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A COMPARATIVE ANALYSIS OF THE WORLD TRADE ORGANISATION (WTO) DISPUTE SETTLEMENT SYSTEM AND THE AFRICAN CONTINENTAL FREE TRADE AREA AGREEMENT (AFCFTA) DISPUTE SETTLEMENT MECHANISM IN TRADE LAW.

BY

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I dedicate this work to my son Warren Akudzweishe, my mother Chihera, and fiancé who have been sources of inspiration in my studies and to all those who made this dissertation a success in one way or the other.

TABLE OF CONTENTS

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 Favoured 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 African Union member states, with the exception of Eritrea, have all ratified the African Continental Free Trade Area Agreement. (the "AfCFTA Agreement"). Among other things, this agreement aims to strengthen economic integration on the continent of Africa by creating a single, liberalised market for services and goods. To add predictability and security to the African Continental Free Trade Area, AfCFTA members adopted the DS Protocol, or Protocol on Rules and Procedures for the Resolution of Disputes. However, the DS Protocol almost largely ignores the African dispute settlement systems (DSSs), particularly the DSSs of Regional Economic Communities, and instead bases its architecture on the WTO Dispute Settlement Understanding. The DS Protocol has clauses that are insensitive to the situation in Africa. This research outlines the advantages and drawbacks of implementing the WTO DSS in the AfCFTA. It also evaluates the AfCFTA DSS's strengths and shortcomings, which need to be improved, and examines the new developments that the AfCFTA DSS has brought about.

CHAPTER ONE

Unpacking the important issues on a comparative analysis of the WTO and AfCFTA dispute settlement mechanism in Trade law

1.0 Introduction

Several prefatory research issues are discussed in this chapter, including introduction, statement of the problem, background, objectives, methodology, research questions, literature review, limitations, justification, and delimitations. Comparing the dispute resolution mechanisms under the WTO and the African Continental Free Trade Area Agreement (AfCFTA) has long been a research objective for the researcher.

1.1 Background to the Study

There is no doubt that disputes are a part of daily life in the contemporary world. According to Black's Law Dictionary, a dispute is a conflict or controversy between individuals or parties over a certain matter, law, or other topic, and the claim of one of the parties is rejected or counterclaimed by the other party. J.G. Merrills puts it thus, disputes occurs when there is actual disagreement among individuals in regard to a specific law, issue, or related subject, and one individual's claim is refused by the other.[1] A disagreement may start between nations, multinational corporations, or intergovernmental organizations before spreading internationally. At law, there are often two main approaches to resolving international conflicts: the diplomatic approach, which includes negotiation, mediation, conciliation, good offices, and inquiry; and the adjudication approach, which includes judicial resolution and arbitration[2]. While adjudication settles conflicts regarding legal concerns, diplomacy is known for resolving disagreements of a political nature.[3]

[1]Etd.aau.edu.et
[2]J. G. Merrills, *International Dispute Settlement* (University of Sheffield, 4th edn, CUP 2005).
[3]Elena Temelkovska-Anevska, '*Peaceful Means for Settlement of Inter-state Disputes: Reflections, Advantages and Disadvantages*' (2017) 3(7) IJASOS available at http://ijasos.ocerintjournals.org/tr/download/article-file/297877accessed 24 April 2022.

As Peter Van den Bossche notes, diplomatic ways of resolving international disputes are less effective than adjudication of late.[4] The World Trade Organization (WTO) dispute resolution system, which was created to arbitrate issues involving international commerce, is a significant example of an effective adjudication. In actuality, the GATT dispute settlement system, which it replaced, had some shortcomings that needed to be addressed by the WTO dispute settlement system.[5] Before the WTO and GATT dispute settlement systems, international trade disputes were resolved through diplomatic negotiations. It is noteworthy that most international trade disputes result from WTO-covered agreements, which contain detailed regulations governing all aspects of trade-related intellectual property rights, including trade-related features of both products and services.[6] States must sign such accords in order to join the WTO. Members of the WTO engage in disputes when they cannot agree on how the rules outlined in the WTO agreement should be understood and applied, and when a member's particular legislation or practice violates a right or responsibility outlined in a WTO covered agreement.

To support the effective operation of the WTO dispute settlement system, the Dispute Settlement Understanding (DSU), the Appellate Body procedures and norms and Articles 22-23 of the particular procedures under the GATS were all placed into the WTO Agreement. Arbitration techniques, consultation, conciliation, good offices, panel proceedings and mediation, are all part of the WTO dispute resolution process. The WTO dispute settlement system has been in place for several years and enforces an international trade disputes settlement system. The African Continental Free Trade Area (AfCFTA), which was signed by some members of the African Union (AU) on March 21, 2018, is one of the most significant free trade agreements to have been inked ever since the founding of the World Trade Organization.[7] The AfCFTA seeks to improve the integration of regional trade between the rest of the world and Africa

[4]Etd.aau.edu.et
[5]*ibid*
[6]*ibid*
[7]Etd.aau.edu.et
Andrea accessed 26 April 2022.

and into the global commerce and, eventually, the economic development of Africa.[8] An agreement, though, is useless without a strong enforcement system. An efficient, affordable, and contextualized conflict resolution system is the key component that makes an agreement implementable. Members joined the AfCFTA in signing the Protocol on Rules and Procedures on Dispute Settlement in order to accomplish this.[9]

The dispute resolution Protocol offers a framework for resolving conflicts resulting from the AfCFTA. In reality, the stated Protocol is heavily based on the WTO's DSU, which has recently run into problems. As a result, this report outlines the advantages and drawbacks of incorporating the WTO's dispute resolution procedure within the regional economic structure of Africa. The transplantation of conflict systems, like the WTO model in the trade arena, is not intrinsically bad, but how well it is adapted to the socio-political conditions of the destination or receiving nation or region determines whether the transplant is successful.

For instance, the transplantation of systems in Africa has revealed a substantial dissatisfaction with and apathy toward a highly formalized and legalized trade dispute system. The unhappiness has expressed in one type of blowback or another, with varied degrees of success, in respect to the Southern African Development Community (SADC), the Economic Community of West African States (ECOWAS), and the East African Community (EAC).[10] Dilemma that resulted from the discontent still exists, but the AfCFTA's move towards a more rules-based dispute process makes it worse. Therefore, the purpose of this study is to contrast the WTO and AfCFTA dispute resolution processes.

1.2 Statement of the Problem

It is undoubtedly clear that the AfCFTA dispute resolution system is modelled on the basis of the World Trade Organisation model. This is problematic in that the WTO

[8] Article 3 (a) of the AfCFTA.
[9] Etd.aau.edu.et
[10] Digitalcommons.schulichlaw.dal.ca

system as a global aspect has suffered criticism from all angels be it academics, economists and various stakeholders. Notable flaws include the fact that many African nations avoid the WTO dispute settlement process because it is a highly legalized system that demands expensive lawyers and the mechanism of enforcement , retaliation[11], demoralise African nations from accessing the WTO system because they might not have the financial muscle to make their partners in trade to comply with their trade duties.The weaknesses of the WTO system can thus be imputed on the AfCFTA regional system on the basis that it is modelled along the same lines as those of the global systemin order to settle regional trade disputes. The AfCFTA did not introduce a completely new dispute resolution system that promotes the involvement of African countries. Additionally, the WTO dispute resolution system's several forums are not fully addressed by the AfCFTA dispute settlement mechanism. The AfCFTA system does not preserve special and unequal treatment for least developed nations, in contrast to the WTO system (LDCs). The AfCFTA system still lacks a crucial element to integrating LDCs into regional trade. As a result, this paper looks at the AfCFTA's dispute resolution protocol, outlines the dispute resolution processes that are in place for both the AfCFTA and the WTO, and makes reform suggestions.

1.3 Research Questions

i. What are some parallels and differences between the WTO dispute resolution process and the AfCFTA dispute resolution process?
ii. What serves as the foundation for both the WTO and AfCFTA dispute settlement systems?
iii. How effective are the WTO dispute resolution procedures and the AfCFTA dispute resolution procedures?
iv. What changes might be made to the WTO and AfCFTA dispute resolution procedures?

