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COMPARATIVE ANALYSIS OF DISPUTE SETTLEMENT SYSTEM UNDER AfCFTA AND WTO

A Thesis Submitted in Partial Fulfillment of the Requirements for the Award of Master of Laws (LL. M.) in Public International Law at the School of Law, College of Law and Governance Studies, Addis Ababa University

BY

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Addis Ababa, Ethiopia

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Advisor

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January, 2021

Declaration

I, Bethelhem Abraham, declare that this thesis is my original work which has not been presented for a degree program in any other university. Besides, I would like to affirm that all materials utilized in the thesis have been duly acknowledged.

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List of Acronyms

AB - Appellate Body

ACWL - Advisory Centre on World Trade Organization Law

AD - Anti Damping

ADR - Alternative Dispute Resolution

AEC - African Economic Community

AfCFTA - African Continental Free Trade Area

AOA - Agreement on Agriculture

AU - African Union

COJ - Court of Justice

COMESA - Common Market for Eastern and Southern Africa

CVDs - Countervailing Duties

DG - Director General

DSB - Dispute Settlement Body

DS - Dispute Settlement

DSS - Dispute Settlement System

DSU - Dispute Settlement Understanding

ECOWAS - The Economic Community of West African States

EAC - East African Community

FTA - Free Trade Area

GATS - General Agreement on Trade in Services

GATT - General Agreement on Tariffs and Trade

GC - General Council

LDCs - Least Developed Countries

MFN - Most Favored Nation Treatment

NGO - Non-Governmental Organizations

NT - National Treatment

PIL - Public International Law

RECs - Regional Economic Communities

SADC - Southern African Development Community

S&D - Special and Differential Treatment

TOR - Terms of Reference

VCLT - Vienna Convention on the Law of Treaties 1969

WTO - World Trade Organization

Abstract

The Agreement Establishing the African Continental Free Trade Area (the "AfCFTA Agreement") is signed by all African Union member States except Eritrea, among other things, to enhance economic integration of the African continent by establishing a single and liberalized market for goods and services. Members of the AfCFTA adopted the Protocol on Rules and Procedures on the Settlement of Disputes ("DS Protocol") to create security and predictability to the African Continental Free Trade Area. However, the DS Protocol is almost entirely designed based on the World Trade Organization Dispute Settlement Understanding without giving due regard to the African dispute settlement systems (DSSs), especially Regional Economic Communities' DSSs. The DS Protocol has provisions that are inconsiderate of the African context. This study shows the benefits and risks of adopting the WTO DSS to AfCFTA. It also assesses the strength and limitations of the AfCFTA DSS, which need amelioration, and explores the new developments introduced by the AfCFTA DSS.

Chapter One

Introduction

1.1. Research Background

A dispute is a commonplace phenomenon in the contemporary world. It occurs when an actual disagreement happens amid individuals regarding a specific issue, law, or related subject, and the claim of one of the individuals is declined or counter-claimed by the other individual.[1] Such a dispute may appear among states, multinational companies, and intergovernmental institutions and becomes an international dispute.

There are generally two major techniques to resolve international disputes. The first one is a diplomatic way of dispute settlement, which comprises negotiation, mediation, conciliation, good offices, and inquiry. The second one is adjudication, which encompasses judicial settlement and arbitration. A diplomatic way of DS is known for resolving disputes that have a political nature, whereas adjudication settles disputes involving legal issues.[2]

International DS through adjudication is functioning effectively as compared to diplomatic means lately.[3] A major instance of an effective adjudication is the World Trade Organization dispute settlement system, which is established to resolve international trade disputes. In fact, the main purpose of innovating WTO DSS is to overcome the gaps of the General Agreement on Tariffs and Trade dispute settlement system, which preceded it.[4] International trade disputes were settled by diplomatic negotiations before the WTO and GATT DSS. International trade disputes mostly emerge from the covered agreements of WTO that consist of extensive rules concerning international trade in goods, trade in services, and trade-related aspects of intellectual property rights.[5] States accede to such agreements to become members of WTO. WTO members

[1] J. G. Merrills, *International Dispute Settlement* (University of Sheffield, 4th edn, CUP 2005).

[2] Elena Temelkovska-Anevska, 'Peaceful Means for Settlement of Inter-state Disputes: Reflections, Advantages and Disadvantages' (2017) 3(7) IJASOS <http://ijasos.ocerintjournals.org/tr/download/article-file/297877> accessed 10 January 2020.

[3] Peter Van den Bossche, *The Law and Policy of the World Trade Organization Text, Cases and Materials* (1st edition, CUP 2005).

[4] Ibid.

[5] Ibid.

enter into disputes when they fail to agree on the proper understanding and application of the rules enshrined under the agreement establishing WTO, and a specific law or practice of a member infringes a right or obligation set under a WTO covered agreement.[6]

For effective operation of the WTO DSS, the WTO Agreement incorporated the Dispute Settlement Understanding, the Appellate Body rules and procedures, and Articles 22 and 23 of special procedures under General Agreement on Trade in Services. The WTO DSS contains techniques for arbitration, conciliation, consultation, good offices, mediation, and panel procedures.[7] The DSS has remained to be a successful international DSS for twenty-five years now.

On the other hand, the African Continental Free Trade Area (AfCFTA) is one of the major free trade agreements entered into since the establishment of WTO, signed by African Union member States in Kigali, on 21st March 2018.[8] The AfCFTA has the objective of promoting the integration of the African regional trade into the global economy, and in due course bringing about Africa's economic advancement.[9] However, an agreement deprived of a robust enforcement mechanism is futile. The main instrument which makes an agreement implementable is an effective, inexpensive, and contextualized DSS. To this end, members signed the Protocol on Rules and Procedures on the Settlement of Disputes together with the AfCFTA.[10] The DS Protocol provides the framework for the settlement of disputes that arise from the AfCFTA. In fact, the DS Protocol is enormously founded on the DSU of the WTO, which is facing challenges recently. Therefore, this study shows the benefits and risks of adopting the WTO DSS to the African regional trading system.

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[6] Ibid.

[7] WTO Covered Agreements, DSU, Article 5.

[8] Andrea Cofelice, 'African Continental Free Trade Area: Opportunities and Challenges' (2018) 3 The Federalist Debate,<https://www.researchgate.net/publication/329450723_African_Continental_Free_Trade_Area_Opportunities_and_Challenges/fulltext/5c093578299bf139c74339ae/African-Continental-Free-Trade-Area-Opportunities-and-Challenges.pdf > accessed 2 December 2020.

[9] AfCFTA, Article 3(a).

[10] Obert Bore, 'The Dispute Settlement Mechanism under the African Continental Free Trade Area'(Tralac Blog, 2018) <https://www.tralac.org/blog/article/13529-the-dispute-settlement-mechanism-under-the-african-continental-free-trade-area.html > accessed 10 February 2020.

1.2. Statement of the Problem

The AfCFTA DSS is crafted based on the WTO DSS. Although WTO DSS is appreciated by many as an effective one, earlier studies show that the WTO DSS has weaknesses as well. For instance, WTO DSS is not participatory to African countries because it is highly legalized system that necessitates expensive lawyers. African countries prefer non-participation as they cannot afford paying for such lawyers. Besides, the enforcement mechanism, retaliation, discourages African countries from using the system as they may not have the economic leverage to force their trading partners to comply with their trade obligation. Further, African states esteem solidarity and sense of brotherhood, as reflected under the Treaty Establishing the African Economic Community (the Abuja treaty).[11] Retaliation may evade this sense of brotherhood as it causes inappropriate competition among members. Additionally, they do not have a history of litigating against each other. In this regard, the difference AfCFTA is going to make is obscure.

Nevertheless, the AfCFTA embraced the WTO DSS to settle regional disputes concerning trade in goods and services, intellectual property rights, investment and competition policy. The AfCFTA has not brought a DSS that promotes the participation of African countries. WTO allows members to use multiple forums for settling disputes. However, the use of multiple forums could result in inconsistent decisions on a single dispute and becomes unfair to the defendant state. The AfCFTA DSS has not addressed all questions regarding multiplicity of forums which exist under WTO DSS.

Contrary to WTO DSS, the AfCFTA DSS does not maintain special and differential treatments to least developed countries (LDCs). At this point, the AfCFTA DSS lacks a major component to integrate LDCs into the regional trade.

Despite its limitations, the WTO DSS has been comparatively successful, resolving over 500 cases with a relatively great degree of implementation.[12] Nonetheless, it is unclear if the system

[11] Abuja Treaty, Article 3.

[12] Giorgio Sacerdoti, 'The WTO Dispute Settlement System and the Challenge to Multilateralism: Is the Rule of Law in Peril?' (Bocconi Legal Studies Research Paper No. 3343455, 2018) < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3343455&download=yes > accessed 10 December 2020.

is the best alternative in the context of Africa. It is also not clear if the decision to follow the WTO model is a product of an in-depth study and debate or is simply driven by the easiness of adopting an existing system rather than establishing an entirely different system. While it seems that the AfCFTA followed the WTO DS approach, it has some departures from it.

Therefore, this study examines the DS Protocol of the AfCFTA. It shows whether the AfCFTA follows the WTO DSS or not. It also assesses the problems that the WTO DSS has been facing and put forth proposals for its reform. Moreover, it measures the applicability of WTO DSS - modeled AfCFTA DSS in the context of Africa. It further demonstrates the lessons that AfCFTA DSS can take from the challenges of WTO DSS.

1.3. Objective of the Study:

1.3.1. General Objectives

The general objective of this study is to make a comparative analysis of the DSSs under the WTO and the AfCFTA.

1.3.2. Specific Objectives

More specifically, the study aims to examine:

- The scope of jurisdiction and procedures of the DSS of WTO and AfCFTA;
- The similarities and differences between the two systems;
- The effectiveness of WTO DSS in the African context;
- Limitations of WTO DSS and the lessons for AfCFTA DSS;
- Significant departures of AfCFTA DSS from WTO DSS;
- The benefits and risks of adopting the WTO DSS to AfCFTA DSS; and
- The key points that AfCFTA DSS misses and needs enhancement.

1.4. Research Questions

The study aims to answer the following questions:

- Does the AfCFTA DS Protocol follow the WTO approach of DS?
- Should the AfCFTA adopt WTO DSS as is?
- Can the WTO DSS be effective in the context of Africa?

- Are there differences between the two systems?
- Has the DS Protocol addressed the limitations of the WTO DSU?
- What could be the risks of adopting the WTO DSS in Africa?
- Does the AfCFTA incorporate S&D for the participation of LDCs in DSS?

1.5. Significance of the Study

The study scrutinizes the DS under WTO and AfCFTA. It evaluates the strengths of the DS Protocol of AfCFTA by comparing it to WTO's DSU. It indicates the loopholes of the AfCFTA DS Protocol, assesses the weaknesses of WTO DSS, which the AfCFTA DS Protocol incorporated, and recommends better DSS that works for Africa. Additionally, the AfCFTA is a recent development in Africa, and the DS Protocol has not yet been tested in practice. The study is anticipated to contribute to the proper understanding and implementation of the DS Protocol and its nexus with the WTO DSU. It will be particularly important for future researchers and policy makers, and become an input for them, as there is dearth of researches on the AfCFTA and the DS Protocol associated with the fact that the AfCFTA was only launched recently.

1.6. Scope of the Study

The scope of this study is limited to issues of DS under WTO and AfCFTA. It does not go beyond discussing, evaluating, comparing, and contrasting the DSSs under both systems.

1.7. Research Methodologies

1.7.1. Type of the Study

The study assesses the similarities and differences of the legal instruments that are used in the process of DSS under WTO and AfCFTA. Thus, the study is mainly doctrinal, which uses a comparative analysis method. The study compares the AfCFTA DSS with the WTO DSS. Additionally, the study has involved expert interviews. Therefore, the study is both doctrinal and non-doctrinal.

1.7.2. The Method of Comparison

The study uses a thematic method of comparative analysis to evaluate the DSS under WTO and AfCFTA. This comparative analysis is decisive to scrutinize the DS to be applicable under AfCFTA.

1.7.3. Sources of Data

Both primary and secondary sources of data are used in the study. The primary sources include covered agreements of WTO, the AfCFTA Agreement, the Abuja treaty, and cases. The secondary sources include books, publications by relevant intergovernmental organizations, journal articles, reports, and working papers. Further, this study encompasses expert interviews, which involved both structured and unstructured interview questions.

1.8. Structure of the Study

This study is structured into four chapters. Accordingly, the first chapter is devoted to the proposal of the study. The second chapter incorporates the notion of DS, an overview of WTO and its DSS, the essence of WTO DSU, procedures for DSS of WTO, and implementation of the rulings of the DSB of WTO. The third chapter discusses the AfCFTA, DSS of AfCFTA and the essence of the DS Protocol, procedures for DSS of AfCFTA, and implementation of recommendations and rulings of the DSB of AfCFTA. The fourth chapter makes a comparative analysis of DS under the AfCFTA and the WTO. Finally, the author of this study makes a brief conclusion and recommendations.

