries.

b) Identify the reasons why African countries are not actively participating in the WTO Dispute Settlement System.

c) Accentuate reasons why African Countries should participate in the WTO Dispute Settlement System and suggest ways how they should do so.

d) Review proposals for the reform of the DSU that have been submitted by African countries and make recommendations thereto.

SCOPE.

The WTO Dispute Settlement System is praised as one of the most important innovations of the Uruguay Round and has been described as an effective dispute resolution system.³⁵

It is on this basis that this research will cover the period from 1995 when the WTO Dispute Settlement System was established to 2005. Further more, the participation of African countries is limited to presentation of *amicus curiae* briefs, appearing as respondents or complainants and acquiring third party status.

This Mini thesis will also limit itself to the proposal for the review of the DSU by the African Group dated 25th September 2005 forwarded to the Dispute Settlement Body.

SIGNIFICANCE OF THE RESEARCH.

Much of the writing on developing countries and the WTO Dispute Settlement System has often side stepped the deep concerns that African countries have expressed about the system.³⁶ Often, the issue of the low participation by African countries is a glaring omission.³⁷ At best, the lack of participation by African

³⁵ Brewer T *WTO disputes and developing countries* 33(5) *Journal of World Trade* (October 1999) Pg169 - 182.

³⁶ Mosoti (2003) Pg 4.

³⁷ *Ibid* Pg 4.

countries is dealt with by a single sentence to the effect that African countries have not been involved in the process.³⁸

It has also been argued that African countries do not even need the WTO Dispute Settlement System given their low volume of trade and that instead their efforts should be directed to issues such as poverty, AIDS and starvation.³⁹

However, the November 2001 Doha Round Mandate for trade negotiations did set the ball rolling for African countries by reaffirming the members commitment to review the DSU with the aim of agreeing on improvements and modifications.⁴⁰

This mini thesis will therefore not only be a timely contribution to the on going review of the DSU but will also facilitate the participation of African countries in the WTO Dispute Settlement System in the longer run by identifying reforms that will make the system work for African countries.



RESEARCH METHODOLOGY.

Documentary research in Articles, Journals of Law, WTO Agreements, Text books, Hand books and papers presented at conferences will be used. Some of these will be found in law libraries and the internet. A review of the proposals submitted by different countries in line with the DSU as affirmed in the 2001 Doha Round Mandate will also be relied on.

KEY WORDS.

Marrakesh Agreement - Dispute settlement understanding (DSU) - Panel Rulings and Recommendations - Participation of African countries - WTO - Developing Countries - Panel - Dispute Settlement Body (DSB) - Multilateral trading system

³⁸Rogowsky Robert. *The effectiveness of the DSU for Developing and middle income countries*. A paper presented at the World Trade Forum, World Trade Institute , Berne, August 16-17 2003 Pg 7.

³⁹Mosoti (2003) Pg 4.

⁴⁰<http://www.wto.org/english/tratop_e/dda_e/dda_e.htm> accessed on 28th Oct 2004.

- Third party status - Amicus curiae brief - GATT- GATS - TRIPS - Consultations
- Doha Work Programme - July Package - Appellate Body(AB) - Implementation
and Recommendation - Panel Rulings - Interim report - Panel and Appellate
Body reports - Arbitration - Surveillance by the DSB

OVERVIEW OF CHAPTERS.

Chapter 1: Introduction and Background to the study. It gives an overview and comparison of the old dispute settlement system under GATT with the new WTO dispute settlement system. Briefly hints on the participation of African Countries in comparison with that of the United States, the European Communities and other developing countries and addresses the need for African countries to participate in the WTO Dispute Settlement System.

Chapter 2: Aims at explaining how the WTO Dispute Settlement System operates in practice. It appraises the remedies that the system provides and poses to answer whether they can be utilized by African countries. Lastly, this Chapter does discuss whether the Special and Differential Treatment provisions in the DSU are of any benefit to African countries.

Chapter 3: The purpose of this Chapter is to identify the other reasons that forestall the participation of African countries in the WTO Dispute Settlement System. To that end, this Chapter assesses the major challenges African countries face in trying to make use of the WTO Dispute Settlement System and compares the participation of African countries against the likes of United States, the European Union and other developing countries.

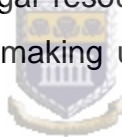
Chapter 4: Explains why African countries should actively participate in the WTO Dispute Settlement System. It argues on the one hand, that African countries should participate in the WTO Dispute Settlement System since WTO law matters not only for individual disputes, but also for discussions and negotiations conducted between parties in the shadow of potentially initiating a case and on

the other hand, that WTO law, as interpreted and applied over time by WTO panels, creates a framework for these bilateral interactions.⁴¹

Lastly the chapter highlights the proposals put forward by African countries as a group in light of reviewing the DSU and assess whether these proposals have been received with open arms by developed nations and other developing countries.

Chapter 5: lays out the strategies African countries can adopt in order to increase their participation in the WTO Dispute Settlement System. This chapter explains the need for in house solutions from the African group as opposed to only seeking technical assistance.

It also highlights some of the strategies that other developing and developed countries have used to mobilize legal resources and at least over come some challenges they face in respect to making use of the WTO Dispute Settlement System.



⁴¹ Brimeyer, B L *Bananas ,beef, and compliance in the World Trade Organisation: the inability of the WTO Dispute Settlement process to achieve compliance from superior nations* 10(1) Minnesota Journal of Global Trade(Winter 2001) Pg 133 -168.

CHAPTER TWO

2.0. THE WTO DISPUTE SETTLEMENT PROCESS.

*"...The dispute settlement mechanism
is the heart of the WTO.
Not only has it proved credible
and effective in dealing with disputes,
it has helped resolve a significant number
at the consultation stage..."⁴²*

Article III:3 and IV:3 of the **WTO Agreement** provide a system of rules and procedures enshrined in the Understanding on Rules and Procedures Governing the Settlement of Disputes(DSU) applicable to disputes arising under any of its legal instruments.



The DSU doubles as a multilateral agreement established under the WTO Agreement and as a comprehensive mechanism under which WTO members can settle their disputes through a structured and binding process rather than by adopting unilateral measures to retaliate against perceived breaches of WTO obligations by other members.⁴³

By virtue of the aforesaid, it breathes predictability and security within the trading system by reinforcing the rule of law through its clearly defined rules and time table as stated in **Article 3(2) DSU**.

The administration of the Dispute Settlement System is done by the Dispute Settlement Body (DSB) which is a permanent body that comprises of

⁴² John H. Jackson *The World Trade Organisation Constitution and Jurisprudence* (1998) Pg 59.

⁴³ Freshfields Bruckhaus Deringer *The WTO and the WTO dispute settlement process* (2003) Pg 5.

representatives of all WTO Members and is responsible for overseeing the entire dispute settlement process. It has the authority to establish panels, adopt panel and Appellate Body reports, maintain surveillance as regards the implementation of rulings and recommendations and it authorises the suspension of obligations under the Covered Agreements.⁴⁴

However, it should be noted that the DSU's application is limited to disputes involving breaches of the Covered Agreements namely the Agreement establishing the WTO, the multilateral Agreements on Trade in Goods, the General Agreement on Trade in Services, the Agreement on Trade related Aspects of Intellectual Property Rights and in certain circumstances, the Plurilateral Trade Agreements.⁴⁵

This limitation of application has raised a lot of criticism for example, **Joost Pauwelyn** argues that it limits the progress against the interests of poorer nations (African countries), and is particularly detrimental to their development concerns in that it excludes breaches that would arise from ministerial decisions and declarations that are part of the Final Act but not the WTO Agreement.⁴⁶

2.1. Procedures for settling disputes.

During the early years of GATT 1947, disputes were decided by rulings of the Chairman of the GATT Council. Later, they were referred to working parties composed of representatives from all interested contracting parties, including the parties which adopted their reports by consensus decisions.⁴⁷

⁴⁴ Article 2.1 DSU.

⁴⁵ Hercules Booyen, *Principles of International Trade Law as a Monistic System* (2003) pg 829.

⁴⁶ Joost Pauwelyn, *The Role of Public International Law in the WTO: How Far Can We Go?* 95 *AJIL* 535, 554.

⁴⁷ *A Handbook on the WTO Dispute Settlement System* Pg 12 - 13.

They were soon replaced by panels made up of three or five independent experts who were unrelated to the parties of the dispute. These panels wrote independent reports with recommendations and rulings for resolving the dispute, and referred them to the GATT Council. Only upon approval by the GATT Council did these reports become legally binding on the parties to the dispute.⁴⁸

Under the current WTO Dispute Settlement System a dispute is deemed to arise when a member of the WTO adopts a trade policy measure or takes some action that one or more fellow WTO members consider to be a violation of the WTO agreements, or to be a failure to live up to WTO obligations.⁴⁹

For example in September 2002 a dispute was triggered between Australia, Brazil and later Thailand, against the European Union on the grounds that the export subsidy measure adopted by the European Union on sugar was in excess of the export subsidies committed by the European Union in the WTO and therefore violating the Agreement on Agriculture, the Subsidies Countervailing Measures Agreement and provisions of GATT 1994.⁵⁰

Consultations.

The first procedure required of members prior to a dispute evolving into a full-blown panel process is Consultations and it is through a request for consultations by a disputant or group of complainants that a dispute is initiated.

In order to appreciate the WTO dispute settlement process under which these disputes are settled, a hypothetical example between country A and B will be examined:

⁴⁸ Ibid Pg 12 - 13.

⁴⁹ <www.wto.org/trade_topics/dispute_settlement> accessed on 3rd December 3, 2004.

⁵⁰ <<http://trade-info.cec.eu.int/wtodispute/print.cfm?id=170&code=2>> accessed on 16th Feb 2005

If for example country A investigates and discovers that a trade policy of country B infringes any WTO obligation, country A pursuant to **Article 4 DSU** can request for bilateral consultations regarding that specific policy. That is, country A submits a complaint in writing to country B, the chairman of the DSB and to the relevant WTO council, concerning the breached obligation, **Article 4.4 DSU**.

Country B by virtue of **Article 4(3) DSU** is then required to make a reply within 10 days after the date of receipt of the request for consultations from country A.

It is also within these 10 days that any other country; say country C (a third party) that has a substantial interest in this dispute can request to join the consultations. The request by country C must be addressed to country A, B and to the DSB. **Article 4.11 DSU**.

However the request by country C can only be entertained if country B agrees that the claim of substantial interest by country C is well founded and the original request for consultation by country A was initiated pursuant to **Article XXII of GATT 1947**, paragraph 1 of **Article XXII of GATS** or the corresponding provisions in other Covered Agreements.⁵¹

Country B in its reply to the request for consultations by country A must respond to the allegations raised by country A with a view of reaching a mutually satisfactory solution, and may accept or decline to attend the consultations. Country A and B may also request the WTO Director-General to use his good offices to conciliate and mediate between them.