[11] Retaliation refers to action taken by a nation whose exports are negatively impacted by a nation's increase in tariffs or other trade restrictions.

1.4 Research Objectives

In achieving the main purpose, the following sub-objectives are essential;

- To establishing the parallels between the WTO and the AfCFTA dispute settlement system
- To Understand the principles behind the WTO and AfCFTA dispute settlement systems
- To examine the efficacy of the WTO and AfCFTA dispute enforcement mechanisms
- To describe potential modifications that are essential for dispute settlement systems in trade law.

1.5 Relevance of the Study

This research is motivated by a desire to compare the WTO dispute resolution system and the AfCFTA dispute resolution system with a view to come up with improvements. As a result, the current study may be beneficial to the researcher, other researchers, university and the law society in the following ways. The research would be helpful and significant to the researcher: To begin with, the researcher would gain valuable knowledge as a student, which would aid in her professional development. The researcher's desire is to contribute to the creation of knowledge. In addition, the findings could provide a solid foundation for the researcher and other researchers who might want to conduct additional research. Furthermore, since the study is one of a kind, it serves as a stimulus for more research, and it may contribute to the current literature. The research is part of Master in commercial law degree program that will enhance the researcher's academic credentials and knowledge base. Lastly, the WTO and AfCFTA could also benefit from the research because it might give vital knowledge in planning and managing activities, as well as evaluating performance and achieving their objectives. Furthermore, the findings of this study can be used to develop new reforms or to phase out ones that are no longer relevant. Furthermore, this research could serve as a foundation for the university's acquisition of new knowledge, as well as a new foundation for a higher academic or university ranking.

1.6 Literature review on a comparative analysis of the WTO and AfCFTA dispute settlement mechanism in Trade law

Various scholars have written about dispute settlement in the field of trade. Van den Bossche opined that international dispute settlement in trade is largely based on adjudication as espoused under the WTO DSU.[12] J.G Merrills is also a notable scholar. He defines a dispute as "*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] It must be noted that what makes a dispute international is the involvement of governments, corporations, and private individuals from various nations.

In relation to dispute settlement system of the WTO which started operating 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] Giorgio Sacerdoti further emphasized that, through independent rule-based adjudication, the WTO system successfully resolved more than 500 cases by year end of 2018 by removing prohibitive measures taken by a country importing in violation of the WTO agreement.[15] As a result, the system benefits members by offering security.[16] The WTO system is also advantageous since, unlike other international law dispute settlement systems, it offers binding decisions that can only be overturned by a unanimous vote of members.[17]

The WTO dispute settlement system has restrictions on the openness of its processes because it is not accessible to the general public or private parties.[18] The proceedings' records are also not open to the public. Gregory Shafer emphasized that the WTO dispute settlement system is highly legalistic, necessitating the use of expensive and

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[12] Peter Van den Bossche, '*The Law and Policy of the World Trade Organization Text, Cases and Materials*' (1st edition, CUP 2005).
[13] J. G. Merrills, '*International Dispute Settlement*' (University of Sheffield, 4th edn, CUP 2005).
[14]Bossche (n 16)
[15]Sacerdoti (n 15)
[16]*ibid*
[17]YafetYosafatWilbenRissy, *'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 on 21 April 2022
[18]*ibid*

specialized attorneys to present matters to the system. Because of this, emerging nations and least developed countries, notably those in Africa, are unable to participate in the system.[19]

Another WTO dispute settlement system restriction that has been shown to be harmful to developing nations is retaliation. Hunter Nottage has claimed that the WTO DSS for developing nations and LDCs is less effective as a result of the retaliatory provisions. Significant data indicates that retaliation is not a necessary element of compliance with GATT and WTO rules.[20] According to TetyanaPayosova, Gary Clyde Hufbauer, and Jeffrey J. Schott, the WTO dispute resolution system is currently in peril since WTO members were unable to reform the DSU and the system is mostly needed to base decisions on murky WTO regulations.[21]

However, according to Malcolm McKinnon, Peter Draper, and Creck Buyonge Mirito, the AfCFTA is being considered in accordance with the WTO's core principles, which support a free-trade system based on rules.[22] Obert Bore claims that dispute resolution is a crucial tool for ensuring the safety and predictability of continental trade.[23] It is important to remember that the AfCFTA's primary goal is to provide a system for resolving disputes over the duties and rights of member nations. Olabisi D. Akinkugbe asserts that the dispute resolution Protocol establishes a Board to resolve conflicts "*in a transparent, responsible, fair, and predictable way that is compatible with the requirements of the AfCFTA*."[24] Emilia Onyema claimed that the Protocol limits the types of disputes that can be brought and the parties that can access the AfCFTA dispute resolution mechanism. Private parties "*that engineer and facilitate*

[19] Gregory Shaffer, '*Weaknesses and Proposed Improvements to the WTO Dispute Settlement System: AnEconomic and Market-Oriented View*' (2005) University of California,.
[20] Hunter Nottage, '*Evaluating the Criticism that WTO Retaliation Rules undermine the Utility of WTO DisputeSettlement for Developing Countries*' in Chad P. Bown and JoostPauwelyn (eds), '*The Law, Economics and Politics of Retaliation in WTO Dispute Settlement*', (Cambridge University Press 2010)
[21]TetyanaPayosova, 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,.
[22]Malcolm McKinnon, Peter Draper and CreckBuyongeMirito, A Business Guide to the African Continental Free Trade Area Agreement (ITC, 2018) 2
[23] Bore (note 11)
[24]Olabisi D Akinkugbe, '*Dispute Settlement under the African Continental Free Trade Area Agreement: APreliminary Assessment*' (2019) 28(138) AJICL
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the traffic in commodities and services throughout the African continent" are not granted access.[25] Nevertheless, this research especially covers the comparative examination of the dispute settlement processes under the WTO and AfCFTA as most publications have done so.

1.7 Research Methodology: Qualitative Research

This research will mainly follow the qualitative research method and the approach to be adopted is a desk or to research in the library. The author will draw on both previously published and unpublished works. The sources will come from a variety of texts, such as books, essays, journals, treaties, conventions, and agreements, without being restricted to them. The study will heavily rely on papers from pertinent institutions and parties as well as online sources. The WTO and AfCFTA's dispute resolution procedures will be compared as part of the research's comparative study.

1.8Assumptions of the Study

The assumptions of the study are:

- It is assumed that there are similarities between the WTO dispute resolution system and that of AfCFTA.
- the WTO and AfCFTA dispute resolution system are structured differently
- It is also assumed that the WTO and AfCFTA dispute enforcement mechanisms are effective

1.9 Delimitations of the Study

The study will be confined to the WTO and AfCFTA and the focus of the study will be on the comparison of the dispute settlement systems in trade only. It will cover both international and African continent.

1.10 Limitations of the Study

[25] Emilia Onyema, '*Reimagining the Framework for Resolving Intra-African Commercial Disputes in the Contextof the African Continental Free Trade Area Agreement*' (2020) CUP

It is useful to set the parameters, in terms of what this study intends to do. The study will be faced with the following limitations.

Corona 19: Access to libraries for search of secondary data would be a challenge as most libraries have restrictions due to the COVID-19 pandemic. The researcher would largely resort to the internet as the source of secondary data.

Data collection instruments: the study could be limited to document analysis only as a data collection instrument.

Methodological limitation: The study will be also limited to qualitative method.

1.11 Organisation of Chapters

The dissertation will be organised as follows:

Chapter 1: Introduction

The chapter gives the reader access to the chapter that serves as an introduction to the research study as a whole. The major goal is to clarify the problem statement, lay out the study's objectives, and provide evidence for why it is required to do this research.

Chapter 2: Dispute Settlement under the WTO

The Chapter articulates the dispute settlement notion, provides a summary of the WTO's dispute resolution procedures. Further the essence of WTO' system, procedures and implementationof therulings of the board of the WTO are elucidated in this chapter.