1.9. Literature Review

Among several scholars who discussed the issue of dispute settlement, J.G Merrills is the notable one. According to J.G Merrills, a dispute is "a certain disagreement concerning a matter of fact, law, or policy in which a claim or assertion of one party is met with refusal, counter-claim, or denial by another."[13] The involvement of governments, corporations, and private individuals makes disputes international.

Regarding WTO DSS, Peter Van den Bossche observed that the WTO DSS which operated since 1 January 1995 is "based on, and has absorbed, almost fifty years of experience from the resolution of trade disputes in the context of the GATT 1947."[14]

Besides, Giorgio Sacerdoti mentioned that WTO DSS effectively resolved over 500 cases until the end of 2018 by eliminating restrictive measures of an importing country at breach of WTO

[13] Merrills (n 1).

[14] Van den Bosche (n 3).

Agreement through independent rule-based adjudication.[15] By doing so, the DSS has stayed advantageous for providing security and predictability to members.[16]

Moreover, Yafet Yosafat Wilben Rissy observed that WTO DSS is advantageous because its Panel and AB provide binding rulings and these rulings can only be demolished by the unanimous decision of members. This makes it powerful system unlike other international law DSSs.[17]

However, the WTO DSS has limitations concerning transparency of its proceedings as it is not open to the public and third parties, and individuals cannot access the DSS.[18] Especially, the records of such proceedings are not publicly available.

Further, Gregory Shafer observed that WTO DSS is highly legalized which requires qualified and expensive lawyers to bring cases before the system. This is unaffordable to developing countries and LDCs particularly to African countries and this is one of the reasons for their nonparticipation in the system.[19]

Another limitation of WTO DSS is retaliation which is detrimental to developing countries. Hunter Nottage stated that the WTO retaliation rules weaken the efficacy of the WTO DSS for developing countries and LDCs. There is significant evidence showing retaliation is not the crucial component for compliance under GATT and WTO rulings.[20]

Tetyana Payosova, Gary Clyde Hufbauer, and Jeffrey J. Schott stated that WTO DSS is in calamity recently because WTO members could not improve the DSU and the WTO DSS is

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[15] Sacerdoti (n 12).

[16] Ibid.

[17] Yafet Yosafat Wilben Rissy, 'Effectiveness of the World Trade Organization's Dispute Settlement Mechanism' (2012) < https://www.semanticscholar.org/paper/Effectiveness-of-the-World-Trade-Organization%E2%80%98s-Rissy/e60f6a96817ca1e12a38b47e1c76e95aa0e946c6?p2df> accessed 10 December 2020.

[18] Ibid.

[19] Gregory Shaffer, 'Weaknesses and Proposed Improvements to the WTO Dispute Settlement System: An Economic and Market-Oriented View' (2005) University of California, < https://www.researchgate.net/publication/228380122_Weaknesses_and_Proposed_Improvements_to_the_WTO_Dispute_Settlement_System_An_Economic_and_Market-Oriented_View > accessed 7 December 2020.

[20] Hunter Nottage, 'Evaluating the Criticism that WTO Retaliation Rules undermine the Utility of WTO Dispute Settlement for Developing Countries' in Chad P. Bown and Joost Pauwelyn (eds), *The Law, Economics and Politics of Retaliation in WTO Dispute Settlement,* (Cambridge University Press 2010).

mostly required to make decisions based on ambiguous WTO rules.[21] They also mentioned that "US officials have blocked the appointment of AB members to force the negotiation of new rules that address US concerns and limit the scope for judicial overreach over the past few years."[22] This problem continued and made the AB lack adequate members to review cases.

On the other hand, Malcolm McKinnon, Peter Draper and Creck Buyonge Mirito stated that AfCFTA is deliberated in line with the essence of the WTO, i.e., commending a rule-based system for free trade.[23] According to Obert Bore, DS is an essential tool to ensure security and predictability to the continental trade.[24] The AfCFTA mainly aims to create a way of DS for claims regarding the rights and obligations of member states.

According to Olabisi D Akinkugbe, the DS Protocol creates DSB that settles dispute "in a transparent, accountable, fair, and predictable way that is consistent with the provisions of the AfCFTA."[25]

Nonetheless, Emilia Onyema stated that the DS Protocol restricts the scope of a dispute and the parties that can access the AfCFTA DSS. It does not give access to private parties "who engineer and facilitate the trade in goods and services across the African continent."[26]

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[21] Tetyana Payosova, Gary Clyde Hufbauer, and Jeffrey J. Schott, 'The Dispute Settlement Crisis in the World Trade Organization: Causes and Cures' (2018) Peterson Institute for International Economics< https://www.piie.com/system/files/documents/pb18-5.pdf > accessed 7 April 2020.

[22] Ibid.

[23] Malcolm McKinnon, Peter Draper and Creck Buyonge Mirito, *A Business Guide to the African Continental Free Trade Area Agreement* (ITC, 2018) <http://www.intracen.org/uploadedFiles/intracenorg/Content/Publications/AfCFTA%20Business%20Guide_final_Low-res.pdf> accessed 28 April 2020.

[24] Bore (n 10).

[25] Olabisi D Akinkugbe, Dispute Settlement under the African Continental Free Trade Area Agreement: A Preliminary Assessment (2019) 28(138) AJICL < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3403745 > accessed 7 April 2020.

[26] Emilia Onyema, 'Reimagining the Framework for Resolving Intra-African Commercial Disputes in the Context of the African Continental Free Trade Area Agreement' (2020) CUP <https://www.cambridge.org/core/journals/world-trade-review/article/abs/reimagining-the-framework-for-resolving-intraafrican-commercial-disputes-in-the-context-of-the-african-continental-free-trade-area-agreement/7933798CCB9587DDE41F385A20510024 > accessed 10 December 2020.

However, since none of these documents specifically addressed the comparative analysis of DSS under WTO and AfCFTA, this research addresses such issue.

1.10. Limitation of the Study

Since the AfCFTA is a new system in Africa, finding adequate sources about this issue was a challenge. Be this as it may, the study has made use of the available relevant sources.

Chapter Two

Dispute Settlement under WTO

2.1. The Notion of Dispute Settlement

Dispute settlement is imperative because unresolved disputes can generate detrimental consequences. DS denotes a process of resolving disputes by employing an appropriate means which is acceptable by the disputing parties. According to political science and international relations literature, DS is viewed as an important instrument for promoting international co-operation by deterring, identifying and punishing violators of commitments.[27]

International disputes usually arise when states fail to behave per their obligations under an agreement, law, and policy or when they deny the existence of these obligations.[28] As the global economy gets more integrated, the emergence of free trade area agreements becomes conventional. These agreements are made among states to provide mutual preferential treatment to each other on the trade of goods and services that originates from their territories-by abolishing tariffs and other trade restrictions.[29] In such cases, DS is an indispensable tool for clarification and enforcement of the agreements.

2.2. Overview of WTO

WTO was established on 1 January 1995 after the Agreement Establishing the WTO was signed in Marrakesh, Morocco on April 1994 to raise the standards of living, create full employment, advance real income, intensify production, and mainly open international trade.[30]

WTO is the successor of GATT of 1947, which was established after the negotiation on the reduction of tariffs and protection of agreed tariff reductions. GATT came into existence in the effort of establishing an international trade organization. Although creating an international trade

[27] Thomas Sattler, Gabriele Spilker and Thomas Bernauer, 'Does WTO Dispute Settlement Enforce or Inform' (2014) 44(4), Journal of Political Science < https://www.jstor.org/stable/43822008 > accessed 30 January 2020.

[28] Merrills (n 1).

[29] Victor Crochet, Frantz Jacques, Caroline Oduor, and Annet Mbabazi, Georgetown University, 'Dispute Settlement Mechanisms in Free Trade Agreements' (2016) < https://www.tradelab.org/single-post/2018/03/02/Dispute-Settlement-Mechanisms-in-Free-Trade-Agreements > accessed 28 March 2020.

[30] The Preamble of the Agreement Establishing the WTO.

organization was unsuccessful, GATT was established as a multilateral agreement. Yet, it transformed into a de facto international organization through time.[31]

2.3. WTO DSS and the Essence of the DSU

WTO DSS is established to resolve international trade disputes arising from WTO agreements. This system has settled numerous trade disputes to date. When WTO DSS is compared to other state-to-state DSSs, it has been used frequently and successfully by governments. Therefore, it is believed to be the most effective system in the international DS history.[32]

The WTO DSS presented a system tested with rules and timelines, and introduced the appellate procedure, which is composed of seven members and held major responsibilities. A dispute can be brought to a WTO DSS when one or more WTO members violate their commitments, cause damage to other members of WTO, actions are taken by members that impair the attainment of a WTO objective.[33]

WTO DSS has jurisdiction over disputes arising from the covered agreements (listed in Appendix 1of the DSU), which include the WTO Agreement, the GATT 1994, and all other Multilateral Agreements on Trade in Goods, the GATS, the Agreement on Trade-Related Aspects of Intellectual Property Rights and the DSU.[34] The jurisdiction of the WTO DSS is contentious because it becomes functional when a dispute occurs between members. Otherwise, WTO does not have the power to make a law under the guise of clarifying the provisions of WTO agreements.[35]

Moreover, the jurisdiction of WTO DSS is a compulsory one.[36] Every complaining member of WTO should bring any dispute that arises from the covered agreements to the WTO DSS. A responding member has no choice but to accept the jurisdiction of WTO DSS as per article 6(1) of the DSU. As opposed to other international DSSs, such as international arbitration, a

[31] Van den Bossche, *Dispute Settlement WTO*, (UNCTAD/EDM/Misc.232/Add.11, 2003).

[32] William J. Davey, 'Issues of WTO Dispute Settlement' (1997) 91, Proceedings of the Annual Meeting ASIL, CUP, < https://www.jstor.org/stable/25659131> accessed 30 January 2020.

[33] DSU (n 7), Article 23(1).

[34] Vanden Bosche (n 3), 188.

[35] DSU (n 7), Article 3(2).

[36] DSU (n 33)

responding member does not need to accept the jurisdiction of WTO by a special declaration. Once States accede to WTO, they consent to the jurisdiction of the WTO DSS.[37]

Further, the jurisdiction of WTO DSS is exclusionary because the DSU prohibits members from resorting to other DSSs in case of disputes, except for WTO DSS.[38] The exclusionary jurisdiction of WTO DSS is a new element introduced by the DSU. WTO DSS is accessible only to members of the WTO.[39] Individuals, international organizations, and private corporations are not allowed to participate in the system.

The WTO DSU is the outcome of the Uruguay round negotiation, which was held in Punta del Este, Uruguay (1986-1993) to discuss the loosening of international trade and the improvement of the institutional mechanisms of the GATT and its DSS.[40] After the negotiation, contracting parties to the GATT formed improved rule and procedure of DS.[41] DSU is attached to the WTO Agreement as Annex 2 and constitutes an integral part of that Agreement and it introduced negative consensus.[42] The DSU brought more judicial procedure to the new agreements.[43] The DSU made legal rulings of the tribunal binding on the parties, and it brought an appellate review for parties unsatisfied by the decision of the Panel.[44]

2.4. Procedures under the WTO DSS

There are four steps under the WTO DSS, i.e, consultations, Panel proceedings, Appellate review proceedings, and enforcement. Consultation is a primary stage in the WTO DSS acknowledged under Articles 22(1) and 23(1) of the GATT in general terms. Consultation is a DS method which requires the complainant and the respondent party to discuss their issue and find a

[37] Ibid.

[38] Ibid, Article 23(2) (a).

[39] DSU (n 7), Article 1.

[40] Van den Bossche (n 31).

[41] Sattler (n 27), 41.

[42] Sattler (n 27).

[43] Daniel T. Shedd, Brandon J. Murrill, Jane M. Smith, 'Dispute Settlement in the World Trade Organization (WTO): An Overview' (2012) < https://fas.org/sgp/crs/misc/RS20088.pdf > accessed 28 March 2020.

[44] Robert E Hudec, 'The New WTO Dispute Settlement Procedure: An Overview of the First Three Years' (1999) Minnesota journal of international law, < https://scholarship.law.umn.edu/cgi/viewcontent.cgi?article=1050&context=mjil > accessed 28 March 2020.

solution. Besides the disputing parties, any member who has a substantial trade interest can join the consultation.[45] As per Article 4(3), members of the WTO are obliged to start consultation in good faith upon request. Preference is given to utilizing such a stage over other procedure.[46]

The state which is requested for a consultation has ten days to respond, and the disputing states enter into consultation within thirty days of the request in general.[47] If it is not shortened in case of urgency, the request usually last for sixty days.[48] Moreover, the consultation should be confidential regarding the contents of the discussion. However, the fact that consultations are taking place or their outcome need not be confidential.[49] If a consultation fails, the second step to the DS is the Panel process, which starts when the complainant submits a written request to the WTO DSB for the establishment of a Panel.[50] The request will be brought and granted at the second meeting.[51] The request might get accepted, and a Panel can be established at the first meeting. Nonetheless, this usually happens when the respondent agrees to the establishment of the Panel.[52]

Members of the Panel are usually three. Yet, they can be five by the agreement of the parties.[53] The Panel is not a standing body, rather it is an ad hoc body established to resolve a particular dispute and dissolves afterwards.[54] It makes an objective assessment of the facts of the case and the conformity with the covered agreements.[55] Besides, it has the discretion to limit the claims it must address in the process of resolving the dispute between the parties. Nonetheless, it should not leave issues unaddressed as they may cause future disputes.[56] In a Panel proceeding, written

[45] DSU (n 7), Article 4(11).