If after 60 days the consultations fail to yield a mutually acceptable settlement, country A may then go on to request for the establishment of a panel as provided

⁵¹ **Article 4.11 DSU**. The same Article provides that if the request of a third party in this case country C is not upheld then country C shall be free to request for the same under Article XXII or Paragraph 1 of Article XXIII of GATS, or the corresponding provisions in other Covered Agreements.

by **Article 4(7) DSU**. However, if country A or B are developing countries, or if the dispute is in respect of perishable goods, the establishment of the panel can be done after 20 days.

Establishment of a panel.

The request for the establishment of a panel initiates the phase of Adjudication. Country A requests the establishment of the panel, by writing to the chairman of the DSB identifying inter alia, the impugned measure, and the legal basis for the complaint.⁵²

Country A must file this request at least 11 days prior to the next DSB meeting, in order for the request to feature as an item on the agenda of a DSB meeting. This request can however be blocked or sabotaged by country B in the first DSB meeting in which such a request is made, as was seen in the ***New Hormones dispute*** where the European Communities' request for the establishment of a panel was blocked by the United States and Canada on 25th January 2005.⁵³

At the second DSB meeting however, which takes place one month later, the panel can be established unless the DSB decides by reverse consensus not to establish the panel.⁵⁴

Within Ten days after the establishment of the panel, three individuals with expertise in international trade law and policy are proposed to country A and B by the secretariat from its indicative list.⁵⁵ Country A and B have the liberty to oppose the nominations and if within 20 days from the establishment of the panel

⁵² *Article 6(2) DSU*. Such a panel must be established unless it is decided by consensus not to do so. See Article 6(1), DSU).

⁵³ < http://www.wto.org/English/news_e/news05_e/dsb_25jan_05_e.thm > accessed on 3rd Feb 2005.

⁵⁴ *Article 6.1 DSU*.

⁵⁵ *Article 8 DSU*. With cases involving developing countries, at least one panelist should come from a developing country (article 8.10, DSU).

there is still no agreement, either party may request the Director-General to appoint the panel.⁵⁶

Once the panel has been established, its jurisdiction and terms of reference are determined by the contents for the request of the establishment of the panel, originally addressed to the DSB by country A, as well as the covered agreement cited in the same,⁵⁷ as was stated by the Appellate Body in ***Australia - Measures affecting Importation of Salmon***.⁵⁸

On the other hand, if the request was not specific in respect to the claim alleged by country A, the request cannot be subsequently cured by country A's written or oral submissions to the panel, as was voiced by the Appellate Body in ***EC - Regime for the Importation, Sale and Distribution of Bananas***.⁵⁹

On the establishment of the panel, any other country, for example country D (a third party other country C) that would be interested in participating in the dispute can notify the DSB of its intention within 10 days, on the premise that it has a substantial interest in the dispute, this is irrespective of whether it took part in consultations.⁶⁰

After the establishment of the panel, the panel draws up a calendar for its work. **Article 12.3 DSU**. However the panel is afforded a certain degree of flexibility and can in fact follow different procedures after consulting the parties.⁶¹

⁵⁶ Article 8.7 DSU.

⁵⁷ Article 7 DSU.

⁵⁸ WT/DS18/AB/R of 20/10/98.

⁵⁹ Appellate Body report, *EC - Bananas III*, WT/DS27/AB/R, adopted 25 September 1997 Para. 143.

⁶⁰ Article 12 DSU and Article 10, DSU.

⁶¹ Article 12.1 DSU, and Paragraph 11 of Appendix 3.

Presentation of Arguments.

Following the panel procedure, countries A and B present their arguments. Country A files its written submissions first to the Dispute Settlement Secretariat Registry which then transmits them to country B, to which the latter replies in its first submission.⁶²

In practice however, country A can serve the written submissions to country B through the letter boxes of their Geneva delegation in the WTO building.⁶³ Country C and D, (third parties) usually file their submissions after Country A and B. The time frame within which parties are required to file their submissions is determined by the panel in cooperation with the parties at the time of establishing the panel procedure.⁶⁴

Oral Hearings.



Subsequent to the exchange of the first written submissions, the panel convenes a first oral hearing (first substantive meeting) which is limited to the panelists, interpreters, country A, country B and country C/D, (third parties).⁶⁵

Evidence is heard from country A, country B and from country C/D, (third parties). During this hearing, the panel accords third parties the opportunity to present their views orally during a special session dedicated to third party presentations.⁶⁶ The panel may also solicit information and technical advice from any individual, expert or body it considers appropriate.⁶⁷

⁶² *Article 12.6 DSU.*

⁶³ *A Handbook on the WTO Dispute Settlement System Pg 53.*

⁶⁴ *Ibid Pg 53.*

⁶⁵ *Paragraph 4 5 and 6 of the working procedures in appendix 3 DSU.*

⁶⁶ *Article 10.2 DSU.*

⁶⁷ *Article 13 DSU.* In rare cases panels have consulted submissions from interested non-governmental organizations.

After the oral statements, Country A, B and C/D are invited to respond to questions from the panel and other parties so as to clarify all the legal and factual issues. **Paragraph 8, of the Working Procedures in Appendix 3 DSU.**

Approximately four weeks thereafter, country A and B simultaneously exchange written rebuttals in response to each others first written submissions and oral statements made at the first oral hearing.⁶⁸ These submissions are not provided to country C and D.⁶⁹

A second oral hearing (second substantive meeting) is then held by the panel at which once again country A and B orally present their factual and legal arguments and also respond to further questions from the panel. Country C and D are invited to present their views and make available to the panel a written version of their oral statements.⁷⁰ Panels have the power to schedule a third or more meetings in a dispute.



Panel Reports.

Subsequent to the oral hearings and rebuttal submissions, the panel develops an **interim report in two stages** which it provides to the parties for review and comment.⁷¹ At this stage, country A or B may submit a written request to the panel to review precise aspects of the interim report, prior to its circulation as a final report to the members. **Article 15 DSU**

Hereafter, the panel must finalise its report and present it to the DSB within 6 months from the date the panel was composed. **Article 12.9 DSU.** However the panel can still seek for an extension of time from the chairman of the DSB within

⁶⁸ Paragraph 7 of the working procedures appendix 3 DSU.

⁶⁹ A Handbook on the WTO Dispute Settlement System Pg 56.

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

⁷¹ Article 15, DSU.

which to issue its report. For example in the ***Sugar Challenge dispute***⁷² between Australia, Brazil and Thailand against the EU, the panel requested for an extension of about one month citing complexity of the dispute.

Once the report by the panel is issued to the DSB, the report has to be adopted within 60 days of its circulation to the members at a DSB meeting unless country B notifies the DSB of its decision to appeal or the DSB decides by consensus not to accept it (reverse consensus).⁷³

Appeal.

The right to appeal as provided in **Article 16(4) DSU** is availed to both countries A and B who may appeal a panel's report to a three-person Appellate Body which jurisdiction is limited to matters of law and legal interpretation by the panel.⁷⁴

However this limitation has been given a wider interpretation to at times include a panel's examination of evidence as was accentuated in ***Korea - Taxes on Alcoholic Beverages***⁷⁵, where the Appellate Body stated that an appeal can be based on the issue of credibility and weight ascribed to given facts as a legal characterisation issue.

The Appellate Body can uphold, modify or reverse the legal conclusions of a panel.⁷⁶ Where the Appellate Body sets aside a panel's finding on a legal issue it must give its own finding to complete the legal analysis as was held in ***Australia - Measures affecting Importation of Salmon***.⁷⁷

⁷² *A Handbook on the WTO Dispute Settlement System* Pg 56.

⁷³ *Article 16, DSU.*

⁷⁴ *Article 17(6), DSU.* Note that third party members cannot appeal a decision, although they can participate through making written and oral submissions similar to the process applicable to the panel process.

⁷⁵ Complaint by the European Communities (WT/DS/75/1).

⁷⁶ *Article 17(3) DSU.*

⁷⁷ Appellate Body Report, *Australia - Measures Affecting Importation of Salmon*, WT/DS/18/AB/R, adopted 6 November 1998, DSR 1998: V111, 3327.

Once the Appellate Body has considered the Appeal and for example finds that country B's trade policy violates a WTO obligation, the Appellate Body would then recommend that country B brings its 'illegal' trade policy in conformity with the WTO Agreement and it may further recommend ways on how country B can accomplish this.⁷⁸

The Appellate Body must then circulate its report within 60 days from the date of the appeal. The DSB must then adopt the Appellate Body's report within 30 days, unless it decides by consensus not to do so.⁷⁹ Once adopted, the disputing members are required to accept the decision unconditionally.

Implementation of Recommendations.

As soon as a panel or Appellate Body report has been adopted by the DSB, it is expected from (the defaulting country) country B to comply promptly with the ruling or recommendations of the report as adopted by the DSB.⁸⁰ Country B must inform the DSB of its intentions in respect of the implementation of the recommendations.

However if immediate compliance is impracticable, a reasonable period to comply with the recommendations can be availed to country B.⁸¹

Article 21.3 DSU foresees three different ways in which this reasonable time period can be determined: (a) It can be proposed by country B and approved by consensus by the DSB; (b) Country A and B can mutually agree within 45 days after adoption of the report(s) or (c) it can be determined by the Arbitrator.

⁷⁸ Article 19(1) DSU.

⁷⁹ Article 17(4) DSU.

⁸⁰ Article 21(1) DSU.

⁸¹ Article 21(3) DSU.

Country B bears the burden of proof to show that the duration of any proposed period of implementation constitutes a "reasonable period of time" and the longer the proposed period of time the greater this burden.⁸²

In ***EC - Regime for the Importation, Sale and Distribution of Bananas***⁸³ the Appellate Body established that a reasonable time to implement a panel or Appellate Body recommendation should not exceed 15 months from the date of adoption of a panel or Appellate Body report.

Where the DSB has not approved country B's proposal for a reasonable time and both country A and B cannot agree on the reasonable period of time in which country B can remove the said measure, country A and B may then resort to Arbitration under ***Article 21.3 (c) DSU***. This procedure is initiated by either country A or B by a request communicated to the chairman DSB for Arbitration.

In ***EC - Regime for the Importation, Sale and Distribution of Bananas***⁸⁴ since EC, United States and other parties had failed to reach a consensus; the complaining parties requested that an arbitrator be chosen by the Director - General of the WTO to establish a reasonable period of time.

Surveillance by the DSB.

The primary goal of the WTO dispute settlement system is to ensure national compliance with multilateral trade rules and to ensure effective resolution of disputes⁸⁵ therefore the DSB supervises the implementation of the recommendations or rulings it has adopted. ***Article 21.6 DSU***.

⁸² *A Hand book on the WTO Dispute Settlement System* pg 77.

⁸³ *EC - Bananas III* Appellate Body Report WT/DS27/AB/R adopted 25 September 1997, DSR 1997: II, 591.

⁸⁴ *EC - Bananas III* Appellate Body Report WT/DS27/AB/R adopted 25 September 1997, DSR 1997: II, 591.