Chapter 3: Dispute Settlement under the AfCFTA

This third chapter covers the AfCFTA, its dispute resolution process, the fundamentals of the Protocol that governs dispute resolution, AfCFTA's dispute resolution procedures, and the application of the board's recommendations and decisions.

Chapter 4: Criticism of the WTO and the AfCFTA dispute settlement systems

Makes an analysis of the similarities, what underpins the WTO dispute settlement system and AfCFTA dispute settlement system and how effective are the WTO and AfCFTA dispute enforcement mechanisms?

Chapter 5: Recommendations and Conclusion

This Chapter summarises arguments advanced in this study. Finally, the study's author offers a broad conclusion and suggestions.

CHAPTER TWO

Assessing the WTO Dispute Settlement Mechanism

2.0 Introduction

An intergovernmental body that controls and promotes global trade is the World Trade Organization. The WTO dispute resolution system has been up and running since 1995 being the most effective during this time of all global dispute settlement systems. The organization is used by governments to create, update, and enact laws governing international trade. The agreements between the WTO members lay out a number of detailed regulations governing global trade in products, services, and aspects of intellectual property as a unified enterprise. A key component of the multilateral trading system, dispute settlement strives to stabilize the world economy. The WTO upholds a dispute resolution system to resolve disagreements between members regarding rights or responsibilities under WTO agreements. Rather than making decisions, the priority is to resolve conflicts through talks and agreements wherever possible.

2.1 Historical Evolution of the WTO System Dispute Resolution

Following the signing of the Agreement in Marrakesh, Morocco in April 1994, the WTO was founded on 1 January 1995 with the goals of improving living standards, fostering full employment, advancing real income, stepping up production, and primarily opening up global commerce[26]. It is argued that it is the replacement for the GATT of 1947, which was founded following negotiations on the lowering of tariffs and safeguarding previously reached agreements. In an effort to create an international trade organization, GATT was created. GATT was created as a multilateral pact even though attempts to build an international trade organization were failed. But over time, it evolved into a de facto global organization.[27]

[26]Agreement Establishing WTO preamble

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

It being one of the most significant developments of the Uruguay Round of negotiations, the (WTO) dispute resolution system is frequently commended. However, this should not be interpreted to imply that the WTO dispute resolution system is wholly novel and that the prior multilateral trading system founded on GATT 1947 lacked a dispute resolution mechanism. Contrarily, a dispute resolution system was established by GATT 1947 and developed quite remarkably over the course of almost fifty years basing on Articles XXII - XXIII of the General Agreement on Trade (GATT) 1947. Over time, the contracting parties to GATT 1947 made decisions and agreements that codified many of the principles and procedures that developed in the dispute settlement system of the GATT. In this instance, the GATT 1947's Articles XXII and XXIII's principles for the management of disputes are built upon and followed by the current WTO system (Article 3.1 of the DSU). The preceding system saw significant changes and expansions as a result of the Uruguay Round, which will be discussed later.

2.2 The WTO DSS and the role of the DSU

. To settle international trade disputes resulting from WTO accords, the WTO DSS was founded. To date, many trade disputes have been resolved using this technique. In contrast to other state-to-state DSSs, governments have used the WTO DSS regularly and successfully. As a result, it is regarded as the most effective system in global DS history.[28] . The WTO DSS established the appellate procedure consisting of seven members and has significant duties, and presented a system that has been tested with rules and deadlines. When more than one WTO members break their commitments, harm other WTO members, or adopt measures that hinder the achievement of a WTO objective, a dispute may be filed before a WTO DSS..[29] The WTO DSS has jurisdiction over disagreements resulting from the covered agreements, which include the DSU, the GATS, the WTO Agreement and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).[30] The WTO DSS's jurisdiction is in issue because it

[28]William J. Davey, „Issues of WTO Dispute Settlement" (1997) 91, Proceedings of the Annual Meeting ASIL, CUP, < https://www.jstor.org/stable/25659131>
[29] DSU, Article 23(1)
[30]Peter Van den Bossche, The Law and Policy of the World Trade Organization Text, Cases and Materials (1st edition, CUP 2005).

only functions when there is a member dispute. Otherwise, the WTO lacks the authority to enact legislation to explain the terms of WTO agreements.[31]WTO DSS's jurisdiction is a required one [32]. Any disagreement resulting from the covered agreements shall be reported to the WTO DSS by every WTO member who wishes to file a complaint.

According to article 6(1) of the DSU, a responding member has no choice except to consent to the WTO DSS's jurisdiction. A responding member does not have to formally recognize the WTO's jurisdiction, unlike other international DSSs like international arbitration. States agree to the WTO DSS's jurisdiction as they join the organization.[33] Furthermore, the DSU forbids members from turning to other DSSs in the event of conflicts, with the exception of WTO DSS, hence the WTO DSS's authority is exclusive. A new component added by the DSU is the exclusionary jurisdiction of WTO DSS. Only WTO members have access to the WTO DSS.[34] Participation in the system is prohibited for individuals, non-governmental groups, and private businesses.

The Uruguay round negotiations, which were place in Punta del Este, Uruguay (1986–1993) to talk about easing restrictions on international trade and enhancing GATT and its DSS institutional processes, resulted in the WTO DSU.[35] Following the negotiations, the GATT contracting parties created enhanced DS rule and procedure. The DSU, which established negative consensus, is annexed to the WTO Agreement as Annex 2 and forms a substantial portion of that Agreement.[36] The DSU gave the new agreements greater judicial procedure as a result. The DSU provided an appeals process for parties dissatisfied with the Panel's judgment and made the tribunal's legal decisions binding on the parties.[37]

[31]DSU, Article 3(2)
[32] DSU, (n29)
[33] DSU, Article 32(2)a
[34] DSU, Article 1
[35] Van den Bossche (n30)
[36]www.etd.aau.edu.et >
[37]www.etd.aau.edu.et >

2.3 The dispute handling procedures under the WTO DSS

The WTO DSS has four stages, including consultations, panel proceedings, appellate review proceedings, and enforcement. In general, GATT Articles 22(1) and 23(1) recognize consultation as the first stage of the WTO DSS. The complainant and the responder party must discuss their problems and come up with a solution using the DS technique of consultation. Any member with a significant trade interest may participate in the consultation in addition to the disputing parties.[38] WTO members are required to begin dialogue with good intention after being requested as per Article 4(3). Utilizing such a stage is preferred over alternative procedures.[39]

Furthermore, it should be mentioned that the DSU prefers and advises disputing members to settle their differences through discussions at the outset. A negotiated resolution is more economical and fosters a stronger long-term trading relationship between the parties than panel adjudication.[40] . Consultations also allow the parties a chance to talk about the allegations and the supporting evidence, potentially clearing up any misunderstandings. The groundwork is laid for a settlement or further DSU litigation. The state that is asked to participate in a consultation has ten days to answer, and the disputing states typically have a consultation thirty days after the request. The request typically lasts for sixty days unless it is shortened in an emergency.[41]

Additionally, the session should be private with reference to what was discussed. The conclusion of discussions or their conduct need not be kept a secret, though.[42] The Panel process, which begins when a written request has been submitted by the complaint to the DSB of the WTO for the appointment of a Panel, is the next stage in the DS process if a consultation fails. The second meeting is where the request will be presented and approved. At the initial meeting, the request might be granted, and a

[38] DSU, Article 4(11).
[39]DSU, Article 4(5).
[40]Articles 6.1, 16.4, 17.14 and 22.6 of the DSU
[41]Article 498) DSU
[42]Article 8(5) DSU

Panel could be created.[43] The second meeting is where the request will be presented and approved. At the initial meeting, the request might be granted, and a Panel could be created. However, this usually happens when the respondent agrees to the Panel's establishment.[44]