[46] DSU (n 7), Article 4(5).

[47] Ibid, Article 4(3).

[48] Ibid. Article 4(8).

[49] Ibid, Article 4(6).

[50] Chad P Bown, *Self-enforcing trade Developing Countries and WTO Dispute Settlement* (Brookings institution press 2009).

[51] DSU (n 7), Article 6(1).

[52] Ibid.

[53] Ibid, Article 8(5).

[54] Van den Bosche (n 3).

[55] DSU (n 7), Article11.

[56] WTO, Australia - Measures Affecting Importation of Salmon (WT/DS18*)* [20 October 1998], AB/R, (98-4035).

submissions and meetings between the Panel and parties can be held in two rounds. Third parties can make submissions and be heard when they show substantial trade interest. The Panel follows the working procedures under Annex 3 unless the parties agreed otherwise. After the composition and a TOR of a Panel are agreed upon by the parties, the Panelists shall fix a timetable that is appropriate for the parties to prepare written submissions.[57]

The Panel may consult anyone it deems appropriate including expert group regarding factual issues scientific or technical matters.[58] Panel reports are issued within six months maximum and three months minimum. But in no case, it should exceed nine months, which is calculated from the composition of members and the establishment of TOR date.[59] However, in practice, the Panel proceeding might exceed twelve months due to the complexity of the case, the need to consult experts, the availability of experts, problems with scheduling meetings, and the time taken to translate the report. Occasionally, the complaining party may request the suspension of the works of the Panel for twelve months. If the suspension exceeds twelve months, the authority of the Panel will lapse. Before a Panel report is adopted, there is an interim review stage. Unless a party appeals or the DSB decides not to adopt the report by consensus, a Panel report will be adopted within sixty days of circulation to the members.[60]

Unlike Panels, AB is a standing international tribunal. The DSB decides on issues concerning the appointment of members of AB by consensus based on the recommendation of a Selection Committee, composed of the chairpersons of the Councils for Goods and Services, the DSB, the WTO Director-General, the General Council, and the TRIPS Council. The candidates for the AB membership are nominated by WTO members.[61] The Standing AB has seven members holding four-year terms with the possibility of one-year reappointment. The three members of the

[57] Ibid, Article 12(3).

[58] Debra P Steger and Peter Van den Bossche, 'WTO Dispute Settlement: Emerging Practice and Procedure' (April 1-4, 1998) 92 The Challenge of Non-State Actors, Proceedings of the Annual Meeting ASIL (79) < https://www.jstor.org/stable/25659196 > accessed 30 January 2020.

[59] DSU (n 7), Article 12(9).

[60] Gretchen Heimpel Stanton, 'The WTO Dispute Settlement Framework and Operation' in Kym Anderson, Cheryl McRae, David Wilson (eds) (2001) The Economics of Quarantine and the SPS Agreement, University of Adelaide Press < https://www.jstor.org/stable/10.20851/j.ctt1t304rx.10 > accessed 30 January 2020.

[61] Sattler (n 27).

standing AB entertain cases brought by any member of the WTO. The members of the AB serve in rotation.[62] AB members should be professionals who have recognized authority with demonstrated expertise in law, international trade, and the covered agreements.[63] Appeals are limited to issues of law, and the procedures of appeal should comply with the working procedures drafted by the AB. Parties are allowed to submit oral and written submissions to the AB. Third parties can also make oral submissions after they made written submissions.[64]

It is the parties who can appeal a panel report before the AB. Third parties cannot appeal unless they notified the DSB of their substantial interest in the matter. Only then can they get the opportunity to be heard by the AB.[65] AB can uphold, modify, and reverse the findings and conclusions of the Panel.[66] No rulings of the AB have ever been blocked because of reverse consensus.[67] AB has no remand power and the duty of the AB is limited to the issue of law established by the panel. Nonetheless, it may assess facts when the panel failed to make factual findings or refrain from legal conclusions because of a lack of sufficient facts.

Matters under consideration of the AB shall be confidential.[68] The AB report should be adopted and unconditionally accepted by the parties unless the DSB decides not to adopt it within 30 days from its distribution to all members. Yet, the report will stay open to the view of the members. [69]

The time from the beginning of an Appeal until the circulation of the report to all members is sixty days. Although an extension is possible, the Appellate proceeding in no case should exceed ninety days.[70] The total DS process from the establishment of a Panel to the date the DSB considers the Panel or Appellate report for adoption should not exceed twelve months.[71]

[62] DSU (n 7), Article 17(1).

[63] Merills (n 1), 224.

[64] Ibid.

[65] DSU (n 7), Article 17(4).

[66] Ibid, Article 17(13).

[67] Ibid, Article 17(14).

[68] Ibid, Article 18.

[69] Ibid, (n 67)

[70] Ibid, Article 17(5).

[71] Ibid, Article 20.

2.5. Implementation of Recommendations and Rulings

The DSU emboldens the implementation of rulings and recommendations of the Panel and AB. The preferable resolution to a dispute is full implementation. Compliance is usually monitored by establishing deadlines and surveillance. The DSB holds a meeting within thirty days where the losing party informs the DSB of its intentions concerning compliance after a report is adopted. If a member cannot implement a report immediately, it will have a reasonable period, which could be the period proposed by the losing party if approved by the DSB or if not approved, a period mutually agreed by the parties, or if no agreement is reached, a period determined through binding arbitration within ninety days from the date of the adoption of the report, which should not exceed Fifteen months from the date of the adoption of the report. For instance, the WTO arbitrator determined the reasonable period for implementation in *EC – Hormones* case.[72]

But, if an implementation is not possible, a mutually agreed solution consistent with the covered agreement becomes the next best resolution.[73] If these solutions do not work, compensation and suspension of concessions become the following alternatives.[74] However, these alternatives are temporary measures. The losing party should request negotiation with the complainant within a reasonable period to reach mutually acceptable compensation. Compensation has to be voluntary, and if it is granted, it has to comply with the covered agreements. Nevertheless, if the parties could not reach mutually acceptable compensation, the complainant can request for authorization of suspension of concessions. [75]

[72] WTO, European Communities - Measures Concerning Meat and Meat Products (Hormones), (WT/DS26), [29 May 1998] [98-2227].

[73] DSU (n 7), Article 22(1).

[74] Brendan Mcgivern, 'Implementation of Panel and Appellate Body Rulings: An Overview' in Rufus Yerxa and Bruce Wilson (eds), *Key Issues in WTO Dispute Settlement the First Ten Years*, (Cambridge University Press, WTO 2005).

[75] DSU (n 7), Article 22(2).

Chapter Three

Dispute Settlement under AfCFTA

3.1. Overview of AfCFTA

The AfCFTA was signed on 21st March 2018, by 44 of 55 African countries in Kigali, Rwanda.[76] It was ratified by 36 members as of 5th February 2021.[77] Currently, all African countries, except Eritrea, have signed the Agreement. The AfCFTA entered into force in May 2019 after 24 states deposited their instruments of ratification with the Chairperson of the AU.[78] The Agreement is a huge regional treaty that aims to embody the 55 member countries of the AU and eight recognized Regional Economic Communities. The establishment of AfCFTA is pursuant to the multilateral trading system under the WTO as per Article XXIV of the GATT 1947, the Enabling Clause, and Article V and V bis of the GATS.

The major objectives of the AfCFTA are enhancing the AEC, expanding agreement among African Union members, and recognizing Agenda 2063[79] to create a prosperous and united Africa.[80] The AfCFTA Agreement encompasses the Protocol on Trade in Goods, the Protocol on Trade in Services, and the DS Protocol in phase one negotiation. The concern of this chapter is the DS Protocol.

[76] Peter Leon, Ernst Rachwal, 'the African Muller and Natasha Continental Free Trade Agreement: A New Pathway for Africa?'(2019), Legal Briefings, < https://www.herbertsmithfreehills.com/latest-thinking/the-african-continental-free-trade-agreement-a-new-pathway-for-africa> accessed 7 April 2020.

[77] Status of AfCFTA Ratification (2020) <https://www.tralac.org/resources/infographic/13795-status-of-afcfta-ratification.html> (Tralac Blog), accessed 04 April 2021.

[78] Ibid.

[79] Agenda 2063 is a strategic framework to bring inclusive social and economic development, regional integration, and democratic governance in Africa.

[80] See (n 9).

3.2. AfCFTA DSS and the Essence of the DS Protocol

The AfCFTA DSS is designed by the DS Protocol to ensure the implementation of the rights and obligations envisaged under the Agreement.[81] However, AU members are anticipated to contribute normative frameworks and instill a culture of good governance and rule of law in the system to make the DSS operational.[82] The Protocol aims to establish a rule-based mechanism for DS where parties to the AfCFTA claim their rights envisaged under the AfCFTA Agreement.[83] Further, the DSS of AfCFTA aims to preserve the rights and obligations of State Parties.[84]

Disputes in AfCFTA should arise from the interpretation of the Agreement concerning the rights and obligations of members.[85] Therefore, the AfCFTA and, its annexes and protocols should be interpreted pursuant to customary international law and the VCLT in a manner that addresses members' claims.[86] The DSS allows its members to use amicable DSS, and they are anticipated to enter into conciliation, good offices, and mediation in good faith.[87] The recommendation and rulings of the DSB should aim at providing a satisfying resolution without narrowing the rights and duties of members.[88]

The AfCFTA DSS has jurisdiction over disputes between members that arise from the AfCFTA Agreement. A member that invokes the violation of its right under AfCFTA cannot invoke the

[81] The African Continental Free Trade Area Unfolding Changes, < https://www2.deloitte.com/content/dam/Deloitte/ng/Documents/tax/ng-The-African-Continental-Free-Trade-Area-Unfolding-Changes.pdf > accessed 30 January 2020.

[82] Magdi A. Farahat, *African Continental Free Trade Area: Policy and Negotiation Options for Trade in Goods*, (New York and Geneva, 2016), UNCTAD Report < https://unctad.org/en/PublicationsLibrary/webditc2016d7_en.pdf > accessed 28 March 2020.

[83] Gerhard Erasmus, 'Dispute Settlement in the African Continental Free Trade Area' (Tralac Blog, Perspectives on Africa's Trade & Integration, 2019) < https://www.tralac.org/blog/article/14150-dispute-settlement-in-the-african-continental-free-trade-area.html> accessed 28 March 2020.

[84] DS Protocol, (n 9) Article 4(1).

[85] Ibid, Article 1 (e).

[86] Ibid, Article 30.

[87] Ibid, Article 4(5).

[88] Ibid, Article 4(6).

same violation under other DSSs.[89] To clarify, the institution of an action under the AfCFTA excludes the possibility of bringing the same action in another forum. Only members can access AfCFTA DSS. Private parties do not have direct access to the DSS. However, a member can bring private parties' case before the DSS.[90]

The DS Protocol is signed to give a guarantee to the enforcement of the AfCFTA during its endorsement. It has the objective of creating a DSS that ensures security and predictability to the AfCFTA.[91] It will be used to solve disputes under AfCFTA. But, if there is a discrepancy between rules and procedures of the DS Protocol and special and additional rules in the Agreement, the special and additional rules prevail.[92]

The DS Protocol envisaged most of the provisions of the DSU of WTO as is without consulting RECs DSSs. For instance, provisions of the DSU concerning timelines, amicus curie briefs, implementation, and access to the DSS it adopted, have limitations which will be discussed in detail under Chapter four of this study.

3.3. Procedures under the AfCFTA DSS

The first stage in the AfCFTA DSS is a consultation where disputing parties seek a mutual agreement by consulting with each other. The DSS of AfCFTA is initiated when a complaining party requests for a consultation, which should be confidential and no detrimental to the rights of any member in any further proceedings.[93]

A satisfactory opportunity should be conferred to consultations by each member. A complaining party can request for consultation by notifying the DSB through the secretariat in writing by including the reason for the request, identifying the issues, and indicating the legal basis for the complaint. The other party should reply within ten days after the receipt of the request and enter into consultations in good faith within thirty days. If the other party does not reply within ten days or enter into consultations within thirty days or enter into consultation within sixty days in any case, the complaining state can refer the issue to the DSB and request for the establishment

[89] Ibid, Article 3(4).

[90] Ibid, Article 3(1).

[91] See (n 84).

[92] Ibid, Article 3(2).

[93] Ibid, Article 7.

of a Panel.[94] A member that has a substantial trade interest in a consultation can request to join the consultation within ten days from the circulation of the request for consultations.[95] If the initial parties refute the existence of a substantial interest, the interested member is allowed to request a consultation.[96]

A Panel proceeding starts when the attempt to resolve the dispute through consultation has failed and the complaining party requests in writing for the establishment of a Panel.[97] The request is anticipated to include the fact that consultation was held, indicate the measures taken and the legal basis of the complaint.[98] However, if the applicant requests for the establishment of the Panel with a TOR that deviates from the standard terms, it has to also submit the text of a special TOR.[99] The meeting of the DSB will be arranged within fifteen days from the receipt of the request, given ten days advance notice is provided to the DSB.[100]

The Panelists set the timetable for the proceedings of the Panel within seven days from the composition of the Panel and the determination of the TOR after consulting with the parties.[101] The Panel fixes the precise time-limits for written submissions by the parties within ten days after the expiry of seven days.[102] The period for the Panel to conduct its business should not exceed five months. However, in the case of perishable goods, it could be shortened to one and a half months.[103] If the parties fail to settle, the Panel needs to submit its findings in a written form to the DSB. The Panel report should incorporate the findings, the applicability of the relevant provisions, and the legal rationale behind its findings and recommendations.[104] However, when

[94] Ibid, Article 7(5).