⁸⁵ *Article 21 DSU*.

The issue of implementation is placed on the agenda of the DSB six months following the date of establishment of the reasonable period of time. The item remains on the DSB's agenda until the issue is resolved, for example the **EC - Bananas III dispute** has been on the DSB agenda for years and has been at the forefront of every regular DSB meeting during that time.⁸⁶

However it should be noted that because of this length of time, the process of settling disputes become too long and inefficient⁸⁷ thereby undermining the goal of the DSU that is, preserving the rights of WTO members.

At least ten days before each such DSB meeting, country B is required to provide the DSB with a written status report of its progress in the implementation. **Article 21.6 DSU**. These status reports not only ensure transparency but also give an opportunity to the country A to demand full and expeditious implementation.

Compliance Review.



If country A and B disagree on whether country B has implemented the recommendations and rulings, either of them can request a panel under **Article 21.5 DSU**. This situation can arise for example, when country B passes a new law to cure the violated WTO Law but country A disagrees and feels that it does not achieve the full compliance as requested by the report.

The disagreement is referred to the original panel by the DSB and is expected to come to a decision within 90 days⁸⁸. The duty of this original panel as laid out in **Canada - Aircraft**⁸⁹ is not only to scrutinize whether the implementing measure

⁸⁶ Panel Report, *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/RW/EEC and Corr.1, 12 April 1999, DSR 1999:II,783.

⁸⁷ Brimeyer, B L *Bananas, beef, and compliance in the World Trade Organisation: the inability of the WTO Dispute Settlement process to achieve compliance from superior nations* 10(1) *Minnesota Journal of Global Trade* (Winter 2001) Pg 133 -168.

⁸⁸ *Article 21.5 DSU*.

⁸⁹ Appellate Body Report, *Canada - Measures affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999, DSR 1999: III, 1377.

remedies the violation or other nullification or impairment as was found in the panel or Appellate report but also to determine whether the new measure in its totality is consistent with the covered agreement.

What therefore happens if country B still fails to bring its measure into conformity with its WTO obligations pursuant to **Article 21.3 DSU**?

Other Remedies.

If country B fails to bring its measure into conformity it can enter into negotiations with country A with a view to agreeing on **mutually acceptable compensation** as provided in **Article 22.2 DSU**. In the **Japan - Alcoholic Beverages dispute**,⁹⁰ compensation was paid by Japan in exchange for an extension of the implementation period.

However **Article 3.7 DSU** explains that this compensation is merely a temporary measure offered when there can not be an immediate withdrawal of the measure. According to **Mosoti** this compensation is voluntary and has no retrospective element to it. It does not therefore address the past effects of the measure⁹¹ and it does not mean monetary payments.⁹²

This therefore means that Country B can for example offer a tariff reduction which is equivalent to the benefit which country B has nullified or impaired.

If country A and B fail to agree on compensation within 20 days after the date of expiry of the reasonable period of time then country A may obtain authorization from the WTO Dispute Settlement Body **to suspend its concessions** (WTO

⁹⁰ *Communication from Japan, Mutually Acceptable Solutions on Modalities for Implementation, on United States Complaint concerning Japan - Taxes on Alcoholic Beverages*, WT/DS8/19(Jan 12, 1998).

⁹¹ Mosoti (2003) Pg 17.

⁹² *A hand book on WTO Dispute Settlement System* (2004) Pg 96.

obligations) toward country B equivalent to the level of the nullification or impairment resulting from such violation.⁹³

The United States for example, did retaliate pursuant to **Article 22.2 DSU**, against the EC for its failure to implement a WTO approved revised banana regime at the end of a deadline in 1999.⁹⁴

The United States imposed a one hundred percent ad valorem duty to certain goods, equaling \$ 191.4 million in sanctions on necessities such as women's hand bags, cotton bed linens, lead acid storage batteries, and coffee makers.⁹⁵

The DSB's authorization of suspension of concessions must follow dispute settlement proceedings under **Article 21.5 DSU**

However how practical can it be for African countries to fully engage these remedies against other developing and developed countries?



Shaffer argues that the aforesaid remedies are biased in favor of countries with large markets such as the United States China and the EC in that they have the clout to retaliate, that is, because of there large markets that are essential to African countries they can easily press African countries to comply with WTO rules and rulings⁹⁶.

Can African countries do the same?

The story is different when it comes to African countries. The fact that African countries are dependent on the lager markets of other developing and developed

⁹³ *Article 22, paragraph 2 DSU.*

⁹⁴ Brimeyer, B L *Bananas, beef, and compliance in the World Trade Organisation: the inability of the WTO Dispute Settlement process to achieve compliance from superior nations* 10(1) Minnesota Journal of Global Trade (Winter 2001) Pg 133 -168.

⁹⁵ Daniel Altman, *Two Wrongs Don't Make Right in World Trade*, New York Times Mar 31 2002 Pg 3 and 4.

⁹⁶ Shaffer (2003) pg 38.

countries, engaging the remedies becomes a nightmare. For example if African countries were to close a sector or market as a retaliation action they would instead lose out much more , there would be little impact on the other country's market, but the consequences of such action for its own market would be grave, be it economically or politically.

In support of this argument **Lal Das** states that;

"If the erring country is economically and politically strong, any retaliatory action against it is likely to have political and economic implications which a weak [African] country would like to avoid."⁹⁷

More so, the wording of these remedies as general recommendations by the WTO panels and the Appellate Body coupled with their failure to suggest ways in which a Member can implement recommendations as permitted by **Article 19 DSU** has created room for the large developed countries to evade compliance.



For example in **EC - Bananas III dispute** though Ecuador had legal success in respect to retaliating against the EC it was unable to translate this legal victory into effective pressure to induce the EC to comply.⁹⁸ Rather, the United States played the primary role in line with United States constituent interests.⁹⁹

Needless to say, the aforesaid system of remedies creates an incentive for these developed and powerful nations to simply drag out a legal dispute for years, so that even when a panel eventually finds that they have violated their WTO obligations they have successfully closed their market without incurring any consequence.¹⁰⁰

⁹⁷ Bhagirath Lal Das, *The WTO Agreements: Deficiencies, Imbalances and Required changes* (1998) Pg 14.

⁹⁸ *European Communities - Regime for the Importation, Sale and distribution of Bananas - Recourse to Article 21.5 DSU by Ecuador*, WT/DS27/RW/ECU(April 12, 1999).

⁹⁹ Shaffer (2003) Pg 38.

¹⁰⁰ Ibid pg 39.

A clear example is In ***United States - Restrictions on Imports of Cotton and Man - Made Fiber Underwear dispute*** the illegal United States safeguard expired on March 27, 1997 just a little more than a month following the adoption of the Appellate Body report.¹⁰¹

Therefore, although the WTO Dispute Settlement System provides remedies, these are merely useful on paper, but ambiguous in application. These remedies are easily applicable to powerful countries that have large markets, but to the African continent, that has the largest membership in the WTO, they are impossible to utilise.

2.2 . Special & Differential (S & D) provisions in the DSU.

*"[African countries] have not been able to reap fully the benefits of the dispute Settlement procedures [through utilizing the Special and Differential provisions]."*¹⁰²

A number of provisions in the DSU relate to Special and Differential Treatment that is accorded to developing and least developed countries. These provisions constitute a set of rights and privileges that apply to developing and least developed countries and from which developed countries are excluded. They are in the form of faster procedures, longer time limits and legal assistance. In effect these provisions are meant to accord developing and least developed countries favorable access in the WTO dispute settlement system.¹⁰³

¹⁰¹ *United States - Restrictions on Imports of Cotton and Man - Made Fiber Underwear* WT/DS24/AB/R (Feb. 10, 1997) (complaint by Costa Rica).

¹⁰² Robert E. Hudec, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System*, Pg 353.

¹⁰³ *Ibid* Pg 353.

For example, **Article 4.10 DSU** calls for members to give special attention to the particular problems and interests of developing countries in consultations, **Article 12.10 DSU** allows for the extension of the consultation period in cases of measures taken by developing countries if the parties agree, while **Article 8.10 DSU** provides that a developing country involved in a dispute can request that the panel include at least one person from a developing country.

Furthermore, **Article 21.8 DSU** entails that If a dispute is brought by a developing country, the DSB, in considering what appropriate action might be taken is to take into account not only the trade coverage of the measures complained of but also their impact on the economy of the country concerned.

As regards technical assistance **Article 27.2 DSU** provides for neutral legal advice to be furnished by the WTO secretariat to developing country members. Finally **Article 24.1 DSU** calls for due restraint in invoking the DSU against least-developed countries in asking for compensation or in seeking the authorisation to suspend the application of concessions or other obligations to these countries.

However though the aforesaid Special and Differential Treatment provisions are enshrined in the DSU can it be stated unequivocally that African countries have benefited from their existence?

Some of these provisions have worked in practice for example in almost all disputes in which a developing country is involved, at least one panelist has come from a developing country and the panels have also consistently explained in their findings how they took into account the relevant Special and Differential Treatment provisions.¹⁰⁴

¹⁰⁴ Frieder Roessler *Special and Differential Treatment of Developing Countries under the WTO Dispute Settlement System* (2003) pg 3.

For example, In ***Indonesia - Certain matters affecting the Automobile Industry***, the Arbitrator used ***Article 21.2 DSU*** as the legal basis for the extension of the implementation period by six months¹⁰⁵.

Then also In the ***Scallops dispute***¹⁰⁶ where Chile and Peru requested that a panel be established on the trade description of scallops drawn up by the European Communities (E C) and the EC counter argued asked that item be removed from the DSB agenda, arguing that the time periods for consultations and for the inclusion of those items on the agenda stipulated in the DSU had not been respected. The panel was of the view that impairing the interests of Chile would be a deviation from the provision of ***Article 4(10) DSU*** which entail the granting of special attention to the particular problems and interests of developing countries.

However this trend is not reflected as regards all the Special & Differential provisions. No developing country has for example ever invoked the 1966 procedures in the DSU, and the DSB has never been requested by any developing country to apply provisions in ***Articles 21.7 and 21.8*** of the DSU according to which the DSB has to take into account the interests of developing countries in its task of surveying the implementation of recommendations and rulings.

According to ***Valentina Delich***, Special & Differential Treatment provisions seem to be very irrelevant given that though some panels have dealt with these provisions they have only been invoked in fewer than 10 cases involving developing countries either in defending or in claiming their rights.¹⁰⁷

¹⁰⁵ Arbitration under Article 21.3(c) of the DSU, *Indonesia - certain measures affecting Automobile Industry* WT/DS54/15- WT/DS59/13- WT/DS64/12, paragraph 24.

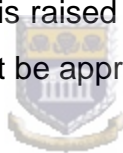
¹⁰⁶ WTO, WT/DSB/M7.

¹⁰⁷ Valentina Delich, *Developing Countries and the WTO Dispute Settlement System* (2002) Pg 71.