Additionally, the consultation ought to be private. Members of the Panel in the WTO dispute resolution process typically number three. However, the parties' agreement allows for a maximum of five. Additionally, the Panel is a one-time organization created to settle a specific dispute; it does not exist on an ongoing basis. It does, however, evaluate the case's facts and compliance with the relevant agreements objectively. Additionally, it is free to decide how many claims it needs handle in order to settle the conflict between the parties. However, it should not ignore problems as they could lead to future disagreements.[45] Written submissions and meetings between the Panel and parties can happen twice throughout a panel proceeding. When third parties exhibit significant trade interest, they are permitted to submit arguments and be heard. Unless the parties have agreed otherwise, the Panel adheres to the working procedures outlined in Annex 3. The Panellists shall set a reasonable deadline for the parties to prepare written contributions when the parties have agreed on the composition and a TOR of a Panel. Additionally, the Panel may seek advice from anybody it deems suitable, including professional groups, with regard to factual, scientific, or technological topics.[46] Panel reports are released within a maximum of six months and a minimum of three months. However, the duration, which is determined by the makeup of the membership and the date the TOR was established, should never be longer than nine months. However, due to the complexity of the case, the requirement for expert consultation, experts availability, issues with meeting organising, and the length of time required to transcribe the report, the Panel proceeding may actually take more than twelve months. On rare occasions, the aggrieved party may ask for a 12-month suspension of the Panel's work. The Panel's power will expire if the suspension

[43]Bown Chad P, Self-enforcing trade Developing Countries and WTO Dispute Settlement (Brookings institution press 2009)
[44]Ibid
[45] www. etd.aau.edu.et
[46] Ibid

lasts more than a year. There is an interim review phase before a Panel report is adopted. Unless a party appeals or the DSB decides not to do so by agreement, a Panel report will be approved within sixty days of its delivery to the members.[47]

On the basis of the suggestion of a Selection Committee made up of the chairs of the Councils for Goods and Services, the DSB, the WTO Director-General, the General Council, and the TRIPS Council, it is asserted that the DSB chooses members of the AB by consensus. It should be emphasized that WTO members nominate applicants for AB membership. Seven members of the Standing AB also have the option of being reappointed for an additional year throughout their mandates of four years. The three standing AB members hear cases submitted by any WTO member. The AB members rotate through their duty. Members of the AB should be renowned experts with a track record of success in the fields of law, trade, and the agreements under consideration. The AB's operating processes must be followed, and appeals are only permitted for legal matters. The AB will accept both written and oral responses from parties. Following the submission of written submissions, other parties may make oral submissions.[48]

A panel report may be appealed by the parties to the AB. Furthermore, if a third party has a major stake in the matter, they must first notify the DSB in order to launch an appeal. The AB won't be able to hear them until then.[49] The Panel's findings and recommendations are subject to AB's support, modification, or reversal. Reverse consensus has never been used to overturn any AB decisions. The AB's responsibility is restricted to the legal problem that the panel determined, and it lacks remand jurisdiction. However, it may assess the facts when the panel was unable to draw factual judgments or refrain from drawing legal conclusions because there weren't enough facts to support them.

[47] Ibid
[48] www.etd.aau.edu.et
[49] Article 17(4) of the DSU

All issues under consideration must remain private, according to the AB. The AB report shall be adopted and unqualifiedly accepted by the parties unless and until the DSB determines not to adopt it within 30 days of its distribution to all members. The report will nevertheless continue to be accessible for members to read. There are sixty days between the beginning of an appeal and when the report is given to all members. Even though there is a chance for an extension, the appellate process shouldn't go on for more than 90 days. From the time a Panel is formed until the DSB examines the Panel or Appellate report for adoption, the entire DS procedure shouldn't take longer than twelve months.

2.4 The WTO Dispute Settlement System's Purpose

Under the agreements covered, consultation and dispute resolution taking place between members are subject to the WTO's dispute settlement system. The covered agreements stated in the DSU must contain the basis for a WTO dispute.[50] The WTO Agreement, the DSU, the TRIPS Agreement, the GATS, the GATT 1994, and all other multilateral agreements on trade in products are included in the covered agreements. As a result, the DSU establishes a single, comprehensive procedure for resolving disputes that arise under the covered agreements. There are special and more specific rules relating to certain commitments under some of the agreements. In this situation, the additional regulations take precedence over the DSU's rules to the degree that there are differences between them. The WTO dispute settlement process stands out for its wide range of jurisdictional authority as well as its mandatory, exclusive, and contentious nature. Members who have complaints must follow the DSU's guidelines and policies in order to resolve them. Accepting the imperative jurisdiction of the dispute resolution system is a requirement to join the WTO. Members must use the DSU instead of any other mechanism in the event of a dispute.[51]

[50]Article 17.4 of the DSU

[51]DSU, Article 17.6

2.5 Having Access to the WTO Dispute Resolution Process

One could argue that the DSU is a system for resolving disputes between governments, and therefore only WTO members are permitted to use it. It should be emphasized that each agreement covered makes clear the conditions under which a party may contact the DSU to resolve a dispute. Additionally, special consideration must be given to GATT 1994 Article XXIII:1. The article outlines the complaint's supporting arguments, and numerous additional covered agreements make reference to it. The various types of complaints are Violation complaints, non-violation complaints, and situation complaints A member does not need to have a legal stake in order to access the WTO dispute settlement mechanism. It should be added that the Appellate Body determined that even though the member did not export bananas, the United States had the ability to file a claim under the GATT 1994. Due to its existing output and the possibility that the EC's management of bananas could have an impact on the US market, the Appellate Body also considered the United States as a potential exporter of bananas. The Appellate Body further stated that the result did not necessarily imply that the factors indicated in this case would be decisive in another case.

Even though almost all WTO disputes directly impact individuals, companies, or non-governmental organizations that export or import goods, they are not actively involved in the dispute settlement procedure. The mechanism only accepts disputes from WTO members. On whether nongovernmental actors should participate in the DSU processes or not, there is no consensus position. A number of WTO countries have internal rules in place that allow private parties to alert their government to a WTO law infringement.

2.6 Implementation and Enforcement of the WTO Dispute Settlement System

According to the etd.aau.edu.et, the DSU under the WTO Dispute Settlement System encourages the execution of decisions and suggestions made by the Panel and AB. Additionally, it should be remembered that complete implementation is the ideal way to resolve a conflict. In this instance, deadlines and monitoring are typically used to monitor compliance. As a result, the DSB schedules meetings within thirty days when the other party notifies the DSB of its plans to comply following the adoption of a report. If a member cannot immediately implement a report, it will have a reasonable

amount of time to do so, which may be the period proposed by the losing party if the DSB approves it, or if not, a period mutually agreed upon by the parties, or, if no agreement is reached, a period determined by binding arbitration within ninety days of the report's adoption date that should not exceed fifteen months.

For instance, in the EC - Hormones dispute, the WTO arbitrator decided the reasonable period for implementation [52]. However, if execution is not feasible, the next best course of action is a mutually agreed-upon option that complies with the covered agreement. The following options are compensation and suspension of concessions if these ones don't work[53]. These are, however, only short-term solutions. In order to establish mutually agreeable compensation, the losing party must request negotiation with the complainant within a fair amount of time. Additionally, any compensation must be given voluntarily and must adhere to the terms of the covered agreements if it is. However, the complainant may ask for permission to suspend concessions if the parties were unable to agree on a fair amount of compensation.[54]

2.7 Chapter summary

The chapter evaluated the WTO Dispute Settlement Mechanism, where the researcher examined the WTO's historical development, the institutions involved in the WTO Dispute Settlement Mechanism, the WTO Dispute Settlement System's jurisdiction, the WTO Dispute Settlement System's procedure, and the system's implementation.

[52] www.etd.aau.edu.et
[53] Ibid
[54] Article 22(2), DSU

CHAPTER THREE

AFCFTA Dispute Settlement Mechanism

3.0 Introduction

The newest attempt by African States to alter the global economic system is the African Continental Free Trade Area Agreement (AfCFTA).[1] The World Trade Organization Dispute Settlement Understanding serves as the basis for the AfCFTA Dispute Settlement Mechanism (AfCFTA-DSM). It intends to establish a sizable, integrated African market for commodities, services, and people-movement. The Protocol on Dispute Settlement, which is a part of the AfCFTA, lays out the guidelines and processes for resolving issues within the framework of the agreement. Specifically, the Protocol on Dispute Settlement, the Protocol on Trade in Services, and the Protocol on Trade in Goods. Rules of origin, trade facilitation, transit, and the abolition of taxes and quantitative import restrictions are all covered by the Protocol on Trade in Goods. The Protocol on Trade in Services enables mutual recognition of standards, licensing, and certification of service providers across African states, as well as transparency in service rules. Member state dispute resolution is covered by the Protocol on Dispute Settlement.