[95] Ibid, Article 7(10).

[96] Ibid, Article 7(11).

[97] Ibid, Article 9(1).

[98] Ibid, Article 9(2).

[99] Ibid, Article 9(3).

[100] Ibid, Article 9(4).

[101] Ibid, Article 15(2).

[102] Ibid, Article 15(3).

[103] Ibid, Article 15(4).

[104] Ibid, Article 15(5).

the parties reach a satisfactory solution, the Panel reports a short brief of the case and the fact that a solution is reached.[105]

If the Panel cannot submit its report within the time frame of five months normally and one and a half months because of urgency, the Panel should inform the DSB of the reason for the delay and estimated time for the Panel to issue its report. Besides, if the Panel could not meet the normal five months and one and a half months in case of urgency cap, it should issue its report within nine months from the composition of the Panel.[106]

The Panel should have TOR within twenty days after the establishment of the Panel to examine the matter brought to the DSB by the complaint and make such findings assist the DSB in making the recommendation.[107] The reports of the Panel need to be drafted in the absence of the parties to the dispute. Nevertheless, they must be based on the information and evidence that the parties and any other person, expert, and institution provided in line with the Protocol. Moreover, the reports of the Panel should be a single one that reflects the positions of all Panelists.[108]

The Panel is authorized to ask information and technical advice from any source that it thinks necessary after informing the relevant authorities of members to the dispute. [109] It can also require information and technical advice from any member given that the member is not a party to the dispute.[110] Such member is required to provide the requested information and technical advice within the time fixed by the panel. Unless the source authorizes, confidential information/ technical advice cannot be disclosed.[111] Besides, where a party raises a factual issue that needs an expert explanation, the Panel requests an advisory report in writing from an expert review group with relevant qualifications on the issue.[112] The deliberations of the Panel are confidential.

[105] Ibid, Article 15(6).

[106] Ibid Article 15(7).

[107] Ibid Article 11(1).

[108] Ibid, Article 17(4).

[109] Ibid, Article 16(1).

[110] Ibid, Article 16(2).

[111] Ibid, Article 16(4).

[112] Ibid, Article 16(5).

Disputing Parties should not disclose any information submitted to the Panel. Nonetheless, parties can disclose their positions about the dispute to the public.[113]

In Panel proceedings, third parties will have the chance to be heard, make written submission provided that they can show they have a substantial interest in the dispute, and parties accept their claim to be well-founded.[114] Moreover, copies of their submissions will be served on the parties and reflected on the panel report. Nonetheless, whenever an action which is a subject of Panel procedure impairs the benefit of third parties, they can claim before a normal DS procedure under the Protocol.[115] Multiple complaints concerning the same matter will be examined before a single Panel considering the interest of all parties to the dispute.[116]

Panel reports will be submitted to the DSB after they are circulated for twenty days between them.[117] The party that objects the Panel report should give its written reasons to the DSB which include the discovery of new facts or facts of substantial effect on the report by notifying the DSB within ten days before the meeting of the parties, and it should serve a copy of the submission to the other party and the DSB.[118]

Parties have the right to participate in consideration of Panel reports.[119] The Panel report will be considered, adopted, and signed within sixty days from the date the final report is circulated to the parties unless the other party formally notifies the DSB of its intention to appeal or the DSB decides by consensus not to adopt the report.[120] The Panel report will not be considered for adoption until the end of the appeal. Within seven days of the adoption of the report, parties can take the signed copy of the report.[121]

[113] Ibid, Article 17(1).

[114] Ibid, Article 13(2).

[115] Ibid, Article 13(4).

[116] Ibid, Article 14.

[117] Ibid, Article 19(1).

[118] Ibid, Article 19(2).

[119] Ibid, Article 19(3).

[120] Ibid, Article 19(4).

[121] Ibid, Article 19(5).

An appeal will be brought before the DSB within thirty days from the communication of the decision to appeal by the party to the dispute.[122] It is the parties who normally bring an appeal before the standing AB. However, third parties are allowed to bring an appeal when they have showed the DSB that they have substantial interest, and the disputing parties agree that their claim of substantial interest is well-founded.[123] The proceeding for an appeal should not exceed sixty days from the date the party formally notifies the DSB about its decision to the date the AB circulates its report. If the AB cannot issue its report within sixty days, it shall give reasons for the delay. Yet, in no case, the proceeding exceeds ninety days.[124]

An appeal should be limited to issues of law and legal interpretations developed by the Panel. The expenses of AB members will be covered from the AfCFTA budget.[125] Working procedures drawn by the AB in consultation with the chair of the DSB will be communicated to members. The proceeding of appeal is confidential and should not exceed ninety days. The report of the AB is drafted in the absence of the parties based on information and statements made. The AB develops a single report that reflects the views of the majority of its members. The report should be adopted by the DSB and accepted by the parties unless the DSB decides by consensus not to adopt it within thirty days after the circulation of the report between the parties.[126] Where a Panel or AB concludes that a certain measure is inconsistent with the Agreement, it suggests the member concerned to make the measure consistent with the Agreement.[127]

3.4. Implementation of Recommendations and Rulings

Members are expected to comply with the recommendations and rulings of the DSB. If compliance is impossible, they will have a reasonable period; proposed by the member and approved by the DSB, or agreed by the parties within forty-five days of the adoption of Panel and AB report.[128] In the absence of agreement, the parties determine the reasonable period by arbitration within ninety days from the adoption of the Panel or the AB report. Yet, the time

[122] Ibid, Article 19(6).

[123] Ibid, Article 21(1).

[124] Ibid, Article 22(2).

[125] Ibid, Article 21(5).

[126] Ibid, Article 22(9)

[127] Ibid, Article 23.

[128] Ibid Article 24(3).

determined by the arbitrator should not exceed fifteen months. The secretariat and the DSB will appoint an arbitrator if parties fail to appoint within ten days after the matter is referred to arbitration.[129]

The secretariat keeps the DSB informed about the status of the implementation of decisions. The time between the establishments of the Panel and the determination of reasonable time should not exceed 15 months. The Panel can only extend the time for providing its report to eighteen months. Where there is a disparity between the measure taken and the Protocol, it can be decided through the original procedure. The DSB must keep the issue of implementation under surveillance, and it will stay on the agenda of the DSB meeting six months after the establishment of a reasonable time. The status report of the extent of the implementation, issues affecting the implementation and the time required to fully implement the rulings should be provided by member at least ten days before each DSB meeting.[130]

Where the respondent state fails to fully implement the recommendation of the DSB, the aggrieved party can request for temporary compensation and suspension of concessions.[131] Normally, suspension of concessions is authorized by the DSB after parties failed to set mutually acceptable compensation within 20 days. It can be authorized regarding the same sector if not; it may go to other sectors in the agreement. And, if this is impossible, suspension of other obligations in the agreement can be authorized. The level of suspension of concession and the level of nullification by that party should be equivalent. Authorization is made within thirty days of request unless the party has objection concerning the level of suspension, which will be resolved by arbitration within sixty days.

[129] Ibid Article 24(3).

[130] Ibid, Article 24(9).

[131] Ibid, Article 25.

Chapter Four

Comparative Analysis of Dispute Settlement System under AfCFTA and WTO

4.1. Purpose

The overarching purpose of WTO DSS is ensuring security and predictability to the multilateral trading system so that members have confidence in the enforcement of WTO agreements constantly.[132] The Panel in the *US – Section 301 Trade Act* case reaffirmed that the WTO DSS has the goal of creating security and predictability.[133] Besides, the WTO DSS has the purpose of maintaining the rights and obligations of members under the covered agreements and clarifying the provisions of the agreements pursuant to customary rules of interpretation of public international law. The covered agreements have gaps that need clarification.[134] However, the DSU prohibits the WTO DSS from adding and diminishing the rights and obligations of members.

The WTO DSS aims to resolve disputes by consultations if possible. Resolving disputes through consultation is cheaper and comfortable for the disputing parties to reach a mutually agreed solution, which has a high likelihood of implementation. Thus, the WTO DSS underpins DS by consultation. Further, it has the purpose of ensuring good faith in DS, which obliges members to pursue the resolution of their dispute with genuine intention.

Similarly, the AfCFTA DSS is instrumental for ensuring security and predictability to the AfCFTA.[135] Besides, it aims to preserve the rights and obligations of members under the Agreement, clarify agreements based on customary international law, and promote good faith in the process of DS.[136] Further, it guarantees the enforceability of the AfCFTA. Therefore, both

[132] See (n 35).

[133] WTO, United States- Sections 301-310 of the Trade Act 1974 (WT/DS152) [22 December 1999], R/ (99-5454), [85].

[134] Van den Bosche (n 3).

[135] See (n 84).

[136] Ibid.

systems have similar purposes.[137] They both emphasize, among others, ensuring security and predictability in their respective systems by preserving the rights and obligations of their disputing members.

4.2. Scope of Jurisdiction

The Jurisdiction of the WTO DSS is limited to resolving disputes arising from the covered agreements and the DSU.[138] The covered agreements (listed in Appendix 1 of the DSU) include the WTO Agreement, the GATT 1994, and Multilateral Agreements on Trade in Goods, the GATS, the TRIPS Agreement, and the DSU. In WTO DSS, the DSU serves as a tool for resolving disputes.[139] However, there are also special and additional rules and procedures on DS that have a related purpose. These rules and procedures will prevail in cases where they come into conflict with the DSU.[140] Further, the WTO DSS bars the DSB from adding or diminishing the rights and obligations of members under the WTO Agreement.[141]

Likewise, the AfCFTA DSS entertains cases that arise out of the AfCFTA and the DS Protocol.[142] Members signed the DS Protocol to guarantee the implementation of the AfCFTA.[143] Since a DSS helps members to force a non-complying party to withdraw violation, members will either respect fearing being sued or they will withdraw violation of the agreement upon being sued. Thus, this promotes the enforcement of the agreement. As is the case with the WTO DSS, the AfCFTA DSS that involves the AB and the Panel is prohibited from adding or diminishing the rights and obligations envisaged under the AfCFTA.[144] Accordingly, the jurisdiction of the AB and the Panel does not extend further from what is written on the AfCFTA and the DS Protocol. Besides the DS Protocol, the special and additional rules and procedures on dispute

[137] Erasmus (n 83)

[138] DSU (n 7), Article 1(1).

[139] Ibid.

[140] See (n 7), Article 1(2).

[141] See (n 35).

[142] See (n 90).

[143] See (n 84).

[144] See (n 88).

settlement can be used during the DS process.[145] Yet, where there is a discrepancy between the two, the special and additional rules and procedures will prevail.[146]

Article 23 of the DSU provides that it is compulsory to submit cases arising out of the WTO covered agreements to the WTO DSS. In this case, no member can raise an objection to the jurisdiction of the WTO DSS because once members become party to the agreement they automatically consent to the jurisdiction of the WTO DSS.

Similarly, Article 3(1) of the DS protocol states that it is the DS protocol that shall be applied when a dispute arises regarding the rights and obligations of members under the provisions of AfCFTA. This provision makes the jurisdiction of AfCFTA DSS compulsory where states are obliged to bring their case before the AfCFTA DSS. Besides, AfCFTA is a single undertaking where every item of the negotiation is part of an inseparable package which cannot be agreed separately. States accept the annexes and appendices of AfCFTA when they sign it. In other words, members who signed AfCFTA accepted the DS Protocol, and consented to the jurisdiction AfCFTA DSS. Thus, it is possible to conclude that both institutions follow similar approach regarding jurisdiction.

4.3. Access to the DSSs

The WTO DSS is accessible only to members of the WTO. Hence, non-member states cannot bring a case before WTO DSS.[147] Yet, there are circumstances where individuals and companies can involve indirectly in the DS proceedings of WTO by lobbying their nation to bring their case before WTO.[148] The participation of private parties can be through persuading a WTO member to promote its cause. Currently, no standards exist to decide if a member can bring a private party's case to the WTO-DSS, instead this issue is left to the will of the members.[149]

Similarly, under AfCFTA DS Protocol, the access to bring a case to any organs of the DSB is provided only for members. Companies and individuals cannot access AfCFTA DSS.[150] Private

[145] See (n 92).

[146] Ibid.

[147] See (n 139).

[148] Van den Bosche (n 2), 193.

[149] Ibid.

[150] See (n 90).

parties may not always be successful at lobbying the state to bring their cases before AfCFTA DSS. Hence, allowing private parties to access AfCFTA DSS helps them to represent themselves and actively participate in the proceedings, which is essential for bringing justice. African countries have no many track records in litigating between themselves because they fear being sued in return. The lack of records shows that there is, perhaps, a small chance that African governments will bring cases of private parties against other members concerning illegal trade measures under AfCFTA DSS. Thus, African countries should either represent their private parties before AfCFTA DSS or amend the DS protocol to open access to private parties.