It is therefore evident that the lack of practical utility of most of these provisions has held back African countries from benefiting from their existence. For example the practical utility of the provision that a panel should have at least one panelist from a developing country if a dispute involves a developing country has been questioned.¹⁰⁸

It is argued that the presence of a panelist will not help matters if the dispute is legally weighted against developing countries and that this provision is more about building the confidence of developing countries in the system than conferring a legal benefit on them.¹⁰⁹

In addition thereto most of the Special and Differential treatment provisions accorded to African countries by virtue of their being developing or least developed require high level expertise and resources. For example, **Article 21.7 DSU** mandates that when a matter is raised by a developing country, the DSB is to consider what further action might be appropriate in the circumstances.



This provision has never been used by a developing country owing to the resources required to enhance analysing and following cases. This involves checking arguments, issues and possibilities and comparing experiences and results; exploring new legal as well economic arguments; and, domestically, building up an efficient and transparent liaison between the state and industry in order to obtain up to date information on trade problems in which developing countries have a stake.¹¹⁰

The technical assistance called for in **Article 27.2 DSU** is provided by only a few consultants and is inadequate, given the large number of disputes. In addition

¹⁰⁸ Mosoti (2003) Pg 27.

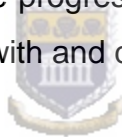
¹⁰⁹ Ibid Pg 20.

¹¹⁰ Valentina Delich, *Developing Countries and the WTO Dispute Settlement System* (2002) Pg 71.

since the WTO secretariat must be impartial; its latitude for helping developing countries with legal strategic issues is limited.

On the premise of the aforesaid, it is evident that African countries have difficulty with reaping the benefits of the Special and Differential provisions enshrined in the DSU as the nature of the provisions does not grant them the opportunity. Most of these provisions are of rather limited scope and are merely declarative and not obligatory hence not addressing the core difficulties such as, shortage of human and financial resources faced by African countries in seeking to use the Dispute Settlement System.

The Doha Declaration instructs WTO members to review all Special & Differential provisions¹¹¹ with a view of strengthening them. The African group has played a leading role in presenting specific proposals in both pre- and post Cancun however there has been no tangible progress in realizing the Doha Agenda only procedural issues have been dealt with and decided.¹¹²



Above all, In the **July package** it was merely decided that work on dispute settlement should continue in line with the Doha Mandate.

The recent **WTO Sutherland Report on the future of WTO**¹¹³ is likewise strangely silent on its comments in line with the reforms of the DSU and Africa's absence from the process hence hardly any progress has been registered.

In conclusion, it has been shown how the WTO Dispute Settlement System operates and how some of the very features of the same system hinder the participation of African countries. If these features of the WTO Dispute Settlement System were to be set aside, would African countries actively

¹¹¹ Valentina Delich, *Developing Countries and the WTO Dispute Settlement System* (2002) Pg 71.

¹¹² <http://www.rieti.go.jp/en/columns/a01_0090.html?mode=print> accessed on 31st may 2005.

¹¹³ <<http://www.tralac.org/scripts/content.php?id=3523&print=1>> accessed on 3rd may 2005.

participate in the dispute process? Are there any challenges other than these features?

Chapter Three will therefore address other challenges that limit the participation of African countries in the above explained process.



CHAPTER THREE

3.0 African Country participation in the WTO Dispute Settlement System:

A prolonged slumber?

The table below shows the participation of WTO members in the Dispute Settlement System for the period 1995 to 21/03/2005. The figures therein are limited to member participation as complainants and respondents.¹¹⁴

WTO Member Involvement in Disputes.

MEMBER	NO. OF TIMES AS COMPLAINANT	NO. OF TIMES AS A RESPONDENT
Antigua and Barbuda	1	0
Argentina	9	15
Australia	8	9
Bangladesh	1	0
Belgium	0	3
Brazil	22	12
Canada	26	13
China	1	1
Chinese Taipei	2	0
Chile	10	10
Colombia	4	1
Costa Rica	3	0
Croatia	0	1
Czech Rep	1	2
Denmark	0	1
Dominican Republic	0	2
Ecuador	2	3
Egypt	0	3
European Communities	68	52
Guatemala	5	2
France	0	3
Germany	0	1
Greece	0	2
Honduras	6	0
Hong Kong, China	1	0
Hungary	5	2
India	16	17

¹¹⁴ The statistics in the table are derived from http://www.wto.org/english/tratop_e/dispu_e/distabase_wto_members1_e.htm accessed on 21/03/05.

MEMBER	NO. OF TIMES AS COMPLAINANT	NO OF TIMES AS RESPONDENT
Indonesia	3	4
Ireland	0	3
Japan	12	14
Korea	12	13
Malaysia	1	1
Mexico	14	12
Netherlands	0	1
New Zealand	6	0
Nicaragua	1	2
Norway	1	0
Pakistan	2	2
Panama	2	0
Peru	2	4
Philippines	4	5
Poland	3	1
Portugal	0	1
Romania	0	2
Singapore	1	0
Slovak Rep	0	3
South Africa	0	2
Spain	0	1
Sri Lanka	1	0
Sweden	0	1
Switzerland	4	0
Thailand	11	1
Trinidad & Tobago	0	2
Turkey	2	7
United Kingdom	0	2
United States	79	89
Uruguay	1	1
Venezuela	1	2

From the statistics, only two African countries that is, South Africa and Egypt have appeared as Respondents and at the same time none has appeared as a Complainant, in the 10 year period that the WTO Dispute Settlement System has been in existence. At the Appellate level, no African country has participated as either a Complainant or a Respondent, as of April 4th, 2005.¹¹⁵

¹¹⁵ <http://www.wto.org/english/tratop_e/dispu_e/distabase_wto_members1_e.htm> accessed on 21.03.05.

However as regards third party status a handful of African countries have participated as portrayed by the table¹¹⁶ herein under.

Third Party Participation by African Countries.

MEMBER	NO OF TIMES AS A THIRD PARTY
Benin	1
Cameroon	1
Chad	1
Cote d'Ivoire	1
Egypt	2
Ghana	1
Kenya	1
Madagascar	1
Malawi	1
Mauritius	3
Nigeria	1
Senegal	2
Swaziland	1
Tanzania	1
Zimbabwe	1

As of 21st March 2005, out of about 41 African memberships to the WTO only 15 African countries have so far acquired third party status in disputes.

¹¹⁶ The statistics in the table are derived from http://www.wto.org/english/tratop_e/dispu_e/distabase_wto_members1_e.htm accessed on 21/03/05.

Clearly, African countries are in a *prolonged slumber*, as far as participation in the WTO Dispute Settlement System is concerned. From the tables, it is evident that the number of times African countries have participated they were on the defensive to protect their preferences such as Sugar, Bananas and generalized system of preferences.¹¹⁷ In the case of Egypt and South Africa it was mainly to defend their interests in cotton and asbestos.¹¹⁸

Why haven't African countries been on the offensive to open markets for products of export interest to them?

Can it therefore be concluded that the *prolonged slumber* by African countries implies that they have no rights or obligations to enforce in the multilateral trading system? Aren't trade disputes a normal occurrence in the conduct of international trade? Does the lack of participation of African countries mean that they do not have potential disputes that they can submit to the Dispute Settlement System?

This chapter is therefore going to explore why African countries are not active participants in the Dispute Settlement System, that is, *why the prolonged slumber?*

3.1 Why African Countries are not active participants in the WTO Dispute Settlement System?

The majority of African countries do not actively participate in the WTO Dispute Settlement System because of their relatively smaller volume and variety of exports.¹¹⁹ Africa's trade as a continent accounts for 2% of the global trade,¹²⁰

¹¹⁷ Presentation titled *The DSU Negotiations and African Countries* by Dr. Edwini Kessie during a conference organized by TRALAC in Cape Town, South Africa on 31st March 2005.

¹¹⁸ Ibid.

¹¹⁹ Mavis Marongwe, *African Countries and the WTO Dispute Settlement System*. Available at <<http://www.tralac.org/scripts/content.php?id=2718>> accessed on 31.03.05

¹²⁰ Ibid.

and the inter trade between the African states is limited to 10.5% of the continent's trade volume.¹²¹

This therefore means that African countries are less active traders on the whole, and are therefore less likely to participate as complainants or respondents because of their small volume of trade.

This can be contrasted with the position of the United States of America and the European Communities which have a much higher volume and variety of trade, with their trade accounting for 70% of the global trade.¹²² That is why according to the statistics in the 1st table, United States and the European Communities have appeared as complainants 79 and 89 times respectively and 58 and 62 times as respondents respectively.

African country participation in the WTO Dispute Settlement System is also shuttered by the high costs of initiating an individual WTO dispute, which are deemed too prohibitive to African countries. The WTO panels and Appellate Body employ a case-based approach where individual case opinions average in hundreds of pages, thereby sky-rocketing the costs of litigation.¹²³

For example in a ***dispute challenging Argentina's customs treatment of US textiles***,¹²⁴ the United States provided data on the customs treatment of 118 separate tariff categories. Because of such documentation and complexity involved in disputes, the costs for litigation increase tremendously.

¹²¹ Mavis Marongwe, *African Countries and the WTO Dispute Settlement System*. Available at <<http://www.tralac.org/scripts/content.php?id=2718>> accessed on 31.03.05.

¹²² Alan F Holmer *Dispute resolution in the New World Trade Organisation: Concerns and Net Benefits*, 28 *International Lawyer* 1095 (1998).

¹²³ See e.g., Communication from the Appellate Body, *United States-Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/13 (Oct. 12, 1998) (rejecting a generic analysis based on categories of trade measures in favor of a fact - specific analysis based on the 'specific case'.

¹²⁴ Chad Bown *Participation in the WTO Dispute Settlement: Complainants, Interested Parties and Free Riders* Pg 12-15 available at <<http://www.tralac.org>> accessed on 31.03.05.

In the *Kodak and Fuji in Japan- Photographic film dispute*¹²⁵ the costs for litigation amounted to \$10 million dollars.

Needless to say, the lack of institutional and human capacity in WTO law in most African countries contributes to the high costs of litigation. A majority of these countries hire private law firms in America to represent them at fees ranging from \$200 -\$1000 an hour.¹²⁶

As such, given the small economies of African countries and their small contribution to global trade, combined with the high costs of litigation, participation in the WTO Dispute Settlement System for most African countries becomes a myth.

More so, the expected benefits from the conclusion of a dispute have kept African countries away from the WTO Dispute Settlement System.¹²⁷ As earlier mentioned in Chapter Two, the lack of monetary awards or compensation to a successful party and the existence of self enforcing remedies such as retaliation have greatly moved African countries away from the WTO Dispute Settlement System.

According to **Bown** these remedies would require economic and political power of a country to have them enforced against the offending country and yet most of the developing countries are not that powerful enough to enforce such remedies against an economically powerful offending country.¹²⁸

Indeed, the majority of African countries fall into the category of countries that lack the economic power to enforce such remedies. This is because they are

¹²⁵ Alan Wm. *Reflections on WTO Dispute Settlement*, 32 Int'l Law. 951,956 (1998).