3.1 The African Continental Free Trade Area – An Overview

The AfCFTA Agreement, Protocol on Trade in Goods and Related Annexes, Protocol on Trade in Services and Related Annexes, and Protocol on Rules and Procedures for the Settlement of Disputes were all ratified by the African Union (AU) Ministers of Trade on March 9, 2018. The basic and particular goals of the AfCFTA complement one another. The formation of a single market for products, services, as well as the free movement of people and capital within African countries, as well as the liberalization of the market for goods and services, build the groundwork for the creation of a Continental Customs Union and increase the competitiveness of African States' economy both within the continent and with the global market are among the general goals of the AfCFTA.[2]

[1]Margherita Melillo, "Informal Dispute Resolution in Preferential Trade Agreements" (2019) 53:1 Journal of World Trade Law
[2]AfCFTA, *supra* note 7, art. 3(e), (g).

The AfCFTA aims to improve trade regime cooperation across the continent and do away with problems brought on by overlapping and numerous trade agreements. Despite the AfCFTA's increasing inclusion of measures meant to solve the enduring issue of multiple and conflicting trade agreements, the practicality or modus operandi for attaining the goal is still unclear given the historical trajectories and heterogeneity of the various African areas. Along with healthcare, the agreement's goals also include socioeconomic development, gender equality, and structural change in the parties' states.

The AfCFTA provides that, in addition to liberalizing trade in services, the State Parties are required to gradually remove tariffs and non-tariff trade barriers. They are also required to cooperate on investment, intellectual property rights, and competition policy in all areas of trade as well as on customs issues and the implementation of trade facilitation measures. In addition, they are supposed to provide a process for resolving disagreements over their responsibilities and rights, and sustain an institutional structure for the AfCFTA's implementation and administration.

In addition, among other customary provisions in trade agreements, Article 5 of the AfCFTA contains principles such as variable geometry, consensus decision-making, adoption of regional economic community free trade areas and as building blocks, as well as best practices in the RECs, State Parties, and International Conventions binding the African Union. The Assembly, as the highest organ, the Council of Ministers, the Committee of Senior Trade Officials, and the Secretariat, in that order, make up the institutional framework for the AfCFTA's governance and execution.

Its success depends on the agreement's implementation, which has been a major issue in earlier regional economic integration programs in Africa. So reflecting the socio-economic and political realities and practices of its Member States is crucial for the AfCFTA's implementation. Without a doubt, efficient regulation of the formal and informal economies has the promise of an unparalleled leveraging of capital and

resources that is positive for the future of the single market economy when paired with the potential of the continent in information and financial technology.[3]

3.2 AfCFTA DSS and and the DS Protocol Fundamental Elements

The DS Protocol created the AfCFTA DSS to guarantee the execution of the rights and obligations envisioned under the Agreement.[4] . To make the DSS operational, AU members are expected to contribute normative frameworks and instill a culture of good governance and the rule of law in the system. The Protocol's goal in this situation is to create a DS rule-based system where AfCFTA parties can assert the rights outlined in the AfCFTA Agreement The DSS of the AfCFTA also seeks to protect the commitments and interests of State Parties. AfCFTA conflicts should also result from how the Agreement is interpreted in relation to the rights and obligations of its members.[5]. As a result, the VCLT and customary international law should be used to interpret the AfCFTA as well as its annexes and protocols in a way that takes members' claims into account. As a result, the DSS permits its participants to use amicable DSS, and it is expected that they would engage in conciliation, good offices, and mediation in good faith.[6] Additionally, the DSB's proposals and judgments must to strive for a successful outcome without jeopardizing the rights and obligations of the members. Regarding disagreements between members resulting from the AfCFTA Agreement, the AfCFTA DSS has jurisdiction. A member may not claim the same rights infringement under other DSSs after asserting a violation of their rights under the AfCFTA.[7]

To be clear, once an action has been launched, the AfCFTA prohibits the possibility of bringing it in another venue. Only members have access to the AfCFTA DSS. Private parties cannot have direct access to the DSS. The DSS may, however, hear a private party's case from a member. As a guarantee for the AfCFTA's enforcement during its approval, the DS Protocol is signed. Its objective is to create a DSS that provides security and predictability for the AfCFTA. It will be

[3]James ThuoGathii, *African Regional Trade Agreements as Flexible Legal Regimes*, 35 N.C. J. INT'L L. & COM. REG. 572, 573 (2010).
[4] The African Continental Free Trade Area Unfolding Changes, < https://www2.deloitte.com/content/dam/Deloitte/ng/Documents/tax/ng-The-African-Continental-Free-Trade-AreaUnfolding-Changes.pdf
[5] DS Protocol, Article 4(1).
[6]DS Protocol, Article 1 (e).
[7] Ibid, Article 4(5)

used to resolve AfCFTA issues. In the event of a conflict, the special and additional restrictions in the Agreement, however, prevail above the guidelines and practices of the DS Protocol. The majority of the WTO DSU's requirements were included in the DS Protocol in their current form without consulting RECs or DSSs. For instance, Chapter 4 of this study will go into further detail on the DSU's requirements and restrictions. These provisions deal with deadlines, amicus curia filings, execution, and access to the DSS it created.

3.3 Dispute handling procedures under the AfCFTA DSS

According to the etd.aau.edu.et, the AfCFTA DSS's first stage is a consultation during which disagreeing parties seek a mutual understanding by speaking with one another. When a complaining party demands a consultation, which must be private and not impair any member's rights in any subsequent proceedings, the DSS of AfCFTA is activated.[8]. Each member should be given a suitable opportunity for consultations. Additionally, it should be noted that a complaining party may request consultation by sending a written notification to the DSB's secretariat that details the request's justification, the problems it seeks to address, and the legal foundation for the complaint. In addition, after receiving the request, the opposing party has ten days to respond before entering into good faith negotiations within thirty days. The complaint state may refer the issue to the DSB and submit an application for the establishment of a Panel if the opposing party does not respond within ten days, engage in consultations within thirty days, or engage in consultations within sixty days under any circumstances. Any member who has a major commercial interest in the consultation may request to participate within ten days of the call for consultations being distributed. If the initial parties dispute the existence of a substantial interest, the interested party may request a consultation.[9]

According to etd.aau.edu.et, a Panel process begins when the complaining party requests in writing the creation of a Panel after an attempt to address the disagreement through consultation has failed. It is anticipated that the request will mention that consultations were held, list the actions done, and state the complaint's legal justification. However, the applicant must also provide the wording

[8]DS Protocol, Article 7.
[9] DS Protocol, Article 7(11)

of a special TOR if it asks the formation of the Panel with a TOR that differs from the regular terms. If the DSB is given ten days' notice, the meeting of the DSB will be scheduled within fifteen days of receiving the request.[10]

In this case, the etd.aau.edu.et contends that after consulting with the parties, the Panelists set the timetable for the Panel's proceedings within seven days of the Panel's formation and the determination of the TOR. After the initial seven days have passed, the Panel determines the specific deadlines for the parties' written submissions within ten days. The Panel should not undertake its activity for more than five months. However, it could be cut down to 1.5 months in the case of perishable commodities. The Panel must deliver its conclusions to the DSB in writing if the parties are unable to reach a settlement. The findings, the applicability of the pertinent provisions, and the legal justification for the Panel's conclusions and recommendations should all be included in the report. However, the Panel publishes a brief summary of the case and the fact that a resolution was achieved when the parties arrive at a satisfactory resolution.