4.4. The Proficiency of Panels

Members of the Panels of WTO have the proficiency to settle disputes that arise out of the covered agreements.[151] Proficiency like; pertinent expertise in international trade law to resolve disputes arising from WTO Agreement, the GATT 1994, Multilateral Agreements on Trade in Goods, the GATS, the TRIPS Agreement, and the DSU.[152] However, there is no explicit rule in the covered agreements regarding the proficiency of the WTO Panel to decide on legal questions that are not directly connected to the covered agreements.[153] For example, if a case involves norms of jurisdiction where a state affects persons and property outside its territory, coercion where a state compels another state to act in a certain way by use of force, and non-intervention issues where a state meddles in the internal affairs of foreign nations, the DSU does not provide for the proficiency of the Panel to decide such cases.[154] Yet, Article 11 of WTO DSU gives the Panel implied power to "make other findings", which will help the DSB in making the recommendation or the rulings. This provision gives broad power to the Panel to resolve all sorts of disputes, including questions of PIL. The best instance is the *US - Helms Burton case* between EC and USA concerning the US Helms-Burton legislation imposing economic and diplomatic sanctions on persons and companies that "traffic" with certain property in Cuba.[155] This case

[151] Thomas J. Schoenbaum, 'Praise and Suggestions for Reform' (1998) 47(3) The International and Comparative Law Quarterly < https://www.jstor.org/stable/761427 > accessed 30 January, 2020.

[152] Ibid.

[153] Ibid.

[154] Ibid.

[155] WTO, United States - The Cuban Liberty and Democratic Solidarity Act (WT/DS38/1) [13 May 1996] (96-1850).

involved questions of PIL besides legal questions under GATT. One of the questions of PIL, in this case, was whether the US legislation exceeds jurisdiction norms, economic sanctions, and non-intervention. Thus, the WTO DSS should have had an explicit rule regarding the proficiency of the Panel to decide questions of PIL because leaving such questions undecided will cause a fragmentary decision.

Likewise, under AfCFTA DSS, there is no explicit law that authorizes the Panel to resolve legal questions of PIL- not directly related to the AfCFTA Agreement. Yet, Article11 (1) (b) states that "… make such finding as will assist the DSB in making recommendations and rulings…", and part of Article 12(2) of the DS protocol states that "…make finding to assist the DSB in making recommendations and rulings." These provisions could be interpreted as giving an implied power to the Panel to decide all parts of a dispute including PIL like Article 11 of the WTO DSU. This is because, addressing an issue of PIL is essential for addressing an issue relating to the AfCFTA agreements and the Panel cannot make a complete decision without being empowered to decide on the related issue of PIL. It is not appropriate for the Panel to disregard questions of PIL during decision making just because there is no explicit provision to decide such cases. Therefore, although it is not sufficient, it is possible to take an implied power from Articles 11(2) and 12(2) of the DS Protocol to decide questions of PIL. Nevertheless, the inclusion of a specific provision that authorizes the Panel of AfCFTA DSS to decide questions of PIL could have been a better tool to render a comprehensive decision.

For instance, if a dispute arises between Ethiopia and Kenya under the AfCFTA and the dispute contains questions of jurisdiction, the Panel of the AfCFTA DSS does not have a clear authority to decide on such questions. As the DS Protocol lacks a particular provision concerning questions that do not arise from the AfCFTA Agreement, there is a possibility of providing a non-inclusive decision that opens a door for further claims. As such, the DS protocol has not come up with a new approach in dealing with questions of PIL. Therefore, it should be amended to include a law that authorizes the Panel to decide questions of PIL.

4.5. **Approaches of DS**

The approaches of DS under WTO DSS are consultation, adjudication through Panel and AB, arbitration, good office, conciliation, and mediation. The first method provided under the DSU is consultation. Parties are encouraged to solve their dispute through consultation. Nonetheless,

they can resort to Panel proceedings and AB review if their effort to resolve their dispute through consultation failed. The common ways of DS in WTO DSS are resolution by Panel and AB. However, the WTO DSS provides arbitration under Article 25 of the DSU alternatively. Parties should clearly define the issues referred to arbitration if they resort to arbitration, agree upon procedures to be followed and agree to respect the arbitral award.

Conciliation, good offices, and mediation are also provided in the DSU as ways of DS.[156] Such techniques can be employed and terminated at any time in a confidential manner. Moreover, they can continue with the Panel process upon the agreement of the parties.[157] The DG may assist the DS by providing good offices, conciliation, and mediation.

Similarly, the AfCFTA DSS uses consultation, adjudication by Panel and AB, arbitration, and conciliation, good office, and mediation as approaches of DS.[158] The AfCFTA DSS encourages parties to settle their dispute through consultation. However, if consultation fails to resolve the dispute, the next way is adjudication by a Panel and AB. Arbitration is also used to resolve disputes in AfCFTA DSS based on the mutual agreement of the parties regarding the procedures in the agreement. Parties are required to include their intention of respecting the arbitral award in the agreement. The agreement and the arbitral award should be notified to the DSB. The DS Protocol precludes simultaneous adjudication of the same matter before the DSB. However, if one of the parties refuses to cooperate, the complaining party is allowed to bring the matter before DSB.

The Conciliation, good offices, and mediation under AfCFTA DSS should be confidential, and they can be started and terminated at any time. When they are entered after the consultation request is made, the complaining party should wait until sixty days before requesting the establishment of a Panel. However, if the attempts to settle the dispute through conciliation, good offices, and mediation fail during the sixty days cap, the complaining party can request the establishment of a panel without waiting till the time limit elapses. Under AfCFTA DSS, it is the

[156] See (n 7).

[157] Ibid.

[158] DS Protocol (n 9), Article 8.

head of the Secretariat, which is expected to offer conciliation, good offices, and mediation at the request of state to the dispute.[159]

Most of the procedures in the consultation are similar under both WTO DSS and AfCFTA DSS. However, under WTO DSS, the way of requesting consultation is direct, where the complaining party notifies the DSB directly, whereas, under AfCFTA DSS, the parties notify the DSB through the Secretariat.[160] Furthermore, the WTO DSS provides special attention to LDCs when the AfCFTA DSS does not. The details of this issue will be discussed in the section that deals with S&D. Moreover, the AfCFTA-DSS differs in the method of consultation from WTO DSS. For example, if parties enter into a dispute concerning non-tariff barriers and fail to resolve it after a mutually agreed solution is reached through consultation, the complaining party can resort to the Panel stage.[161] Besides, if the parties agree, they can resolve their dispute through arbitration.

Regarding the Panel and appellate stage, both follow almost similar method. Under both systems the procedure for selecting panelists is lengthy. Therefore, the selection of panelists from a shortlist of panelists should substitute the former lengthy process.[162] Besides, the ad hoc nature of the panel is another problem. Creating a standing Panel can be useful to provide quality decision.

However, concerning the establishment of a Panel, the AfCFTA DSS differs in the time that the DSB meets, which is within fifteen days after the request, provided that a ten days advance notice is given.

4.6. LDCs under the DSS of WTO and AfCFTA

Based on a per capita income, human assets, and economic vulnerability criteria, there are 34 LDCs in Africa, which need S&D in DS than other countries in Africa.[163] The WTO DSS

[159] Ibid.

[160] DSU (n 7), Article 4(4) and Ibid, Article 7(3).

[161] Ibid, Article 7(9) (c).

[162] Susan Esserman and Robert Howse, 'The WTO on Trial', (2003) 82(1) < https://www.jstor.org/stable/20033434 > accessed 30 January 2020.

[163] UNCTAD, *The Least Developed Countries Report* (2017) < https://unctad.org/system/files/official-document/ldc2015_en.pdf > accessed 13 December 2020.

confers S&D and legal assistance to LDCs and developing countries, whereas the DS Protocol of AfCFTA does not provide S&D to LDCs in Africa.

4.6.1. **Special and Differential Treatment**

The WTO DSS provides S&D to developing and LDC members to encourage them to use the system. For example, in consultations, Article 4(10) the WTO-DSU provides special attention to the particular problems of developing countries. Besides, Article 3(12) of the WTO-DSU provides the complainant a right to claim the provisions of the *Decision of 5 April 1966 (BISD 14S/18)* as an alternative to rights under Articles 4, 5, 6 and 12 of the DSU where a developing country brings a complaint against a developed country. Nonetheless, this might not be the case when the Panel considers that the time frame under paragraph 7 of the decision is insufficient to provide its report, or the time frame should be prolonged. In a case of conflict between the two, the latter prevails.

In Panel proceedings, Article 8(10) provides for the inclusion of at least one Panelist from a developing country member when a dispute is between a developing country member and a developed country member. Article 12(10) of WTO DSU provides that sufficient time to developing country member to prepare and submit its argument should be given.[164] For instance, in *India -Quantitative Restrictions* case where India was a complainant. The Panel entertaining the case gave India an extra ten days to prepare its submission.[165] Besides, Article 12(11) obliges the Panel to indicate the relevant provisions on S&D and MFN for developing country members where one or more of the parties are a developing country member.

Similarly concerning LDCs, DSU provides that, during the determination of causes of dispute and DS procedure, LDCs should obtain a certain consideration.[166] In disputes that involve LDCs, the DG, or the Chairman of the DSB, upon the request of an LDC, offers its good offices, conciliation, and mediation to assist the settlement of disputes before a request for a Panel is made if the consultation could not produce a satisfactory solution.[167] When a developing country

[164] Van den Bossche (n 31).

[165] WTO, India - Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products, (WT/DS90/R) [6 April 1999] Report of the Panel [132] - [133].

[166] DSU (n 7), Article 24.

[167] Van den Bossche (n 32).

brings a claim, the DSB, in considering what appropriate action to take, should consider both the trade coverage of the measures complained of and their impact on the economy of the country concerned.[168] Under Article 24(1), members should consider proper restraint in claiming compensation and authorization to suspend the application of concessions or other obligations against LDCs.

In the interview conducted in the course of conducting this study, the reasons behind not including a clear S&D provision in the DS Protocol were discussed, which were under discussion at the negotiation stage. One is that the treatment of S&D can be narrowed by rules of origin as most of African countries manufacture goods by adding a little value to almost finished imported inputs.[169] The other is that the difference between the economies of African Countries is not that significant. Consequently, including it as one principle of AfCFTA was found to be appropriate. Further, the author of this paper gathered that AU Ministers of Trade will consider the issue of S&D on a case-by-case basis if a member requests the treatment in general.[170] There is a basis for this conclusion in the AfCFTA Agreement.[171] However, there is no convincing reason which justifies the non-inclusion of S&D in the DS Protocol.

The inclusion of S&D clause will protect the rights of LDCs under the AfCFTA and encourage them to claim it whenever necessary. S&D grants LDCs sufficient time to prepare and submit their argument when a claim is brought against them. As African LDCs lack well-equipped legal experts, allowing them to have an extra-time for the preparation of their argument permits them to gather legal advice on the subject. Moreover, S&D assists African LDCs to have one Panelist from LDCs, which can consider their situation. Moreover, during the consultation, S&D enables LDCs to get special attention concerning their problems. Additionally, when the causes of dispute and the DS procedure are determined, the S&D permits the consideration of the situations of LDCs. Therefore, denying LDCs this privilege in AfCFTA DSS is unacceptable, and the DS Protocol should be amended to include S&D.

[168] DSU (n 7), Article 21(8).

[169] Interview with Dr Melaku Geboye, Technical Advisor during the preparation of AfCFTA, Principal Regional Advisor, Regional Integration and Trade Division, UNECA (Addis Ababa, Ethiopia, 10 March 2020).

[170] Ibid.

[171] AfCFTA, Article 6.

The inclusion of S&D is advantageous because it encourages the implementation of commitments under AfCFTA. Moreover, it will inspire LDCs to participate in regional trade. S&D benefits developing countries and LDCs by according special rights. However, long term S&D might negatively affect LDCs as it makes them dependent and prevent them from participating in negotiations that are in specific interest to them.[172]

4.6.2. **Legal Assistance**

The WTO Secretariat supports developing countries when they need legal advice and assistance concerning DS.[173] Yet, the support of the Secretariat is not wide-ranging because the Secretariat lacks sufficient human resources and has the responsibility for ensuring impartiality during assistance. Its assistance is limited to the first phases of a dispute, and it does not extend to representation. However, the Geneva-based Advisory Centre on World Trade Organization Law (an intergovernmental organization that is independent of WTO) has the purpose of combating imbalanced access to international justice between states. The main functions of the ACWL are, being a law office that specialized in WTO law, providing legal service and training to developing countries and LDCs. ACWL helped Pakistan for the first time in the AB proceedings in the *United States -Transitional Safeguard Measure* on Combed Cotton Yarn from Pakistan.[174]

Under AfCFTA DSS, the DS Protocol does not have an explicit provision, which requires the Secretariat to give special legal assistance to developing countries and LDCs in particular. Although there is a provision that talks about technical cooperation in the Protocol, it does not demand the Secretariat to provide special assistance to LDCs. Instead, it expects the Secretariat to assist all members of the AfCFTA.[175] Hence, the Protocol needs a clear provision that obliges the secretariat to provide special support to LDCs. LDCs lack well-informed lawyers who can represent them and protect their rights. Also, they lack financial resources to hire experienced lawyers in international trade laws. The lack of sufficient financial resources casts a fear that

[172] Andrew D Mitchel, *Legal Principles in WTO* (1st edn, Cambridge University Press, New York, 2008).