¹²⁶ Shaffer Gregory, *How to make the WTO Dispute Settlement work for Developing Countries: Some proactive Developing Country Strategies* (2003) Pg 16.

¹²⁷ Chad Bown *Participation in the WTO Dispute Settlement: Complainants, Interested Parties and Free Riders* Pg 12-15 available at <<http://www.tralac.org>> accessed on 31.03.05.

¹²⁸ *Ibid* Pg 12.

dependant on interalia, continuing agricultural trade relationships with the powerful members of the WTO, given that the bulk of their unprocessed goods which are the primary export commodities of African countries end up in one developed nation or another.¹²⁹

African countries are therefore less likely to participate in a dispute where they are not powerful enough to enforce such a remedy or to retaliate, as their economies would stand to suffer more if they tried to do so.

Furthermore, most African countries' National Budgets are dependent on aid from developed nations¹³⁰ hence they have instilled in themselves the common attitude; "*you can't slap the hand that feeds you*" thereby watering down their desire to participate in a dispute, in fear of losing this Aid in the future. For example, African negotiators were prevailed upon to take certain positions to safeguard certain aid packages.¹³¹



This was the case in relation to the ACP-EU Cotonou waiver which was a trade off for developing countries outside this scheme that were advocating for their inclusion in the scheme, on the grounds that the scheme's being limited to particular developing countries was a violation of the MFN rule. These countries accepted to waive their objections to the ACP - EU Cotonou Scheme's being limited to particular developing countries in exchange for the inclusion of the Singapore issues in the Doha Round.¹³²

Therefore because of this so called Aid and/or favors extended to African countries by the developed nations, the likelihood of their participation in the WTO Dispute Settlement System is likely to be prejudiced. A clear illustration can be drawn from the conduct of the President of Uganda Yoweri Museveni who

¹²⁹ Mosoti, *Does Africa need the WTO Dispute Settlement System* Supra Pg 15.

¹³⁰ Donors contribute about 40% of Uganda's National Budget. This information was obtained from the Monitor News Paper of 3rd May 2005.

¹³¹ Mosoti, *Does Africa need the WTO Dispute Settlement System* (2003) Pg 15.

¹³² *ibid.*

through a last minute letter during the Ministerial Meeting at Cancun in Mexico in 2003, compromised the agreed position of African Countries as a group in relation to the separate treatment of Cotton as a distinct item from Agriculture as a whole, in return for aid from the United States of America.¹³³

The lack of expertise in WTO law grossly hinders the desire of African countries to actively participate in the WTO Dispute Settlement System. In most African countries there are no locally available private lawyers to advise their governments as regards their rights in WTO litigation¹³⁴ and as expected with such ignorance about their rights, there ceases to be any desire by the African countries to enforce their obligations.

For example Kenya has three officials in Geneva while Tanzania and Uganda each has two,¹³⁵ which means that all of East Africa as a bloc has only 7 trade officials in Geneva.



In contrast, there are over one hundred law professors teaching WTO law to over two thousand students a year in the United States, yet in the whole of Africa, there are less than 10 professors specialised in WTO law.¹³⁶ This in the long run has created the lack of confidence and experience as regards matters of WTO Law thereby making the whole system a challenge to most African countries.

This lack of expertise impedes the confidence of African countries thereby brewing negative perception and little faith in the WTO system. For example a proposal received on 9th September 2002 by the DSB on behalf of the African Group illustrated this lack of confidence in the system. The African group

¹³³ Monitor Newspaper of Thursday April the 14th at Pg 9 Published in Uganda.

¹³⁴ Shaffer Gregory, *How to make the WTO Dispute Settlement System work for Developing Countries: Some proactive Developing Country strategies*. (2003) Pg 17.

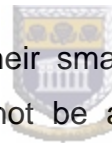
¹³⁵ Monitor Newspaper published in Uganda on the 17th of April 2005 Pg 9.

¹³⁶ Chad P Bown, *Participation in WTO Dispute Settlement: complainants, interested parties and free riders* (2005) Pg 11.

submitted that the means for the enforcement of findings and recommendations are skewed against African countries and cannot be utilized by them.¹³⁷

This negative perception means although that although African countries may become aware of measures against which they could invoke their legal rights they are less likely to develop pro-active strategies to defend these rights and interests on grounds that the system is structured to their disadvantage.

African countries have also turned a blind eye to the WTO dispute settlement mechanism because they view the process as too long and inefficient.¹³⁸ On average a dispute takes almost three years and for complex cases like the Banana dispute it can even take a much longer time. Basically the more complex the issue the less likely the panels will be able to stay within the time frames prescribed by the DSU.¹³⁹



Therefore African countries with their small economies and limited resources believe that such a system can not be an option for enforcing their rights. Engaging in the dispute settlement process to them would entail spending millions of dollars in return for a twenty to seven percent chance of success.

African countries argue that this system would only entice the likes of United States who may be able to spend millions of dollars to claim victory in the WTO dispute settlement process which does not necessarily equate with economic success, because the implementation or compliance process is often too long, complex and expensive – an option which is not available to most African countries.

¹³⁷ Proposal of the African Group submitted to the special session DSB on 22nd September 2002.

¹³⁸ *Has the WTO gone bananas? How the Banana dispute has tested the WTO Dispute Settlement Mechanism.*

¹³⁹ Alter, Karen *Resolving or Exacerbating Disputes? The WTO's New Dispute Resolution System* 79(4) *International Affairs* 783 -800(2003).

Having identified the reasons why African countries are not actively participating in the WTO Dispute Settlement System, there is now a compelling need to suggest ways on how these countries can advance their participation and the benefits that would arise from such participation.



CHAPTER FOUR

4.0 Why African countries should participate in the Dispute Settlement System.

Shaffer views participation in the WTO Dispute Settlement System as essential for the development of the interpretation and application of WTO law.¹⁴⁰ **Mosoti** postulates that participation in the WTO Dispute Settlement System is of great importance given that the System is constantly evolving a set of legal interpretations and principles that will over time continue to form the foundation for WTO law in the years to come¹⁴¹.

This is based on the fact that first, WTO law not only requires consensus among all members irrespective of their varying interests, values, levels of development and priorities to modify or amend its law, but also involves tradeoffs between them, thereby making the process complex and beneficial to a few members¹⁴².

Secondly, the fact that though the WTO law does not formally adopt a common law approach, it has taken more of a common law orientation, with the panels and Appellate Body citing and relying on past WTO jurisprudence in their legal reasoning.¹⁴³ This therefore means that individual WTO cases are not only solely about judicial resolution of an individual dispute but the panel and Appellate Body decisions also produce systemic effects of future cases.

Accordingly, African countries should take note of the increased importance of WTO jurisprudence and the rigidity of the WTO political process to modify it through treaty amendment or formal interpretation. They should become aware of the fact that governments that are able to participate most actively in the WTO

¹⁴⁰ *How to make the WTO Dispute Settlement System work for Developing Countries: Some proactive Developing Country strategies.* (2003) Pg 10.

¹⁴¹ *Does Africa need the WTO Dispute Settlement System* (2003) Pg 27.

¹⁴² Shaffer (2003) Pg 11.

¹⁴³ *Ibid* Pg 11.

dispute settlement system are best positioned to effectively shape the law's interpretation and application to their advantage.

As stated by **Busch and Reinhardt** it is because of the aforesaid reasons that the United States and EC remain by far the predominant users of the system and thereby are advancing their larger systemic interests through the judicial process.¹⁴⁴

Further more, the **European Communities Sugar challenge** dispute, inter alia, highlights the significance of the Dispute Settlement System as a means by which countries can defend their trade and sustainable development interests.¹⁴⁵

On the other hand, the absence of colossal participation by African countries in the Dispute Settlement System poses very serious risks and fades away the usefulness of the WTO to these countries. African countries should realise that if they desire to fully integrate into the multilateral trading system and at the same time have their unique interests, views and aspirations reflected in the body of the WTO law being formulated, they need to stop 'thumbing their noses' at the Dispute Settlement System.

Owing to the aforesaid benefits, it is pertinent that African Countries should participate actively in the WTO Dispute Settlement System.

In view of increasing their participation in the WTO Dispute Settlement System African countries have submitted a number of proposals suggesting the areas and features that need to be reformed in the DSU.

¹⁴⁴ *Bargaining in the shadow of the law: Early Settlement in GATT/WTO Disputes*, 24 Fordham Int'l L. J. 158-159 (2000).

¹⁴⁵ Mavis Marongwe, *African Countries and the WTO Dispute Settlement System*. Available at <<http://www.tralac.org/scripts/content.php?id=2718>> accessed on 31.03.05.

The following section will therefore give a brief background of the DSU negotiations, highlight the proposals so far submitted by the African countries and other WTO Members and then subsequently evaluate the proposal submitted by the African Group, to determine whether any success has been achieved in respect to the said Proposal. This section will also limit it self to the proposal by the African Group dated 25th September 2002 submitted to the Special Session of the Dispute Settlement Body.

Background of the DSU Negotiations.

Initially, the review of the DSU had been included in the built- in agenda in the Ministerial Decision adopted in April 1994 at the Ministerial meeting in Marrakech, Morocco, under the Uruguay Round of trade talks. According to this Decision, the review procedures were to be concluded within four years after the DSU took effect that is by January 1st 1999.¹⁴⁶

Though the actual work to review the Dispute Settlement Rules had began in 1997 no agreement had been reached by the initial deadline of January 1st 1999 as such causing the Geneva - based delegates from Japan and some other countries to voluntarily and informally continue with the review negotiations.¹⁴⁷

Subsequent thereto **Paragraph 30 of the Doha Ministerial Declaration** contained a mandate for negotiations to commence with a view of reaching an agreement by May 2003 thus the revision of the DSU was separated from other issues to be negotiated so as to enable an early harvest of an agreement with disregard to any possible delays in other areas.¹⁴⁸ Accordingly the Special Session of the Dispute Settlement Body set up by the WTO Trade Negotiations Committee was launched.¹⁴⁹

¹⁴⁶ *A hand book on WTO Dispute Settlement System* (2004) Pg 118.

¹⁴⁷ <http://www.rieti.go.jp/en/columns/a01-0090.html?mode=print> accessed on 30th May 2005.

¹⁴⁸ Ibid.

¹⁴⁹ *A hand book on WTO Dispute Settlement System* (2004) Pg 118.

To date there has not yet been a break through in the negotiations for the reform of the WTO Dispute Settlement System despite the fact that delegations have met on countless occasions the **July Package** merely hints on the fact that it reaffirms the Members commitment to progress in DSU negotiations in line with the Doha Mandate and adopts the Trade Negotiations Committee recommendation that work in the Special Session should continue.¹⁵⁰

Proposals and Negotiating Positions of Member countries or Regions.