If the Panel is unable to deliver its report within the permitted time of five months under normal circumstances and one and a half months due to urgency, the Panel should notify the DSB of the cause for the delay and the projected time for the Panel to issue its report. Additionally, the Panel should release its report within nine months of the Panel's composition if it could not complete it within the standard five months and 1.5 months in cases of urgency. The Panel must have a mandate within 20 days of its formation to investigate the issue raised in the complaint and come to any conclusions that would help the DSB formulate a proposal. The reports of the Panel must be written without the parties to the dispute present. However, they must be supported by the data and proof that the parties and any other institution, expert, or person provides in accordance with the Protocol. Additionally, the Panel's report should be a single document that summarizes the opinions of all Panellists.

The etd.aau.edu.et further asserts that the Panel is equipped with power to seek information and technical guidance from any source after notifying the pertinent authorities of the disputing parties. Given that they are not a party to the dispute,

[10] DS Protocol, Article 9(4).

any member may be asked for information and technical assistance. According to the arguments made by etd.aau.edu.et, such member must give the desired information and technical advice within the time frame established by the panel. Confidential information and technical advice cannot be shared without the source's consent. In addition, when a party brings up a factual matter that requires professional explanation, the Panel will ask an expert review group with the necessary credentials to provide an advisory report in writing. The Panel's decisions are kept confidential.

It should be mentioned that contesting Any information provided to the Panel by the Parties shall not be shared. However, parties are free to make public statements about their viewpoints about the dispute. If third parties can demonstrate that they have a significant stake in the outcome of the dispute and that the parties recognize their claim to be well-founded, they will be given the opportunity to be heard and submit written arguments during Panel proceedings. Additionally, the parties will receive copies of their submissions, which will also be represented in the panel report. However, anytime a Panel procedure-related action reduces the benefit of third parties, those parties may file a claim before a regular DS procedure under the Protocol. A single Panel will consider the interests of all parties to the dispute when reviewing several complaints about the same issue.

Additionally, the DSB will receive Panel reports once they have been distributed for a total of 20 days. The party objecting to the Panel report should provide the DSB with written justification, including any new information discovered that has a material impact on the report, within ten days of the parties' scheduled meeting. A copy of the submission should also be provided to the DSB and the other party.

Parties may also elect to participate in the review of Panel report recommendations. The Panel report will be taken into consideration, adopted, and signed within sixty days following the day the final report is provided to the parties, unless another party formally informs the DSB of its intention to appeal or the DSB decides by consensus not to adopt the report. The Panel report's adoption

won't be agreed upon until the appeal is resolved. Within seven days after the report's adoption, the parties can obtain a signed copy.[11].

After the disputing party has communicated their desire to appeal, they have thirty days to file an appeal with the DSB. Typically, the parties are the ones that file an appeal with the standing AB. However, when third parties have demonstrated to the DSB that they have a substantial interest and the disputing parties concur that their claim of a substantial interest is well-founded, they are permitted to file an appeal. The appeals process shouldn't take more than sixty days from the day the party formally informs the DSB about its decision to the day the AB releases its report.. The AB must explain why it took more than sixty days to publish its report. But the trial seldom lasts longer than 90 days.

Only legal questions and the Panel's legal interpretations should be the subject of an appeal. The AfCFTA funding will be used to pay for the expenses of the AB members. [12]. Members will be dvised on the working procedures created by the AB with the chairperson of the DSB. The appeals process is private and shouldn't go longer than 90 days. In the absence of the parties, the AB drafts its report based on statements and information. The AB creates a report that captures the consensus among its members. The report should be adopted by the DSB and accepted by the parties unless the DSB unanimously decides not to do so within thirty days of its distribution to the parties.[13] A Panel or AB will advise a member to make a measure compliant if it finds that the measure in question violates the Agreement.[14]

3.4. The African Continental Free Trade Area's Dispute Settlement Mechanism and its interaction with other local dispute resolution mechanisms

Despite the time-consuming procedure required to develop a rules-based continental trade framework, African countries have demonstrated to be more adept at forging

[11]DS Protocol, Article 19(5)
[12]Ibid, Article 21(5)
[13] DS Protocol, Article 22(9)
[14] etd.aau.edu.et

regional economic connections. Despite the fact that trade between RECs is largely informal and intra-African trade is less active than trade with Western countries.[15]

On the entire continent, the AU has recognized more than eight regional economic communities, with some governments subscribing to more than one. Examples include the COMESA, ECOWAS, and SADC (EAC). Despite the fact that RECs were in varying stages of integration, regional economic communities (or "RECs") had historically been thought of as the foundation upon which an AEC would grow. The COMESA Treaty, Article 2, the SADC Treaty, Article 32, and the ECOWAS Treaty, Article 17 founding the ECOWAS, are just a few examples of the unique dispute resolution procedures that each REC has.[16] . When a dispute arises between members of the same region, it is conceivable to forum-shop between the AfCFTA dispute settlement mechanism and a REC dispute settlement mechanism because the RECs and AfCFTA pursue same broad purposes — economic integration and trade liberalization.[17]

The AfCFTA will protect the current assets of the regional economic communities [18]. In an effort to allay these worries, Article 19(1) of the AfCFTA says that the Agreement will have precedence to the extent of the specific disagreement if there is Inconsistency and conflict between the Arrangement and any agreement in the region. This phrase answers the broad query of which set of rules is to be followed in the event of a disagreement or inconsistency. However, there is one important exception: State Parties that are members of RECs that have achieved "greater levels of regional integration" than those allowed under the AfCFTA shall continue to maintain their relationships with one another[19]. What impact could this exception have on how the AfCFTA and the dispute Resolution Procedures for the RECs interact?

[15] JT Gathii , The Performance of African's International Courts: Using Litigation for Political, Legal, and
Social Change (OUP Oxford 2020)
[16] Article 2 of the COMESA Treaty, EAC Treaty Articles 23 and 27, ECCAS Treaty's Article 16
[17] J Pauwelyn, 'Going Global, Regional, or Both? Dispute Settlement in the Southern African
Development Community (SADC) and Overlaps with the WTO and other Jurisdiction' (2004)
[18] Articles 5(b), (l), 8(2), and 18(2)
[19] AfCFTA , Art.2

Let's take the fact that some RECs' dispute resolution procedures allow for private disagreements as an example (Article 26 of the COMESA Treaty). Problems may be reported to the Secretary-General, Partner States, and both legal and natural persons, according to Articles 27, 28, and 29 of the EAC Treaty. The fact that some of the RECs permit litigation in national courts seems to be at odds with the AfCFTA perspective. Article 19(1) would overturn this interpretation and deny private firms standing in trade procedures. However, if it is found that the RECs of any States have integrated more thoroughly than the AfCFTA, private firms in those States could maintain their standing under Article 19(2). Not only does this lead to unequal access to justice inside the AfCFTA, but it also ignores a crucial point: just because a REC has a higher level of integration does not automatically imply that the AfCFTA's settlement mechanism is inefficient. It doesn't necessarily mean that the REC dispute resolution procedures are better adapted to achieving the objectives of the relevant RTA or the AfCFTA. There is no proof that the RECs' conflict resolution processes—especially for the somewhat more active ones—can actually do anything to advance regional integration.

The primary goals of the AfCFTA may be jeopardized by the lack of consistency in dispute resolution that results from this regard for particular REC dispute settlement systems. According to Oppong, employing conflict resolution will guarantee uniformity in the AEC's integration,

"*A foundation for instability is laid where uneven obligations, in terms of the enforcement and enforceability of community law, are imposed on member states. It is difficult to conceive of a stable and effective economic community where community law is not uniformly applicable within and enforceable against member states. Indeed, the very essence of integration is defeated; "uniformity in the meaning of law is part of the constitutional glue that holds the Community together"*

The AfCFTA dispute resolution procedure must bear the responsibility of maintaining uniform efficiency in dispute resolution, avoiding forum shopping, and fostering compliance, stability, and rapid integration.