[173] DSU (n 7), Article 27(2).

[174] WTO, United States - Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan (WT/DS192/7).

[7 November 2001] DSR (01-5499) as cited by Van den Bossche (n 31).

[175] DS Protocol (n 9), Article 28.

African LDCs might not use the AfCFTA DSS. However, if the DS Protocol gets revised and enables the Secretariat to provide special assistance to African LDCs, the fear of participation can be eliminated. Besides, if the AfCFTA DSS establishes an institution like ACWL, which provides free legal advice to African LDCs, LDCs will get encouraged to make use of the AfCFTA DSS sufficiently. Therefore, the DS Protocol should be revised to oblige the Secretariat to give special technical assistance to LDCs or establishes a committee or institution that provides this service.

4.7. The Participation of LDCs under the DSS of WTO and AfCFTA

African countries have not intensively used the WTO DSS. Even when they participated, it has been as respondents or as third parties. From WTO DSS using African countries, South Africa is worth mentioning. South Africa was brought five times before WTO DSS at the end of 2009, among which one dispute was regarding agriculture where South Africa partook as a third party.[176] Developing countries are not that much capable of defending their systemic interests within the WTO judicial system as third parties. Such incapability happens because using the WTO DSS is costly due to the high legalization of the system, the benefit and cost mismatch, and limited aggregate value and variety of exports. Given their insignificant value of exports, the cost of litigating before WTO outweighs their trade benefit. Thus, the cost disincentivizes them from using the DSS besides retaliation, which they believe narrows their chance of gaining financial support from developed countries.[177]

The participation of members of AfCFTA under the AfCFTA DSS will also be dependent on their willingness. African countries do not litigate against each other not because there is no cause of action, rather because they fear that they could be sued as well. They are not proud of

[176] Gustav Brink, 'South Africa's Experience with International Trade Dispute Settlement', in Gregory C. Shaffer and Ricardo Melendez-Ortiz (eds), *Dispute Settlement at the WTO, the Developing Country Experience* (CUP, 2010).

[177] Gregory Shaffer, 'Developing Country Use of the WTO Dispute Settlement System: Why It Matters, the Barriers Posed, and Its Impact on Bargaining' (2005) <https://www.ictsd.org/sites/default/files/downloads/2013/02/developing-country-use-of-the-wto-dispute-settlement-system_shaffer.pdf > accessed 28 March 2020.

their system due to corruption and lack of rule of law.[178] The absence of intra-African trade, honor to the principle of sovereignty, and the colonial effect that urges African countries to export their goods and services to their former colonial masters are additional reasons.[179] If we see the trade volume in Africa, "the share of exports from Africa to the rest of the world ranged from 80% - 90% in 2000 - 2017."[180] However, "intra-African exports were 16.6% of total exports in 2017, compared with 68.1% in Europe, 59.4% in Asia, and 55.0% in America."[181] Nonetheless, the volume of trade should not justify the nonexistence of litigation. Instead, members should be encouraged to use AfCFTA DSS by considering their special situation and providing them with S&D if they are LDCs.[182] Further, African countries should compromise their sovereignty to litigate against each other.

AfCFTA DS Protocol is designed to eradicate the non-litigation culture of African countries and promote amicable DS. African countries lack the tradition of using African products because of their trade ties with their colonial masters, their low attitude towards African products and a huge infrastructure conundrum that hinders trade within Africa.[183] Further, most African countries are discouraged from trading with each other because African countries produce similar products. Therefore, AfCFTA is expected to create an intra-African market by changing the attitude of African states towards their products, improving infrastructure, promoting the diversified production of goods and services, and considering the special situation of African LDCs. Thus, African countries will start to trade with each other efficiently, and have the chance to use the AfCFTA DSS.[184]

[178] Interview with Mr Million Habte, Expert on Trade in Services, African Union Headquarter (Addis Ababa, Ethiopia 12 March 2020).

[179] Ibid.

[180] UNCTAD, Facts & Figures (2019) < https://unctad.org/press-material/facts-figures-0 > accessed 3 April, 2021.

[181] Ibid.

[182] Interview with Mr Million, (n 178).

[183] Interview with Mr Musse Mindaye, Alternative Negotiator at AfCFTA and Multilateral Trade Relation and Negotiation, Ministry of Trade and Industry (Addis Ababa, Ethiopia, 30 March 2020).

[184] Ibid.

4.8. Limitations of WTO DSS vis-à-vis the AfCFTA DSS

4.8.1. Limitations Regarding the Functions of AB

Currently, the WTO DSS is in crisis because the USA representatives to WTO began to block the appointment of new members of the AB since June 2017. The terms of three AB members expired in 2017, and one has resigned. And then, the terms of the two members expired on 10 December 2019. The minimum number of judges required to entertain a case is three. Therefore, the reduced number of AB members has kept it from handling its work. Now, it reached a point where it cannot hear appeals. From 1995 to 2014, disputing parties appealed 67% of all panel reports.[185] At this rate, if AB continues to be disabled, WTO members can permanently block the adoption of Panel reports they object by filing appeals, which cannot be heard. Such blocking of the adoption of Panel reports might have a consequence of making members whose complaint remain unheard prefer taking unilateral measures against alleged violations, and creating retaliation and trade wars.[186]

WTO members stayed requesting the WTO AB to render decisions on WTO rules though they failed to modernize the DSU.[187] The WTO AB faced objections from the USA and proposals for reform from developing countries, such as Pakistan and India. USA contended that members of the AB are continuing on service after their term of appointment is expired, which is against Article 17(2) that requires the DSB to decide whether a member whose term is expired should continue on service. Moreover, it argued that the Appellate Report of the AB exceeds the legal texts of the DSU especially in the area of subsidies, AD duties, CVDs, standards and technical barriers to trade, and safeguards, and the AB disregards the ninety-day deadline and reviews Panel fact-finding when it should focus on legal issues.[188]

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[185] Laura von Daniels, Susanne Droge and Alexandra Bogner, 'Ways Out of the WTO's December Crisis How to Prevent the Open Global Trade Order from Unraveling' (2019) 46 < https://www.swp-berlin.org/fileadmin/contents/products/comments/2019C46_dns_dge_boegner.pdf > accessed 15 May 2020.

[186] Ibid.

[187] Payosova, Hufbauer, and Schott (n 21).

[188] Ibid.

Developing countries also proposed a reform contending that the AB abuses its power by making rules under the pretext of interpretation.[189] For instance, it allows amicus curiae briefs, which bring NGOs into the DSS. Since NGOs have no contractual rights and duties under WTO, it puts the AB under the undue influence of the campaign of NGOs. A case in point is *EC - Asbestos*.[190]

One of the reasons that caused the stalemate of the AB is the requirement of consensus to appoint the next members of the AB. If the mechanism to decide the appointment of the AB was no consensus, the USA could not have blocked the appointment of members. Thus, members should use majority vote to decide the appointment of members of the AB. Besides, they should reduce the urge of members of the AB to extend tenure by themselves by extending the tenure from four to six years.

As the AB is facing objections from both developed and developing countries, it is possible to conclude that there are gaps in the works of AB that need improvement. For example, the AB should not receive amicus curiae briefs from NGOs and, when it examines the merits of an appeal, it should focus on legal issues. Moreover, the formal proceedings in WTO DSS are lengthy. The AB does not usually meet the ninety-day deadline due to lack of resources in the WTO Secretariat and translation delays. Hence, temporarily forced conciliation, mediation, and voluntary arbitration can be used as an alternative DSS.[191] Further, until permanent solution is found, academics and practitioners suggested that using arbitration as a substitute for appellate review is meritorious since the arbitration is consistent with the object and purpose of the DSU.[192] The other suggestion is agreeing not to appeal and considering the decision of the Panel as a final decision or, waiving the right to appeal temporarily.[193]

Thus, the AfCFTA DSS can learn from the crisis that the AB is facing recently, and the AfCFTA DSS can amend the mechanism it brought to decide the appointment of the AB to majority vote.

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[189] Chiara Giuliani, 'Multilateral Trade in Crisis: The WTO's Appellate Body and the Risk of Paralysis' (2019) (ISSN 2532-6570) istituto, Affari internazionally, < https://www.iai.it/en/pubblicazioni/multilateral-trade-crisis-wtos-appellate-body-and-risk-paralysis> accessed 7 April 2020.

[190] WTO, European Communities - Measures Affecting Asbestos and Asbestos-containing Products (WT/DS135) [12 March 2001] AB/R (01-1157).

[191] Giuliani, (n 189)

[192] Payosova, Hufbauer, and Schott (n 21).

[193] Ibid.

It should establish an arbitration tribunal which can play the role of the AB to avoid the possibility of stalemate. Moreover, it should make the provisions regarding the submission of amicus curiae brief strict so that it forces the AB to take caution when it accepts information from NGOs, and it should extend the tenure the members of the AB to evade the possibility of extension by themselves.

4.8.2. **Enforcement**

Under WTO DSS, the major enforcement mechanisms are voluntary compliance, compensation, and suspension of concession agreements/retaliation. Voluntary compliance has occurred in most of the cases brought before WTO.[194] However, limited cases are resolved by compensation. A case in point is the *Japan - Alcoholic Beverages II*. [195] Retaliation is the most criticized mechanism, as it creates hostility among members. From sixty WTO cases, the right to retaliate was requested only in seventeen cases. However, retaliation rights were authorized to only nine of those cases, and retaliation measures were implemented on five cases from such cases.[196]

Retaliation involves the removal of tariff concession when a respondent party fails to comply with the rulings of the Panel/AB. The rationale behind retaliation is that the increment of tariffs will cause economic damage on exporters of the respondent state, and this will put the respondent state under internal pressure to withdraw measures in contravention with WTO law. However, this theory works when there is a difference between the economy of the retaliating and the noncomplying nation, i.e., when the market size of the retaliating nation is enhanced than the non-complaining nation. Since the market size of developing country and LDCs is small, they cannot impose adequate economic or political influence on members of WTO with larger market size to induce the compliance of the respondent state.[197] A case in point is *US* -

[194] Nottage, (n 20).

[195] WTO, Japan - Taxes on Alcoholic Beverages, (WT/DS8/19) (WT/DS10/19) (WT/DS11/17) [12 January 1998] (98-0138) mutually agreed solution.

[196] Gregory Shaffer and Daniel Ganin, 'Extrapolating purpose from practice: rebalancing or inducing compliance' in Chad P. Bown and Joost Pauwelyn (eds), *The Law, Economics and Politics of Retaliation in WTO Dispute Settlement*, (CUP 2010).

[197] Nottage (n 20), 32.

Gambling, where the smallest WTO member, Antigua sued the USA and applied retaliation.[198] Antigua faced retaliation problems because its market size is small, and Antigua's less than 0.02 % of all exports from the USA cannot impact the USA's economy. [199] Likewise, in *EC – Bananas III case* between EC and Ecuador, Ecuador tried to retaliate well against the EC by suspending tariff concessions.[200] As Ecuador imported, during the dispute, below 0.1% of the total EC exports, the removal of concessions was improbable to impose any substantial impact on demand for these EC exports.

Retaliation is against the principle of trade liberalization, and it negatively affects the retaliating countries themselves as their market is often very small. If we see the two cases stated above, Antigua is a small island with high dependence on imports. Therefore, import restrictions by Antigua will harm itself as the imported goods become expensive to the population of the country. The same is true for Ecuador. As it is an import-dependent nation, raising tariffs on imported goods will harm its citizens.[201] WTO retaliation rules weaken the use of WTO DS for developing countries as the remedies are insufficient and rigid.[202]

AfCFTA adopted all enforcement mechanisms used in WTO DSS. However, Retaliation will not be feasible under AfCFTA DSS. As African countries have small economies; they will not have the leverage to force the responding party to comply with the decisions of AfCFTA DSS. Besides, most of African LDCs are importers, and retaliation might increase the prices of imported goods which will hurt the citizens of the retaliating country itself. Moreover, retaliation becomes a problem when the trade relationship is one way, which is also the problem under WTO. For example, if Ethiopia exports coffee to Chad and if there is nothing that Ethiopia imports from Chad, it is difficult for Chad to retaliate if Ethiopia violates its obligation under AfCFTA.[203] As the disadvantage of retaliation prohibited African countries from using the WTO

[198] WTO, United States - Measures Affecting the Cross-Border Supply of Gambling and Betting Services (WT/DS285) [7 April 2005], AB-2005-1 AB/R (05-1426).

[199] Ibid.

[200] WTO, European Communities - Regime for the Importation, Sale and Distribution of Bananas (WT/DS27) [26 November 2008].

[201] Ibid.

[202] Ibid.

[203] Interview with Mr Million, (n 178).