Japan, the EU and Canada are of the view that the Dispute Settlement Procedures should be made more legalised and the current list of panelists should be transformed into a streamlined panel roster to ensure availability of qualified panelists.¹⁵¹

The United States is proposing for greater transparency in the Dispute Settlement Process in that WTO panel meetings should be made open to the public, that is, the public should have access to various documents and statements and *amicus curiae* submissions by the likes of NGO's should be received by WTO panels.¹⁵²

The proposals by developing countries have been grouped in two camps with likes of India, Cuba, Malaysia, and Sri Lanka on one hand and the African group on the other hand both placing emphasis on the need to improve developing country access to the dispute proceedings and a more effective mechanism of enforcing WTO rulings, particularly against developed countries.¹⁵³

¹⁵⁰ WT/L/579 Decision Adopted by the General Council on 1 August 2004 Paragraph F titled Other Negotiating Bodies.

¹⁵¹IFTI Watch - Transparency Issues at the WTO. <<http://www.freedominfo.org/ifti/wto.htm>> Accessed on 5/30/2005.

¹⁵² <http://www.rieti.go.jp/en/columns/a01-0090.html?mode=print> accessed on 30th May 2005.

¹⁵³IFTI watch - Transparency Issues at the WTO. <<http://www.freedominfo.org/ifti/wto.htm>> Accessed on 5/30/2005.

4.1. Proposals by African Country Members.¹⁵⁴

"... No large number of judgments handed down makes a system just, if the judgments are one sided or manifestly unjust, if they prejudice or are not fully responsive to [African countries]..."

Establishment of a Trust Fund.

It is the argument of African countries that for the Dispute Settlement System to become more responsive to their needs a Trust Fund on dispute settlement should be established to develop both institutional and human capacity.¹⁵⁵

African countries hold the view that since the WTO Dispute Settlement System is complicated and overly expensive, requiring institutional and human resources as well as having financial implications, African countries will need supplementary resources and means to be provided to develop both the institutional and human capacity for using the Dispute Settlement System.¹⁵⁶

African Members thumb their noses at the Advisory Centre on WTO Law on the premise that it does not act as a panacea for all institutional and human capacity constraints faced by African countries as evidenced by its terms of reference which are equivocal in certain instances and do not cover African countries specifically, hence they recommend that the WTO as a decent legal system must

¹⁵⁴ Proposal by the African group dated 25 September 2002 to Dispute Settlement Body accessed from <http://64.233.161.104/search?q=cache:w2Lf0Es17MQJ:www.law.georgetown.edu/iiel/rese....3/16/2005> accessed on 13th December 2004.

¹⁵⁵ Paragraph 3(a) of the proposal by the African group submitted to the Dispute Settlement Body Special Session dated 25 September 2005.

¹⁵⁶ Ibid.

ensure that members who are not able to exercise their rights in the system for financial constraints are provided with the means to do so.¹⁵⁷

Monetary or Appropriate Compensation.

African countries are also calling for the introduction of monetary or appropriate compensation in WTO Law. They argue that there should be a rule providing that:

*Measures withdrawn by Members in the course of consultations shall be notified to the DSB as mutually agreed solutions in accordance with **Article 3.6 DSU** where the mutually agreed solutions are notified, the DSB shall recommend compensation of injury suffered by the Member.*¹⁵⁸

Further a rule requiring that;



*Measures withdrawn without or prior to the commencement of any proceedings under the DSU shall entitle a Member to compensation that shall be enforceable under the DSU at the instance of members affected.*¹⁵⁹

The aforesaid proposal is founded on the premise that the economies of most African countries are small and therefore they are bound to face serious injury or severe nullification and impairment of benefits from measures restricting their exports even if imposed for short periods by the developed nations.¹⁶⁰

African countries therefore want compensation to be accorded when a measure is withdrawn during consultation or even when the proceedings have been finalized between a developed and developing country.

¹⁵⁷ Paragraph 3(b) and (c) of the proposal Pg 2.

¹⁵⁸ Paragraph 4 of the Proposal Pg 3.

¹⁵⁹ Ibid.

¹⁶⁰ Paragraph 4 of the Proposal Pg 3.

Collective Suspension by all Members.

It is further contended by African countries that there must be collective suspension by all members in the resort to the suspension of concessions against a developed member whose adopted measures are in breach of WTO obligations and are against a developing Member, notwithstanding the requirement that suspension of concessions is to be based on the equivalent level of nullification and impairment of benefits.¹⁶¹

African Countries argue that though the DSU currently provides suspension of concessions as a remedy in situations where a party to a dispute does not withdraw measures that are in breach of WTO obligations this remedy is skewed against them in that, they cannot practically utilize this sanction as individual country members against the developed country members and even if they did; they would probably suffer further injury.¹⁶²

Developmental perspective in the Implementation of Recommendations and Rulings.

African countries are also, proposing that there should be a developmental perspective in the implementation of recommendations and rulings, as part of the mechanisms for achieving the development objectives of the WTO.¹⁶³ This proposal is derived from the failure of panel and Appellate Body reports and the authorization of suspension of concessions to reflect and address the development implications of certain findings and recommendations.

Accordingly the DSB should prior to adopting the findings and recommendations of the panels and Appellate Body fully take into account reports to be prepared by relevant international organizations particularly UNCTAD and the UNDP on

¹⁶¹ Paragraph 6 of the Proposal Pg 4.

¹⁶² Ibid.

¹⁶³ Paragraph 7 of the Proposal Pg 5.

the development implications of the implementation of findings and recommendations.¹⁶⁴

This they believe will always maintain the developmental spirit of the WTO.

Third Party participation.

As regards Third Party participation, African countries are proposing that they should not be required to demonstrate a trade or economic interest in a dispute as a precondition for their admission as third parties.¹⁶⁵

Secondly, that they may always be admitted as third parties at whatever stage the dispute may be and lastly there should be a provision guaranteeing that third party African country members have a right to all documents and information.¹⁶⁶

African countries postulate that owing to the endless challenges they face in accessing the WTO dispute system such as, gaining legal expertise in procedural, substantive, systemic, or other issues the generosity of this proposal benefit them greatly and in fact protect their long - term development interests.¹⁶⁷

Conflict between WTO Agreements or Provisions.

African countries are of the view that where there is a conflict between provisions of any covered Agreement or between any covered Agreements the panel or Appellate Body should refer the matter to the General Council for a determination and there should be periodic reviews every five years to evaluate and improve through amendments the existing jurisprudence.¹⁶⁸

¹⁶⁴ Ibid.

¹⁶⁵ Paragraph 9 of the Proposal Pg 5.

¹⁶⁶ Ibid Pg 5.

¹⁶⁷ Paragraph 9 of the Proposal Pg 5.

¹⁶⁸ Paragraph 10 of the proposal Pg 6.

This they argue will enable the General Council to consider the jurisprudence developed in the WTO Dispute settlement system and prevent the panels and Appellate Body coming up with surprises in their interpretation and application of WTO provisions for example, the right to seek information conferred under **Article 13 DSU** to panels has been interpreted to mean an obligation to receive un - requested information.¹⁶⁹

Amicus curiae.

It is also the view of African countries that use of the expression "**Amicus curiae**" in the context of **Article 13 DSU** is inappropriate .The Article concerns the "right to seek information" and for clarity that expression should be maintained and used within the frame work of the intention in **Article 13**.

The term **amicus curiae** is ordinarily understood to refer to respected experts that a court may request for additional advice and guidance on issues of law and interpretation and issues requiring expert knowledge. The term is not ordinarily used in reference to adducing of factual evidence in support of a party's case.¹⁷⁰

There fore this proposal shall also promote the development goals of the WTO.

Panels and the Appellate Body.

African countries do also feel that the system of panelists and the Appellate Body should be changed. They propose that there should be a balanced representation of Africa on the panels and the Appellate Body. This they believe will assist in promoting a balanced WTO dispute settlement system that reflects

¹⁶⁹ Ibid.

¹⁷⁰ Paragraph 10 of the proposal Pg 6.

the various backgrounds and inherent concerns of the entire WTO membership.¹⁷¹

Additionally, African countries are proposing that members of the panels and the Appellate Body should each give a written opinion on the issues raised, and the decision should be by majority opinion of the members. This would assist to ensure a balance in the general development of the interpretation and application of the law, or the development of the jurisprudence, and to show and record the various views on issues.¹⁷²

Special and Differential treatment provisions.

It is the proposal by the African Group that the Special and Differential treatment provisions enshrined in the DSU should be revisited with the aim of making them more effective. The African Group is of the view that these provisions do not fully or coherently address¹⁷³ the core difficulties faced by African countries in seeking to use the DSU and yet these difficulties relate to the lack of financial and human resources.¹⁷⁴

To address the difficulties the African Group is of the view that all provisions for special procedures should be improved to specifically provide assistance in the form of a pool of experts and lawyers in the preparation and conduct of disputes.

Transparency and access to the Public.

Lastly African Countries have submitted that transparency is not a priority in the DSU negotiations when viewed in the context of the objectives of the Doha Development Agenda. They also propose that if transparency is designed to

¹⁷¹ Paragraph 11 pg 7.

¹⁷² Ibid.

¹⁷³ Paragraph 11 pg 7.

¹⁷⁴ Paragraph 8 of the proposal.

assist delegations and other government representatives to view the process and determine their interests if any, that fact should be very clearly stated and agreed by all delegations as the issue to consider. In that case, there would be technical and financial assistance implications for developing country members.¹⁷⁵

Evaluation of Proposals

However will these proposals win support from other WTO Members? Can it be said that once the aforesaid proposals are granted, African participation shall tremendously increase?

The greater majority of the proposals submitted by African countries have been levied as controversial by the developed nations and also by other non - African developing countries which are frequent users of the dispute settlement system.

For example, the proposal that there should be a balanced representation of Africa on the panels and the Appellate Body is too shocking. Already African countries claim that one of the many reasons why the Dispute Settlement Process is alien to them is due to the lack of trained personnel in WTO law.

How then can there be a balanced representation yet there is a fundamental lack of WTO skilled and trained personnel in Africa? Wouldn't the handful of skilled personnel be over loaded with disputes and thereby cause a back log of disputes?

More so the proposal that African countries should not demonstrate a trade or economic interest as pre condition for admission as third parties will be hard to swallow by other members.

¹⁷⁵ Paragraph 12 of the Proposal.

The proposal as it stands will only grant benefit to African countries. However what will become of other members? It seems that the failure of African countries to fully participate as third parties is their own doing.

The practice in fact conveys a different story, relatively few third party petitions (Just 4% of the 600+) submitted are rejected for any reason and while it might seem that the requirement for substantial interest constitutes an entry barrier, other WTO Members have overcome this 'barrier' by claiming a 'systemic interest' in the dispute, such as having a stake in the interpretation of a Covered Agreement.¹⁷⁶

If other WTO Members have been able to circumvent this 'barrier' why shouldn't African countries borrow a leaf? It is because of this success by other WTO Members that this proposal will receive a cool reception.