3.5 The Implementation of the AfCFTA dispute settlement system

According to the etd.aau.edu.et, the AfCFTA members must abide by the DSB's recommendations and decisions. If compliance is difficult, the parties must agree on a reasonable amount of time within 45 days of the approval of the Panel and AB report, which must be presented by the member and accepted by the DSB. Without prior agreement, the parties must arbitrate the reasonable time within 90 days of the adoption of the Panel's or AB's report[20]. Without prior agreement, the parties must arbitrate the reasonable time within 90 days of the adoption of the Panel's or AB's report. On the other hand, the arbitrator's time frame must not be longer than fifteen months in accordance with etd.aau.edu.et.

Additionally, the etd.aau.edu.et contends that if parties do not select an arbitrator within ten days of the dispute being referred to arbitration, the secretariat and the DSB will do so. The secretariat updates the DSB on the progress of decision implementation. The interval between the Panel's formation and the determination of the reasonable time shall not be longer than 15 months. Additionally, it should be highlighted that the Panel is only permitted to extend the deadline for submitting its findings by eighteen months. The original technique can be used to resolve any discrepancies between the measure taken and the Protocol. The DSB is required to monitor the implementation issue, and it will remain on the meeting agenda for six months following the determination of a reasonable time. At least ten days before each DSB meeting, members shall provide a progress report outlining the level of implementation, problems impeding implementation, and amount of time needed to completely execute the judgements.[21] The aggrieved party may ask for temporary compensation and the suspension of concessions if the respondent state does not completely implement the DSB's recommendation. Normally, where parties fail to agree on mutually acceptable compensation after 20 days, the DSB may sanction the suspension of concessions. If the agreement allows it, it may apply to other sectors other than the same sector. And if that's not practicable, the agreement's other duties may be suspended. The level of that party's nullification and suspension of concessions

[20]DS Protocol, Article 24(3)
[21]DS Protocol, Article 24(9)

must be equal. Authorization is given within thirty days of the request, unless the party has objections to the length of suspension, which will be addressed by arbitration in sixty days.

3.6 Chapter summary

The chapter provided an overview of the African Continental Free Trade Area, as well as information about how disputes are resolved within the AfCFTA and the basis for its implementation. The researcher also examined the goals and model of the AfCFTA Dispute Settlement Mechanism.

CHAPTER FOUR

Comparative Analysis of the WTO and AfCFTA dispute enforcement mechanisms

4.0 Introduction

The success of the WTO dispute resolution system in bringing predictability and certainty to the new continental trade system, which is now certain to go into effect, remains to be seen in terms of how well the WTO rules have been transplanted into the AfCFTA. To create a functional secretariat, choose panels and appellate body members, and most crucially, convince States to embrace the new system, will need a lot of political will among AfCFTA member states. Activating this dispute resolution will provide a number of obstacles that must be solved in order for it to be effective. First off, the adoption of these regulations runs counter to the vast majority of business actors' propensity to avoid taking their trade disputes to Africa's international trade courts to court. These actors, by a large margin, favor non-judicial resolution of their commercial issues. Since national courts are able to issue remedies with a track record of enforceability, these actors frequently litigate their issues there. Therefore, simply importing WTO regulations that have worked in that setting is insufficient to persuade potential litigants to use this new court system to settle their trade disputes in Africa.

4.1 The similarities between the WTO and AfCFTA dispute settlement systems

The dispute settlement provisions of the WTO are virtually identical to those of the African Continental Free Trade Agreement (AfCFTA).[1] To make the AfCTA's dispute settlement system as effective as the world trade system, the dispute settlement system created by the WTO regulations is being adopted in full. In a situation where African states have been hesitant to fight trade issues between themselves, this adoption is also motivated by a desire to judicialize trade conflicts. The AfCFTA Dispute Settlement mechanism, however, will only be applicable to conflicts occurring between the member states, similar to the WTO. Such disputes

[1] www.afronomicslaw.org
[2] 4th Ed; see also *Keith v. Levi C.C.Mo.*2 F. 745.

will center on the State Parties' rights and responsibilities under the terms of the AfCFTA Agreement.[2]

If possible, the WTO DSS seeks to settle conflicts through consultations. It is more affordable and convenient for the conflicting parties to reach a mutually acceptable solution through consultation, which has a high possibility of implementation. Thus, DS via consultation is supported by the WTO DSS. Additionally, it aims to uphold DS's good faith, which requires members to pursue their dispute's settlement with sincere desire. The AfCFTA DSS plays a crucial role in guaranteeing the security and predictability of the AfCFTA. In addition, it works to safeguard members' rights and responsibilities under the Agreement, make agreements clear in accordance with customary international law, and promote good faith throughout the DS procedure. Additionally, it guarantees that the AfCFTA can be implemented. As a result, the goals of both systems are similar. They both place a strong emphasis on, among other things, maintaining the rights and obligations of their disagreeing members in order to ensure security and predictability in their respective systems.

4.2 The WTO and AfCFTA dispute resolution systems' jurisdiction

The WTO DSS's jurisdiction is restricted to addressing conflicts resulting from the covered agreements and the DSU. The agreements that are covered include the WTO Agreement, the GATT 1994 and Multilateral Agreements on Trade in Goods, the GATS, the TRIPS Agreement, and the DSU. The DSU is a dispute-resolution tool in the WTO DSS. But there are also extra, unique regulations and guidelines on DS that serve a related function. When these guidelines contradict with the DSU, these guidelines will take precedence. The WTO DSS also prohibits the DSB from changing the rights and obligations that members have under the WTO Agreement.

The AfCFTA DSS also considers cases that result from the DS Protocol and the AfCFTA. To ensure the AfCFTA's implementation, members signed the DS Protocol. Members will either respect the agreement out of fear of being sued or they will withdraw violation after being sued since a DSS assists members to force a non-complying party to withdraw violation. Thus, this encourages the agreement's enforcement. The AfCFTA DSS, which involves the AB and the Panel, is barred from altering the rights

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

and duties envisioned by the AfCFTA, as is the case with the WTO DSS. As a result, the AB's and the Panel's authority is limited to the provisions of the DS Protocol and the AfCFTA. In addition to the DS Protocol, the DS process may make use of special and supplementary conflict resolution rules and procedures. However, the special and additional regulations and procedures will take precedence in cases where there is a conflict between the two.

4.3 Access to WTO and AfCFTA dispute resolution mechanisms

Only WTO member states can access the WTO DSS. As a result, non-member governments cannot file a complaint with the WTO DSS. However, there are instances where people and businesses can indirectly participate in the DS processes of the WTO by persuading their country to file their issue before the WTO. Private parties may participate by convincing a WTO member to support their cause. At the moment, there are no criteria in place to determine whether a member can submit a private party's case to the WTO-DSS; instead, this decision is left to the members' discretion. Similar to this, under the AfCFTA DS Protocol, only members are permitted to present a case to any of the DSB's organs. AfCFTA DSS is inaccessible to both businesses and people. It's possible that private parties don't always succeed in persuading the state to refer their cases to AfCFTA DSS. Consequently, allowing private parties access to AfCFTA DSS enables them to advocate for themselves and take an active role in the proceedings, both of which are necessary for bringing about justice. African nations have a poor history of resolving disputes amicably because they worry about being sued again. Due to a paucity of records, it is possible but unlikely that African governments will file private lawsuits under the AfCFTA DSS against other members for engaging in illicit trade practices. In order to represent their private parties before the AfCFTA DSS or to change the DS protocol to allow access to private parties, African countries should do both.

4.4 Power of the panels of the WTO and AfCFTA dispute settlement systems

Members of the WTO Panels are qualified to resolve disputes that result from the covered agreements under the WTO regime. One must be knowledgeable of and possess the required skills in international trade law to resolve disputes resulting from the WTO Agreement, the GATT 1994, Multilateral Agreements on Trade in Goods, the GATS, the TRIPS Agreement, and the DSU. The ability of the WTO Panel to decide on legal issues not immediately related to the agreements covered,

however, is not expressly stated in the covered agreements. The DSU does not guarantee that the Panel will be qualified to decide cases involving, For instance, norms of coercion where a state forces another state to act in a particular way through the use of force, norms of jurisdiction where a state affects people and property outside its territory, and non-intervention issues where a state meddles in the internal affairs of foreign countries.