DSS in the past, it should have been replaced by other appropriate implementation tools under the AfCFTA DSS. Therefore, the DS Protocol should be amended to include monetary damages or compensation instead of retaliation.

4.8.3. **Timelines for Approaches of DS**

Under WTO DSS, the period in which consultation is completed is sixty days. According to some developing countries and scholars, it is prolonged.[204] Thus, it should be shortened to thirty days normally, and thirty additional days should be added when one of the parties is a developing country.[205] During Panel proceedings, they indicated that the time for receipt of the complaining party's first written submissions takes time.[206] Hence, the time for the receipt of the complaining party's first written submissions in the working procedure should be reduced to three-four weeks from three-six weeks.[207] Yet, the time for the defendant to respond should be increased from two-three weeks to four-five weeks.[208]

Although such timelines are challenged by developing countries under WTO DSS, the AfCFTA DSS adopted them anyway. For instance, the parties need to wait until sixty days consultation period lapses to request for the establishment of the Panel.[209] This timeline is prolonged, and the AfCFTA DSS should shorten this period.

4.9. **The Effectiveness of WTO DSS in the Context of Africa**

The AfCFTA DSS is designed based on WTO DSS without being considerate of the African context. Therefore, the implementation of the DS Protocol without adjustment might be ineffective. For example, using retaliation to cause enforcement can harm African solidarity and brotherhood as it creates improper competition among African nations. However, the reflections gathered say to the contrary.

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[204] Valentina Delich, 'Developing Countries and the WTO Dispute Settlement System' in Bernard Hoekman, Aaditya Mattoo, and Philip English (eds), *Development, Trade, and The WTO* (*A Handbook* World Bank 2002).

[205] Ibid.

[206] Ibid.

[207] Ibid.

[208] Ibid.

[209] DS Protocol (n 9), Article 7(8).

According to the interview, retaliation will be applied to an African country that already violates its commitment. Thus, authorizing retaliation on a violating nation does not go against African solidarity and sense of brotherhood, instead forgoing a commitment does go against them. In fact, trade is very practical which has an actual impact on the trading partners. To recall what is discussed about the principle of MFN during the negotiation of AfCFTA in general, there were countries that declined to provide the same treatment, which they provide to parties of their third-party concession agreement, to members of AfCFTA. [210] For instance, the Southern African Custom Union (SACU) has an agreement with the EU, and it was asked to give the same treatment that it provides to the EU under AfCFTA. Yet, representatives of SACU mentioned that sections are opened for EU because it opened other sections for SACU. If AfCFTA does the same, it is possible to extend the same treatment under AfCFTA.[211] It is also gathered that deciding regarding trade by making cost-benefit analysis does not go against solidarity.

Nonetheless, the author believes that using retaliation will be ineffective because it might create hostility among members. Besides, applying retaliation has economic costs. It diminishes the economic safety of a small complaining member as it increases tariff to imports from the responding state which obliges importers to reduce or stop importing. Consequently, consumers, will get harmed from higher prices and poor-quality goods. Therefore, the economic costs of retaliation are not affordable to African states.[212] Additionally, retaliatory measures contradict with one of the objectives of AfCFTA which is achieving free trade at the highest level. Further, retaliation weakens the stability and predictability of AfCFTA and makes cross-border integration difficult because it involves a temporary suspension of concession which may extend to the suspension of the entire AfCFTA obligations between the two members if the noncompliant state continues to decline to comply.[213] Furthermore, forcing private parties to bear

[210] Interview with Dr Melaku (n 169).

[211] Ibid.

[212] Reto Malacrida, 'Towards Sounder and Fairer WTO Retaliation; Suggestions for Possible Additional Procedural Rules Governing Members' Preparation and Adoption of Retaliatory Measures' (2008) 42(1); 3-60, Journal of World Trade <https://www.researchgate.net/publication/291362242_Towards_sounder_and_fairer_WTO_retaliation_Suggestions_for_possible_additional_procedural_rules_governing_members'_preparation_and_adoption_of_retaliatory_measures> accessed 10 December 2020.

[213] Ibid.

the costs of retaliation for the failure of the responding state may escalate the dispute to have a spillover effect on other bilateral relations between the two states.[214] Hence, it will not guarantee the withdrawal of the violation and will not be effective under AfCFTA DSS.

The highly legalized nature of WTO DSS makes it ineffective to AfCFTA because African countries lack financial capacity to hire highly skilled lawyers who can understand the complexity of the DSS procedures.[215] Therefore, adopting similarly legalized system to AfCFTA might create nonparticipation which was the challenge of African states under WTO.

Further, the WTO DSS's lengthy procedure makes the DSS ineffective to be applied under AfCFTA as it makes the DSS more expensive and forces the complaining state to stay harmed by the violation of the respondent state until the DSB gives its ruling. Therefore, unless shortened, adopting the lengthy DS procedures of WTO DSS to AfCFTA is ineffective.

4.9.1. **The Risks of Adopting WTO DSS under AfCFTA**

Preparing AfCFTA DS Protocol based on WTO DSS might have many risks. One is impracticability. Agreements will be fully applicable when they consider all situations of their members. If things are lingering uncovered, they might create the risk of impracticability. For instance, the AfCFTA DS Protocol provides retaliation as an implementation tool. However, retaliation does not have a satisfactory effect for African countries because they have small economies. It is the main reason behind their nonparticipation under WTO DSS. As they know they cannot have much influence on other countries because of their weak economy, they do not participate. Thus, this tendency of nonparticipation might make the AfCFTA DS Protocol impractical.

Besides, as discussed earlier, there is no difference between the DS Protocol and the DSU concerning timelines to complete consultations and Panel proceedings. Following similar timelines as WTO DSS might also cause prolonged procedures under AfCFTA DSS. Consequently, this creates the risk that AfCFTA DSS will be incapable of resolving disputes in time and discouraging to use. Moreover, the DS Protocol does not give access to private parties. Instead, it allows members to bring the cases of private parties as WTO DSS. Adopting the WTO

[214] Ibid.

[215] Shaffer (n 19).

DSS approach concerning access to the AfCFTA DSS will preclude private parties from using the system. This creates the risk that their case might not be resolved through the DSS as African countries do not have the tradition of suing each other.

Further, as WTO DSS has court-like structure, adopting it to AfCFTA will make members disregard other alternative DSSs. Under WTO, the role of alternative DSSs is supportive to the role of the DSB. Thus, there is a risk that this will happen in AfCFTA DSS as well.

Furthermore, the DS Protocol follows the same procedure regarding the appointment of the AB as WTO. Since the AB of the WTO is in crisis lately because of the difficulty to attain consensus to appoint full members of the AB, there is a risk that the AB of the AfCFTA might face similar problem in the future.

4.9.2. **Why WTO DSS Model over Other Regional DSSs?**

As discussed earlier, the WTO DSS has its limitations and designing the DS Protocol based on the WTO DSU without modification makes it inoperative. For instance, being inaccessible to private parties is one limitation of WTO DSS. Yet, the DS Protocol envisaged it as is though there were RECs' DSSs such as COMESA COJ and the EAC COJ which have a solution for this.

The COMESA COJ allows claims from private parties whose interest is affected by "the act, directive and decision of a signatory state" besides members.[216] However, the private parties should exhaust all local remedies before filing before the COMESA COJ. A case in point is the *Polytol case* between Polytol Paints & Adhesives Manufacturers Co. Ltd (Applicant) versus the Republic of Mauritius (Respondent) brought before the COMESA COJ.[217] In this case, it is the private party that brought the case before the court.[218] Additionally, the EAC COJ gives access to private parties to pursue legal remedies when their right under Treaty for the Establishment of the EAC is violated.[219] Private parties could be natural or legal persons and they are entitled to bring their claim before the court to challenge any law, decision and action by a signatory state or institution which infringes their rights.

[216] Treaty Establishing the Common Market for Eastern and Southern Africa, Article 26.

[217] Polytol Paints & Adhesives Manufacturers CO. LTD V the Republic of Mauritius (2012) 1, COMESA COJ.

[218] Ibid.

[219] Treaty for the Establishment of the East African Community, Article 31.

Further, COMESA COJ has an arbitration role when a dispute arises from the treaty and brought under a special agreement between members.[220] The court provides an arbitration service to members if they prefer arbitration. The EAC COJ has also the jurisdiction to provide an arbitration service to members as long as there is a special agreement between members.[221] Yet, arbitration is not allowed as an independent DSS under WTO DSS.[222] Thus, it should have been better if RECs' DSSs were consulted during drafting the DS Protocol.

However, the information collected from the interview asserts to the contrary. According to the interview, WTO has 164 members, from which 44 are African countries and if 44 countries are members of WTO and exposed to WTO DSS, it was thought that WTO DSS is more understandable to members.[223] Besides, the experts who drafted the AfCFTA have WTO experience, and WTO DSS majorly focuses on the state-to-state disputes and traditional intergovernmental system.[224] Further, WTO DSS's success story made it preferable though it has international applicability.[225]

Nevertheless, the author believes that contextualized DSS will work better under AfCFTA. Designing the DS Protocol based on one DSS without exploring other DSSs is not wise because it excludes potentially advantageous ADR mechanisms. Moreover, being inconsiderate of the economic situation of Africa - while adopting the WTO DSS will have a negative consequence as it brings the same non-participation problem that was typical for African countries in WTO DSS to AfCFTA. Therefore, the drafters of the AfCFTA DS Protocol should have taken experiences from African RECs' DSSs besides WTO DSS concerning access to the DS and alternative means of DS, i.e., arbitration. Hence, the DS Protocol should be revised to give access to private parties and make arbitration a major DS mechanism. Clearly, arbitration will avoid the possibility of using retaliation as a means of enforcement which will be one incentive for African states to participate in AfCFTA DSS.

[220] COMESA Treaty (n 218), Article 28.

[221] East African Treaty (n 221), Article 32.

[222] DSU (n 7), Article 25

[223] Interview with Mr Million, (n 178).

[224] Interview with Mr Musse, (n 183).

[225] Ibid.

4.9.3. **What about Arbitration Tribunal?**

Arbitration is advantageous because it gives faster resolution as it has less-complex procedures. The process of arbitration is not much adversarial which precludes future business relationships.[226] Under arbitration, parties can choose arbitrators having appropriate experience for resolving intricate issues rather than depending on a judge who may not have technical experience on the issue. Further, its decisions are practicable as it is easier to enforce arbitral awards.

However, arbitration can sometimes be disadvantageous because its awards are final which cannot be corrected even if the arbitrator makes a mistake concerning a fact or law. Another disadvantage is that it is the parties who pay to the arbitrators which may be expensive sometimes.

There was a debate about making the DSS an arbitration tribunal though no consensus was reached.[227] Finally, the WTO DSS is preferred because arbitration imposes monetary damage, which is the concern of African countries, as a remedy. Furthermore, arbitration may cause inconsistency if two arbitration centers give different decisions on a single case. WTO DSS was favored because the decision of the Panel is appealable and it uses rule-based system as arbitration tribunals.[228]

Nonetheless, the author believes that the WTO DSS enforcement mechanism is not suitable to African countries, lengthy procedures are harmful for the complainant and the requirements for appointing members of the AB has already created a problem under WTO DSS. Evidently, consensus is required to appoint members of the AB which became difficult to attain recently. Hence, the DS Protocol should be revised to widen the scope of arbitration and create an arbitration tribunal as decisions are final and enforceable in Arbitration, and its remedies are better than WTO DSS.

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[226] Arthur Mazirow, 'The Advantages and Disadvantages of Arbitration as Compared to Litigation' (2008) <https://www.international-arbitration-attorney.com/wp-content/uploads/796608-1-2008-arthur-mazirowthe-advantages-and-disadvantages-of-arbitrationas-compared-to-lit.pdf > accessed 27 November 2020.

[227] Ibid.

[228] Ibid.

4.10. **Relevant Departures of AfCFTA DSS from WTO DSS**

The AfCFTA DSS is a regional DSS and only applicable in AfCFTA. Although it is nominal, there are differences between WTO DSS and AfCFTA DSS.[229] The DS Protocol brought a single provision regarding the costs of Panelists, arbitrators, and experts that enables the DSB to determine the remuneration and expenses of Panelists, arbitrators and experts pursuant to the financial rules of AU.[230]

However, as opposed to WTO DSU, it requires the parties to cover the remuneration, travel expenses, and lodging of Panelists, arbitrators, and experts in equal parts as determined by the DSB. Besides, parties have the responsibility to cover all additional costs of the process. Moreover, the DS Protocol enabled the chairperson of the DSB to appoint members of the AB within one month in consultation with the Secretariat when the DSB fails to attain consensus for the appointment within two months.[231] This might prevent the possibility of stalemate of the AB under AfCFTA.[232]

Nonetheless, the additional one-month time makes it inefficient solution as it will add extra-time. Hence, the author believes that adopting majority vote to appoint AB members instead of consensus will still be better solution because it brings immediate appointment. Further, disputes regarding trade remedies such as AD & CVDs usually take prolonged time under WTO DSS. The AfCFTA DS Protocol amended the system that makes disputes concerning trade remedies time taking by deferring it to a special procedure.[233]

However, the AfCFTA DSS has not addressed all the limitations of WTO DSS. As gathered from interviews, this happened because the negotiation on the Protocol on Trade in Goods and

[229] Interview with Mr Musse (n 183).