The proposals in respect to Collective Suspension and establishment of a Trust Fund may not go down well with other WTO Members in particular developed countries. First of all by according collective suspension only when a developed country is in breach of WTO obligations raises dust amongst other WTO Members. It creates a kind of double standard and ushers in the alleviation of substantive legitimate obligations owed by African countries under the WTO through various procedures. In the long run, such a proposal would not help in the strengthening of the Multilateral Trade System.

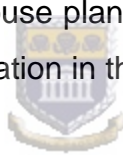
Secondly though the establishment of a Trust Fund seems a legitimate proposal it does raise 'eyebrows' at the same time. The availability of funds is no guarantee for increased participation by African countries for it takes more than funds to lodge a complaint in the WTO Dispute Settlement System. There must be proper coordination between the private sector and the government to detect

¹⁷⁶ Marc L. Busch and Eric Reinhardt *Fixing What "Ain't Broke"? Third Party Rights, Consultations and the DSU* (2004) Pg 4.

WTO branches by other Members. However, most African countries lack this coordination which cannot simply be cured by the availability of Trust Funds.

In any case the lack of participation by African countries has been attached to the fear of losing foreign Aid. Therefore wouldn't a Trust Fund fully bank rolled by the developed countries undermine the ability of African countries to lodge complaints against the developed countries?

It is therefore doubtful if these proposals will attract broad support in the current negotiations. Already there have been diverse negotiation positions and a feeling that most of the proposals by African countries are very extreme. For example, the **Sutherland Report**¹⁷⁷ on the future of WTO does not even mention any of the proposals submitted by the African Countries. This therefore shows that African Countries should have in house plans other than those proposed on how best they can increase their participation in the WTO Dispute Settlement System.



Shaffer argues that in order for these reforms to succeed there should at least be a potential trade - off in Negotiations over the DSU reform. These potential tradeoffs must be of importance to the developed country constituencies due to the fact that implementing a more equitable and effective WTO Dispute system will depend on developed countries' political will.¹⁷⁸

Even if there is strong opposition from both developed and developing countries, and African countries may not prevail immediately in their attempt to change the DSU, they should strive to do so both in the DSU review and in the subsequent negotiations.

¹⁷⁷ By a commission chaired by the former Director - General of the WTO.

¹⁷⁸ Shaffer *How to make the WTO Dispute Settlement System Work for Developing Countries* (2003) Pg 55.

Just as the United States was relentless in pressing for the inclusion of agreements on services and intellectual property rights into the WTO system so as to advance United States constituent interests,¹⁷⁹ African countries should also demand relentlessly that the DSU be modified so as to advance interests vital to their development.



¹⁷⁹ Shaffer *How to make the WTO Dispute Settlement System Work for Developing Countries* (2003) Pg 58.

CHAPTER FIVE

Recommendations and Conclusion.

The goal of this paper was to examine why African country participation in the WTO Dispute Settlement System is *petite*, and why these countries have shied away from the system. It has been the finding of this paper that African countries face three major challenges that bar their participation in the WTO Dispute Settlement System, that is:

- (a) The lack of legal expertise in WTO law and the capacity to organize information concerning trade barriers.
- (b) The lack of financial resources including hiring outside legal counsel
- (c) fear of political and economic pressure from the Developed nations.



This Chapter is going to explore the strategies that African countries can adopt to address the aforesaid challenges, so as to enhance their participation in the WTO Dispute Settlement System.

Increased Coordination between Governments and the Private Sector.

Most African country governments lack the aspect of coordination with their private sectors and business associations and yet the interests that the government represents at the WTO Dispute Settlement System are derived from the private sector. It is pertinent to note that most business is carried out by the private sector as opposed to the government itself, which is more of a regulatory body.

The private sector not only provides information which these governments can rely upon in the enforcement of rights, but also provide additional resources that are made available to the governments to initiate claims, owing to the fact that their interests are at stake.

A clear example of the absence of coordination between the government and the private sector was seen after the creation of the East African Customs Union. Following the creation of this Union, there was an adjustment in tariffs and the ushering in of free movement of certain goods within the East African Region.¹⁸⁰

However owing to the lack of coordination between the Individual governments in the East African Region and their various private sectors, a number of goods ended up being impounded by government custom officials due to their ignorance of the established Customs Union, which knowledge was already known by the private sector. Had the government officials been in close coordination with the private sector, they would have been at the same page in respect to the new tariffs and the free movement of certain goods.¹⁸¹

In contrast the success of the United States and the EU in the WTO Dispute Settlement System has been attributed to the highly organised coordination between the private sector, business associations and the government.

For example in the ***EC - Trade dispute on the Description for Sardines***¹⁸² the UK Consumer Association worked with Governmental officials in the preparation of an Amicus Curiae Brief. The information from this business association threw more light on complex issues in the afore said case such as the history and

¹⁸⁰ Shaffer *How to make the WTO Dispute Settlement System Work for Developing Countries* (2003) Pg 55.

¹⁸¹ Ibid.

¹⁸² WT/D5231/R accessed from www.wto.org on 15th December 2004.

application of relevant EU Regulations, which information was of great relevance and was accordingly relied upon by the WTO Panel which cited it.¹⁸³

Like wise in South Africa, the coordination between the private sector pharmaceuticals and the South African Government helped counter United States pressure on African Countries to enforce United States pharmaceutical company patents under a strict interpretation of the TRIPS Agreement.¹⁸⁴

This private sector/ government coordination has also been evident in USA, India and EU, where private sector resources are used by the governments to initiate claims in the WTO Dispute Settlement System.¹⁸⁵

Therefore the coordination between African Country governments and their private sectors would access to African countries valuable information that can detect WTO breaches and resources that can help commence claims in the WTO Dispute Settlement System.



This coordination can be practically achieved through sensitisation of the private sector and government officials through workshops, seminars and the establishment of an office to coordinate the activities of both parties. Governments can use flyers, to sensitise the public, use weekly briefs through the local newspapers, and also set up help telephone lines and help desks, for the enlightenment of the private sector.

These methods have been successfully used in an attempt to enlighten the public on the introduction of new taxes such as VAT and various political matters such as referendums. It is therefore the submission of this paper that this same

¹⁸³ http://www.rieti.go.jp/en/columns/ao1_0090.html?mode=print accessed on 31 May 2005.

¹⁸⁴ Shaffer *How to make the WTO Dispute Settlement System Work for Developing Countries* (2003) Pg 34.

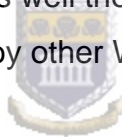
¹⁸⁵ *Ibid* Pg 19.

road can be taken in order to enlighten the public about the importance of coordination between the private sector and the government.

Creation of a Regional Legal Unit.

African Country members can also work towards the creation of a Regional Legal Unit and/or Centre that focuses on WTO law. This centre can avail preliminary advise to African Countries on WTO breaches and enforcement of their rights.

This can be emulated from the European Union that serves several countries that are members to the WTO through its Legal Service Division. This Legal Service Division employs numerous lawyers specialised in WTO matters who are fully available to the different countries as well the Union, in respect to the detecting of the violation of WTO commitments by other WTO members.¹⁸⁶



The proposed African Regional Legal Unit could work hand in hand with Academics from the various African Countries specialising in WTO law, as well as governmental officials and the private sector in as far as investigating various WTO breaches, coordinating the flow of information and securing the interests of African Countries during disputes in the WTO.

Since African Countries lack skilled personnel in WTO law, the proposed African Regional Legal Unit would go along way in offering legal services to the various African Countries and thereby address the hindrance of immense costs of litigation and the lack of skilled personnel in WTO matters in Africa.

¹⁸⁶ Bello, Judith, *The WTO Dispute Settlement Understanding: Less is More* 90 American Journal of International Law 416 (1996).

This centre could also liaise with the Advisory Centre on WTO Law which could assist in training some of the legal personnel of the proposed African Regional Legal Unit. Even larger developing countries with sophisticated trade bureaucracies have on various occasions used the Advisory Centre to complement their domestic resources.¹⁸⁷

An attempt has been made in the establishment of TRALAC, (The Trade Law Centre of Southern Africa), which provides information on the WTO jurisprudence to various Southern Africa Countries.¹⁸⁸ However TRALAC mainly serves Southern Africa and not the whole of the African Continent. As such, the creation of a regional Legal Unit would be of greater benefit to all African Countries.

This legal centre could be created under the auspices of the African Union and could be based in Geneva, where the heart of WTO law and jurisprudence is shaped. For example, USA has various Legal Units that are based in Geneva, just minutes away from the WTO.¹⁸⁹ No wonder USA is one of the leading beneficiaries of the WTO Dispute Settlement System.

The issue of its funding can be resolved by taking up strict rules with regard to subscription.

Technical Assistance.

As discussed, African Countries' participation in the WTO Dispute Settlement System has been compromised by the lack of financial and human resources. This can be ably addressed by the request for Technical Assistance from various International Organisations and the WTO itself through the Advisory Centre.

¹⁸⁷ Shaffer, (2003), pg 31.

¹⁸⁸ <www.tralac.org> Accessed on 3rd May, 2005.

¹⁸⁹ <http://www.rieti.go.jp/en/columns/a01_0090.html?mode=print> Accessed on 3rd May, 2005.

This technical assistance can be in the form of capacity building through WTO's training of indigenous lawyers in WTO Law and finding them placements with their local government trade bodies or their government representatives at the WTO itself in Geneva.

For example the Ugandan government is working on a system whereby persons trained in WTO Law are granted placements with the Ministry of Trade. Owing to the fact that the Ministry lacks the funds to remunerate these personnel, the government is embarking on a program of Technical Assistance through the WTO to remunerate these personnel.¹⁹⁰

Technical Assistance can also be in the form of funding for various projects. For example, the creation of a computerised data system in respect to trade matters, that would build a rich resource base on WTO related matters, as well as WTO legal rules and procedures.



This technical assistance can be achieved by African Countries' submission of justifiable proposals to the WTO Institute for Training and Technical Cooperation. For example, in October 2004, South Africa through the latter, was able to obtain assistance in the training of government and non government officials in WTO negotiation skills. This same procedure could be advocated for by other African Countries to address the various shortcomings that hinder their participation in the WTO Dispute Settlement System.

For example, South Africa has successfully requested for assistance in the training of government and non government officials from various African Countries, on the WTO Dispute Settlement. This training is set to be held in September 2005.¹⁹¹ This example could be emulated by other African Countries

¹⁹⁰ Alan F Holmer *Dispute Resolution in the New World Trade Organisation :Concerns and Net Benefits*, 28 International Lawyer 1095 (1994)

¹⁹¹ <http://www.chr.up.ac.za/academic_pro/llm2/moothtml> Accessed on 3rd May, 2005.

so as to overcome the various hitches that are preventing them from actively participating in the WTO Dispute Settlement System.