[230] DS Protocol (n 9), Article 26.

[231] AfCFTA, DS Protocol (n 9), Article 20.

[232] Kholofelo Kugler and Kelly Nyaga, 'What Lessons can the AfCFTA learn from the WTO's Dispute Settlement Mechanism's Challenges?' (Afronomics, 2020) <https://www.afronomicslaw.org/2020/12/22/what-lessons-can-the-afcfta-learn-from-the-wtos-dispute-settlement-mechanisms-challenges/?fbclid=IwAR14gxxdG1vSuTDDEKCzskQcRuwuHWQcRVwmr7OTEa28Fptzy-hNT7OKrmA > accessed 23 December 2020.

[233] Interview with Mr Musse (n 183).

Trade in Services took much time. Only two sessions were held as regards the DS Protocol.[234] Another reason is the lack of technical experts who have qualified knowledge on WTO law.[235] During the adoption of the DS Protocol, States gave much attention to whether the Protocol affects their domestic law or not rather than the benefits of modifying the provisions of WTO law.[236] States did not want to take additional commitments, and they believed that WTO law is a perfect text.[237]

In a nutshell, AfCFTA DSS has its own peculiar features even if it is designed based on the DSS of WTO as discussed above. Nonetheless, it should have improved some important matters. For instance, the WTO DSS has failed to resolve recent and complex disputes such as the proper implementation of rulings on agriculture by EC and genetically modified foods.[238] Thus, the DS Protocol should have included provisions that ease the settlement of contemporary trade disputes. Further, the DS Protocol adopted a "reasonable period" from DSU concerning implementation without specifying the exact time. Hence, the DS Protocol should have included a specific time as the existing reasonable period is vague and allows the responding party to deliberately delay the implementation.[239]

[234] Ibid.

[235] Ibid.

[236] Ibid.

[237] Ibid.

[238] Bartosz Ziemblicki, 'The Controversies over the WTO Dispute Settlement System' (2009) http://www.bibliotekacyfrowa.pl/Content/32203/0014.pdf > accessed 14 May 2020.

[239] Ibid.

Conclusion and Recommendation

Conclusion

Disputes become international when they involve international actors such as states, governments, and international organizations. There are two major ways of DS. One is diplomatic, and the other is adjudicative. The adjudicative means of DSS is, currently, viewed as the most flourishing and effective way. In this regard, the WTO DSS is worth mentioning as it has stayed to be the most effective DSS. All disputes under the WTO arises from the covered agreements and exclusively multilateral trade-related agreements.

On another note, members of African countries established a regional trading system by signing AfCFTA, which has a nearly similar purpose with WTO, i.e., launching FTA. However, AfCFTA has its peculiar features as well. The DS Protocol of AfCFTA adopted the DSU of WTO, which is embraced twenty-five years ago and not amended to date. Adopting a problematic DSS when it is possible to produce a DS Protocol, which is modernized enough to resolve contemporary and future trade disputes, considerate of African context, and capable of overcoming WTO DSU's limitations, is completely wrong. Hence, this creates a fear that the AfCFTA DSS may face the risk of non-functionality.

WTO DSS uses retaliation as one implementation mechanism. Yet, it is an unproductive way of enforcement, which creates constant trade wars among members. Therefore, upholding such mechanism under the DS Protocol may cause trade confrontations, which will reduce the sense of fraternity and solidarity of African States. Besides, where trade disputes happen between states that do not trade with each other, there is no way of retaliating. Additionally, prolonged timelines for conducting consultation and written submission are limitations of the DSU of the WTO. The ad hoc nature of the works of the Panel and the part-time nature of the function of the AB are additional limitations. Moreover, the WTO DSS is in calamity because WTO members have failed to modernize the DSU and appoint members of AB.

Indeed, there is a difference between the two DSSs as their sources are different. For example, WTO DSS functions based on WTO covered agreements which are international instruments. Yet, the AfCFTA DSS will work based on the AfCFTA, which is a regional instrument.

As the thesis involves both doctrinal and non-doctrinal research methodologies, in the course of going through primary and secondary sources and interviewing professionals, two theories about the adoption of WTO DSS to AfCFTA have been identified. The first theory supports the adoption of the DSU of WTO because about 44 African countries are members of WTO. The idea is to use the system that members recognize. Further, the AfCFTA is free trade-oriented, and WTO DSS is a tribunal that resolves fully trade disputes. Therefore, adopting the WTO DSU culture to AfCFTA DSS is correct.

The other theory negates the indiscriminate transplantation of WTO DSS because AfCFTA should have generated its own innovative DSS, which is feasible in the context of Africa. The thesis demonstrated how the WTO DSS functions and what challenges it is facing. The AfCFTA DS Protocol adopted the WTO DSS without addressing its limitations. Yet, it failed to incorporate S&D for LDCs in DS. WTO DSS provides S&D by allowing developing countries and LDCs to claim the provisions of the Decision of 5 April 1966 (BISD 14S/18) as an alternative to rights under articles 4, 5, 6, and 12 of the DSU when they bring complaints against developed countries. Besides, the S&D includes making at least one Panelist from a developing country member when a dispute is between a developing country member and a developed country member. Further, the DSU urges members to consider the specific situations of developing countries in consultations. The S&D also includes considering restriction in claiming compensation and authorization to retaliate against LDCs. AfCFTA DSS should have taken a lesson from the S&D clauses of WTO DSS.

Further, African countries do not participate in WTO DSS because of the high legalization and expensive nature of the system. Besides, the aggregate value of the African market is less beneficial to Africa, and the weak remedies of the system are discouraging to them. The DS Protocol has not brought a solution to improve the participation of African countries in AfCFTA DSS.

After a thorough study, it has been identified that the DS Protocol has numerous loopholes that should be ameliorated very soon. The Protocol did not shorten the prolonged timelines for consultation, which are stipulated in the WTO DSU. It adopted the highly criticized retaliation. It is expected to establish ad hoc Panel like WTO DSS which creates a problem of adopting unsound reports. Additionally, the DS Protocol does not give access to private parties as WTO

DSU. However, if we see the DSSs of RECs, they allow private parties to access the DSS and use ADR mechanisms. A quintessential example is the COMESA COJ and EAC COJ. Thus, the drafters of the DS Protocol should have given due regard to the DSSs of RECs and limited extensive transplantation of WTO DSS.

Without amendment, the DS Protocol cannot establish a vigorous DSS that encourages African countries to claim their rights under the AfCFTA. However, if the DS Protocol gets amended to avoid the limitations of WTO DSS and adds some creativity, it will make the AfCFTA enforceable and beneficial to Africa in general and LDCs including Ethiopia, in particular.

Recommendations

Based on the above conclusion, it is possible to say the DS Protocol has gaps. Therefore, the author recommends the following improvements to fill the gaps and make it enforceable;

1. **The DS Protocol should be amended to establish an African arbitration tribunal** that renders a final decision and awards monetary damage as a remedy. Arbitration has flexible and simple procedures compared to WTO DSS. Besides, ADR mechanisms like mediation and conciliation should be compulsory.
2. **If the AfCFTA has to adopt the DSS of WTO, the following particular recommendations should be considered.**

2.1. Concerning implementation, the DS protocol has to provide other alternatives such as mandatory trade compensation and monetary compensations instead of retaliation. Mandatory trade compensation and monetary compensations are better than retaliation because retaliation might discourage African LDCs from using the DSS. Retaliation is economically counterproductive for both retaliating nations and the targeted nation because it causes an increase in the price of imported goods and services from the non-complying member and makes the consumers in the retaliating nation suffer from high prices and low quality. It is also against one of the objectives of AfCFTA - creating free trade area by abolishing tariff and non-tariff barriers to trade. However, mandatory trade compensation and monetary compensation will better encourage African LDCs to use the DSS. Mandatory trade compensation creates trade without injuring innocent industries. Besides, monetary compensation is making a direct payment to the injured party. Therefore, it will not be detrimental to the economy of the retaliating nation and the non-complying state.

The downside of mandatory monetary compensation is that it may allow a country which finds it easy to pay to continue to violate the agreement and the rights of other members. However, relatively, it is better than retaliation since the latter may significantly hurt the innocent consumers and importers of a country that has small economy. Moreover, all AfCFTA members may not find it easy to pay and proceed with the violation.

2.2. The DS Protocol should be amended to provide S&D for African LDCs. The AfCFTA DSS should establish an organ, which is not affiliated to AfCFTA DSB and works alongside the secretariat to provide legal advice to LDCs and encourage them to use the DSS like ACWL of WTO.

2.3. The DS Protocol should be amended to use majority vote to appoint members of AB instead of consensus to prevent possible problem of stalemate of the AB.

2.4. The AfCFTA DSB should make the Panel permanent because permanent Panel requires experienced Panelists who do not depend on the advice of the Secretariat. The introduction of the permanent Panel will bring capable Panelists who can adopt reports that will not be reversed by the AB. And this, in turn, will help for time-saving.

2.5. If the AfCFTA adopts the court like DSS, it should make the DSS open to the public and accessible to private parties. Inaccessibility and confidentiality are limitations under WTO DSS and these should not be reflected under AfCFTA DSS.

2.6. The AfCFTA should establish a DSS, where members of the Panel are selected from a shortlisted roster rather than wasting time on securing the agreement of the parties to the Secretariat's nominees, and transferring the nomination of Panelists to the head of the Secretariat and the chairperson of the DSB, where no agreement between the parties is reached.

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6. Appendices

6.1. Interview Questions

Appendix I: Interview Questions for a Technical Advisor during the Preparation of AfCFTA, Principal Regional Advisor, Regional Integration and Trade Division, UNECA

This Interview is prepared to collect information that was used to assess the intention, purpose and feasibility of AfCFTA.

Part I: Introduction:

i. Greetings
ii. My name is Bethelhem Abraham
iii. I'm from AAU Law School, LL.M. program, Public International Law Stream
iv. The title of the thesis is comparative analysis of dispute settlement under WTO and AfCFTA

Part II.

i. What is your name?
ii. What is your position in the institution?
iii. What is your role in the preparation of AfCFTA legal texts?

Part III: Core Questions

i. Is AfCFTA DS Protocol the product of profound study?
ii. Does AfCFTA DSS avoid the limitations of WTO DSS or endorse it as is?
iii. Provided that the participation of African countries in the WTO DSS is insignificant: What does the DS Protocol bring to enhance the participation of African countries in AfCFTA DSS?
iv. What possible risks come with adopting the WTO DSS to AfCFTA?
v. Why is not the S&D treatment in dispute settlement included in the DS protocol of AfCFTA?

Appendix II: Interview Question for an Expert on Trade in Services, AU

This Interview is prepared to collect information that was used to assess the current status of AfCFTA, the DS Protocol and the establishment of the AfCFTA DSS.

Part I: Self Introduction

i. Greetings
ii. My name is Bethelhem Abraham
iii. I'm from AAU Law School, LL.M. program, Public International Law Stream
iv. The title of the thesis is comparative analysis of dispute settlement under WTO and AfCFTA

Part II. Introductory Questions

i. What is your name?
ii. What is your position in the institution?
iii. What is your role in the preparation of AfCFTA legal texts?

Part III: Core Questions

i. Has AfCFTA DSS been established?
ii. Does WTO DSS work in the context of Africa?
iii. Is not retaliation going to be against the pan African spirit envisaged under the Abuja treaty and Agenda 2063?
iv. Was not there other means of DSS than WTO to follow?

Appendix III: Interview Questions for Alternative Negotiator at AfCFTA and Multilateral Trade Relation and Negotiation Directorate Director, WTO Reference Center, Ministry of Trade

This Interview is prepared to collect information with regard to the negotiation process that precedes the signature of the agreement.

Part I: Self Introduction

i. Greetings
ii. My name is Bethelhem Abraham
iii. I'm from AAU Law School, LL.M. program, Public International Law Stream
iv. The title of the thesis is comparative analysis of dispute settlement under WTO and AfCFTA

Part II.

i. What is your name?
ii. What is your position in the institution?
iii. What is your role in the preparation of AfCFTA legal texts?

Part III: Core Questions

i. What were the major issues during the negotiation?
ii. Do you think it is a good idea to adopt WTO DSS while it is in crisis now?
iii. Why did Member states prefer WTO's DSS to other regional DSSs?
iv. Are WTO DSU and AfCFTA DS Protocol similar or, do they have differences?
v. Does AfCFTA DS Protocol have its departure from WTO DSU?
vi. WTO DSU is 25 years old now; Does AfCFTA adopt it by amending WTO DSU vague and ambiguous provisions or not?
vii. What is your opinion regarding retaliation as an enforcement tool in AfCFTA DSS?

Appendix IV: List of Interviewees

1. Dr. Melaku Geboye: Technical Advisor during the preparation of AfCFTA legal texts, Principal Regional Advisor, Regional Integration and Trade Division, UNECA.
2. Mr Milion Habte: Expert on Trade in Services, AU.
3. Mr Musse Mindaye: Alternative Negotiator at AfCFTA and Multilateral Trade Relation and Negotiation Directorate, Ministry of Trade.