Third Party participation

African countries can also enhance their participation in the WTO Dispute Settlement System by being more active as third parties during the existing disputes. The more African countries participate as third parties the more they will get familiarised with the system and in the long run have an impact on WTO jurisprudence.

African Countries have shied away from the WTO Dispute Settlement System on the grounds that the costs for initiating disputes are prohibitive. Third Party participation would therefore be an alternative, where costs for participation are not as oppressive.



Third party participation is of great value in the WTO as it greatly impacts on WTO jurisprudence. For example in the **Canada - Aircraft dispute**, third party input from the United States was deemed central to the dispute, to the extent that the panel refused the United States to withdraw its submissions, when it attempted to do so.¹⁹²

Mosoti justifies the phenomenon of third party participation when he alludes to the municipal systems where 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.¹⁹³ So African Countries should increase their participation as third parties as this will

¹⁹² Marc Busch and Eric Reinhardt, *Fixing what "Ain't Broke": Third Party Rights, Consultations, and the DSU* (2004) Pg 6

¹⁹³ Benke, R.T.J *List of WTO dispute settlement cases on trade remedies* 6(1) *Journal of International Economic Law* 171 - 4 (march 2003)

accustom them to the WTO Dispute Settlement System, and hence breed their confidence in the System.

Third Party participation by African Countries could first be attempted at by claiming a 'systemic interest' in a dispute such as having a stake in the interpretation of a Covered Agreement.¹⁹⁴ This would be opposed to their delving into a substantial interest claim that would require a higher standard of justification. This method has been adopted by various WTO Members such as United States and the EU, to go around the requirement of proving a substantial interest prior to participating as a third party.¹⁹⁵

The need to strengthen the Special and Differential Treatment provisions.

Lastly, African Countries can work towards the having of the Special and Differential Treatment provisions in the DSU strengthened. Most of these provisions are couched in a language that is not mandatory thereby making it very difficult for the panels and the Appellate Body to enforce such provisions.

For example **Article 4.10 DSU** that requires special attention to be accorded to the particular problems and interests of developing country members during consultations, is not mandatory. By the wording of the provision, it is seen that the words, "... members should give special attention..." imposes no mandatory legal bearing on the Panel.

According to **Paragraph 44 of the Doha Ministerial Declaration of 2001**, all Special and Differential Treatment provisions shall be reviewed with a view to strengthening them and making them more precise, effective and operational.

¹⁹⁴ Marc Busch and Eric Reinhardt, *Fixing what "Ain't Broke": Third Party Rights, Consultations, and the DSU* (2004) Pg 4.

¹⁹⁵ Benetyo, Jose M, *The EU and the WTO: Direct effect of the new dispute settlement system?* 7 *Europäische Zeitschrift für Wirtschaftsrecht* 295 - 299 (1996)

As such, African Countries as a group could advocate for the strengthening of the DSU provisions on Special and Differential Treatment, as encouraged by the Doha Mandate, in the coming Ministerial Meeting that will be held in Hong Kong, in December 2005.

Owing to the fact that trade negotiations bring together members with diverse and divergent views and interests, it is not easy for African Countries to simply push for these proposals without giving anything in return. It is therefore the submission of this paper that African Countries should have a compromise as a trade off for their advocating for the strengthening of the provisions on Special and Differential Treatment in the DSU.

An example of such a compromise can be African Countries' acceptance of the making of WTO Dispute Settlement System procedures more public, a position African Countries have been vehemently opposed to.¹⁹⁶

In Conclusion, as discussed, African countries have not been actively participating in the WTO Dispute Settlement System. Only a handful of them have appeared as respondents and as third parties. No African Country has ever participated as a complainant, in the ten year period that the WTO Dispute Settlement System has been in existence.

At the same time, other developing countries with similar interests and concerns at the WTO are actively participating at a rate incomparable to that of African countries.

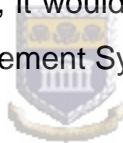
Indeed, as discussed, African countries have become aware of this need and have in fact submitted various proposals on how the DSU can be reviewed with a view of creating an environment that would entice African countries to become more active players.

¹⁹⁶ <http://www.rieti.go.jp/en/columns/a01_0090.html?mode=print> Accessed on 3rd May 2005.

However many of these proposals seem to have landed on deaf ears hence have not won great support from other developing and developed country members in the WTO. This is evident from the recent Sutherland Report on the Future of the WTO which is silent on the proposals so far submitted by African countries.¹⁹⁷

This therefore portrays that African Countries ought to look into other alternatives, that could practically increase their participation in the WTO Dispute Settlement System.

In pursuing the same, it should be noted that there is no single strategy that fits all African countries. Each country will need to determine how best to adapt some or all of the strategies laid out by this research in view of its particular circumstances. At the same time they should still join forces as a group owing to the fact that as Individual Countries, it would not be easy for them to bring about changes in the current Dispute Settlement System.



In summary therefore, African Countries need to address the existing challenges so as to enhance their participation and reap benefits from the WTO Dispute Settlement System, or else they will continue to lag behind and loose out on the benefits of the Multilateral Trading System. Otherwise African Countries are in and will continue to be in a *prolonged slumber*.

¹⁹⁷ <<http://www.tralac.org/scripts/content.php?id=3523&print=1>> accessed on 3rd may 2005

BIBLIOGRAPHY

BOOKS

Anderson Andrew **Seeking Common Ground: Canada-US Trade Dispute Settlement Policies in the nineties** (1995) Boulder, Colo. West view Press.

Bhagirath Lal Das, **The World Trade Organisation: A Guide to the frame work for International Trade** (2000) Zed Books.

Bhala Raj, **World Trade Law: The GATT - WTO System, Regional Arrangements and U S Law** (1998) Charlottesville, Virginia: Lexis Law Publishing.

Cass Ronald. A. and Knoll Michael S, **International Trade Law**, (2003) Dartmouth Publishing Company.

Cottier Thomas and Mavroidis C Petros, **Regulating Barriers and the principle of non discrimination in World Trade Law** (2000) The World Forum Vol 2 University of Michigan Press.

Ernst- Ulrich Petersmann, **International Trade Law and the GATT/WTO Dispute Settlement System**, (1997) Kluwer Academic Publishers.

Hocules Booysen, **International Trade Law as a Monolistic System** (2003)
Inter Legal Pretoria.

Jackson, John H., **The World Trading System, Law and Policy of International Economic Relations.** (1997) Second Edition. Massachusetts Institute of Technology.

Kathryn Morton and Peter Tuccoch, **Trade and Developing countries.** (1997)
Overseas Development Institute.

Sarcevic Peter and Hams Van Houte, **Legal issues in International Trade.**
(1990) Kluwer Academic Publishers Group.

ARTICLES AND JOURNALS

Aldonas Grant D., **The World Trade Organisation: Revolution in International Dispute Settlement,** (1995) 50 Dispute Resolution Journal 73.

Alter, Karen, **Resolving or Exacerbating Disputes? The WTO's New Dispute Resolution System** (2003) 79(4) International Affairs 783-800.

Anderson, Andrew, **Seeking Common Ground: Canada - U.S. Trade Dispute Settlement Policies in the Nineties** (1995) Boulder, Colo. West view Press.

Bello Judith H, **The World Dispute Settlement Understanding: Less is More** (1996) 90, American Journal of International Law 416.

Benetyo Jose , **The EU and WTO: Direct Effect of the New Dispute Settlement System?**, Europäische Zeitschrift für Wirtschaftsrecht (1996) 295 - 299.

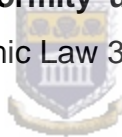
Benke, R.T.J, **List of WTO Dispute Settlement Cases on Trade Remedies** (2003) 6 (1) Journal of International Economic Law 171-4.

Brimeyer, B.L, **Bananas, Beef, and Compliance in the World Trade Organisation: The inability of the WTO Dispute Settlement Process to Achieve Compliance from superior Nations**, (2001) 10(1) Minnesota Journal of Global Trade 133-68.

Bronckers Marco & Reinhard Quick, **New directions in International Economic Law: Essays in Honour of John H Jackson** (2000) Kluwer Law International.

Busch, ML **Bargaining in the Shadow of the Law: Early settlement in GATT/WTO Disputes** (November/December 2000) 24(1/2) Fordham International Law Journal 158-72.

Carmody C, **Remedies and Conformity under the WTO Agreement** (2002) 5(2) Journal of International Economic Law 307.



Hoekman Bernard, Mattoo Aaditya and English Philip, **A Hand Book on Development, Trade and the WTO**. (2002), The World Bank Washington, D.C.

Hom H and Mavroidis P, **Remedies in the WTO Dispute Settlement System and Developing country interests**, (1999) World Bank Washington, D.C.

Hudec Robert, **The Adequacy of WTO Dispute Settlement Remedies: A Developing Country Perspective** (2002) Accessed from A Hand Book on Development Trade and the WTO Published by the World Bank.

Lacarte-Muro, Julio and Gappah Pettina, **Developing Countries and the WTO Legal and Dispute Settlement System: A View from the Bench**, (2000) Journal of International Economic Law.

Mosoti Victor, **Does Africa need the WTO Dispute Settlement System** (2003) paper presented at an ICTSD conference available at http://www.ictsd.org/pubs/ictsd_series/resource_papers/DSU_2003.pdf.

Trubek David and Marc Galanter, **Scholars in Self-Estrangement: Some Reflections on the crisis in Law and Development Studies in the United States**, (1974) WIS.L.REV 1062.

Qureshi Asif, **Interpreting WTO Agreements for the Development Objective** (2003) paper presented at ICTSD conference available at http://www.ictsd.org/pubs/ictsd_series/resource_papers/DSU_2003.pdf.

Rogowsky Robert, **The Effectiveness of the DSU for Developing and Middle Income Countries**, Paper delivered at the World Trade Forum, Berne Switzerland August 2002.



Shaffer Gregory, **How to make the WTO Dispute Settlement System work for Developing Countries: Some Proactive Developing Country strategies** (2003) paper presented at ICTSD conference available at http://www.ictsd.org/pubs/ictsd_series/resource_papers/DSU_2003.pdf.

Thaddeus Mc Bride, **Rejuvenating the WTO: Why the U.S. Must Assist Developing Countries in Trade Disputes**, (1999) 11 International Legal Perspectives.

Valentina Delich, **Developing countries and the WTO Dispute Settlement System** (2002) Accessed from A Hand Book on Development Trade and the WTO Published by the World Bank.

Vermulst Edwin and Drcessen Bart. **An overview of the WTO Dispute Settlement process and its relationship with the Uruguay Round Agreements.** (1995) 29 Journal of World Trade.

INTERNET SOURCES

<http://acpsec.org/file:///A:\Secretariat%20General%20ACP.htm>

<http://www.tralac.org/scripts/contents.php?id=2362>

http://www.wto.org/english/tratop_e/dispu_e/distabase=wto_members1_ehtm

http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htmhttp://www.ictsd.org/pubs/ictsd_series/resource_papers/DSU_2003.pdf