Similar to the DSS of AfCFTA , there is no express law allowing the Panel to address PIL-related legal issues that are unrelated to the AfCFTA Agreement. A portion of Article 12(2) of the DS protocol also specifies that "...make findings to aid the DSB in making recommendations and rulings." Nevertheless, Article 11 (1) (b) instructs that "...make such findings as will assist the DSB in making recommendations and rulings." These clauses could be seen as granting the Panel implicit authority to resolve all aspects of a dispute, including PIL, similar to Article 11 of the WTO DSU. This is due to the fact that resolving a PIL-related issue is crucial to resolving a problem involving the AfCFTA accords, and the Panel is unable to reach a final conclusion without having the authority to resolve the PIL-related matter at hand. Simply because there isn't a specific clause stating that such matters should be decided in advance doesn't mean that the Panel should ignore PIL-related issues while making a decision. Therefore, even though it is insufficient, it is conceivable to rely on an implicit capacity to consider PIL-related issues from the DS Protocol Articles 11(2) and 12(2). However, adding a particular clause allowing the AfCFTA DSS Panel to rule on PIL questions could have been a more effective means of reaching a thorough conclusion.

4.5 Enforcement of the WTO and AfCFTA dispute settlement systems

The primary means of enforcement under the WTO DSS are retaliation, suspension of concession agreements, and compensation. In the majority of the cases that were filed before the WTO, voluntary compliance took place. Only a small percentage of instances, though, are compensated. The Japan - Alcoholic Beverages II is a prime example. The most decried strategy is retaliation because it fosters animosity among participants. Only seventeen out of 60 WTO cases invoked the right to retaliate. Only nine of those cases, though, were given permission for retribution, and five of those cases saw reprisal actions taken against them. When

a respondent party disobeys the Panel/decisions, AB's retaliation involves the withdrawal of a tariff concession. The justification for retaliation is that the increase in tariffs will harm the responding state's exporters economically and put that state under internal pressure to stop doing actions that are against WTO regulations. The retaliating nation's market size must be greater than the non-complaining nation's in order for this hypothesis to hold true when there is a disparity between their economies.

All WTO DSS enforcement practices were adopted by the AfCFTA. Retaliation, however, will not be possible under the AfCFTA DSS. Due to their tiny economies, African nations lack the power to compel the responding party to abide by the AfCFTA DSS's rulings. In addition, the majority of LDCs in Africa are importers, thus retaliation could push up the cost of imported commodities, hurting its own populace. Additionally, when the trading relationship is one-sided, which is also a concern under WTO, retaliation becomes problematic. For instance, it would be difficult for Chad to take action against Ethiopia if it violated its AfCFTA obligations if Ethiopia exported coffee to Chad and did not import anything from that country. The WTO DSS should have been revived with other suitable applicable instruments under the AfCFTA DSS since the risk of retaliation prevented African nations from adopting it in the past. Therefore, it is necessary to change the DS Protocol to substitute monetary damages or compensation for retribution.

4.6 Approaches of DS under the WTO and AfCFTA dispute settlement systems

Under the WTO DSS, the procedures of DS comprise consultations, determination by panel and AB, good office, arbitration, conciliation, and mediation. Consultation is the DSU's primary tactic. The parties are urged to consult one another to resolve their conflict. However, if they are unable to resolve their disagreement through conversation, they may turn to Panel procedures and AB review. DS in WTO DSS are often resolved by a panel and an AB. Arbitration is offered as an alternative by the WTO DSS under Article 25 of the DSU. If the parties decide to use arbitration, they should specify the issues to be resolved therein, as well as the procedures to be followed and their commitment to upholding the arbitral decision. The DSU also offers mediation, good offices, and

conciliation as DS options. Such methods may be used at any time in a private manner and discontinued at any time. Additionally, they can carry on with the Panel procedure with the parties' consent. The DG may help the DS by acting as a liaison and acting as a mediator.

Similar to this, the AfCFTA DSS employs good office, mediation, arbitration, conciliation, adjudication by panel and AB, and consultation as DS approaches. The AfCFTA DSS promotes consultation as a means of conflict resolution. However, adjudication by a Panel and AB is the next option if consultation is unable to settle the conflict. Arbitration is also used in the AfCFTA DSS to resolve disagreements based on the parties' knowledge of the procedures established in the agreement. The parties' plans for upholding the arbitral judgement must be made clear in the agreement. The agreement and the arbitral award should be notified to the DSB in a manner similar to how the AfCFTA DSS operates. The DS Protocol forbids the simultaneous adjudication of the same matter before the DSB. If one of the parties refuses to comply, the aggrieved party may take the case to the DSB.

4.7 Legal Assistance provided under the WTO and AfCFTA dispute settlement systems

When developing nations want legal counsel and support with regard to DS, the WTO Secretariat offers assistance. However, because the Secretariat lacks sufficient human resources and is tasked with upholding neutrality throughout aid, its support is limited. Its aid does not include representation and is only available during the early stages of a dispute. The Based non - profit Advisory Centre on Global Trading Entity Law (an intergovernmental entity separate from the WTO) was founded to combat unequal access to international justice between states. The ACWL's primary duties include acting as a law firm with a focus on WTO law, providing legal aid and training to developing countries and LDCs. First time ever, ACWL supported Pakistan in the American Board of Arbitration proceedings involving the Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan.

The DS Protocol does not explicitly state that the Secretariat must provide specific legal assistance to developing nations, and LDCs in particular, under the AfCFTA DSS. Although the Protocol has a clause discussing technical cooperation, it does

not require the Secretariat to give LDCs any extra help. Instead, it anticipates the Secretariat assisting all AfCFTA participants. Therefore, the Protocol needs a specific clause requiring the secretariat to give LDCs special support. LDCs lack knowledgeable attorneys who could stand in for them and defend their rights. Additionally, they do not have the financial means to retain lawyers with expertise in international trade legislation. Because of a shortage of funding, there is a concern that African LDCs won't use the AfCFTA DSS.

4.8 Limitations of the WTO dispute enforcement mechanisms and AfCFTA dispute enforcement mechanisms

4.8.1 The limitations of WTO Dispute settlement mechanism

The WTO's dispute resolution process does not include an enforcement apparatus; rather, it leaves it up to the complaint to carry out the agreement's enforcement. Due to their frequent lack of' retaliatory that might threaten' consequences on the party violating the agreement, the weaker developing nations are left out of the dispute settlement process. The lack of economic consequences for the offending country takes away motivation to uphold WTO Agreements. The WTO Advisory Services in Geneva's subsidized legal help is not entirely sufficient for a state to successfully file a complaint against a more powerful member state. This is due to the possibility of prejudice in the assistance provided by the Advisory Services and other NGOs, favouring the unique interests of the NGOs. The work done by NGOs has come under fire for being of a lower calibre because it is frequently done by interns who work for these organizations. This stands in stark contrast to the work that the developed countries' arguments are based on, which is prepared by high-level legal specialists that the governments pay with the assistance of powerful corporations.

The system is far from ideal and has faced internal and external criticism. In reality, though, the process has come under fire for not providing equal opportunity for the effective involvement of African nations. The ability of member states to use the DSB is unbalanced, according to a number of variables. The WTO dispute settlement process is not open to all members, and it does not

provide a level playing field for all parties. Furthermore, the structure does not promise that African nations would always be able to influence the WTO's course.[78]

The WTO dispute settlement system takes too long to settle disputes as presented in Table 4.1 below.

Table 4.1 Timeframes for settling disputes.

Days 60	Mediation, consultations etc.
days 45	Panelists are appointed and the panel is set up
Months 6	panel finally reports to parties
weeks 3	Panel finally reports to WTO members
days 60	Report adopted by the DSB
Totals 1 year	No appeal
Days 60-90	Report of the Appeal
Days 30	Appeals report adopted by DSB

Source: globaltraderelations.net

By removing developing nations' veto power, the creation of a third-party quasi-judicial process (the Appellate Body) to settle disputes could result in rulings that change the WTO's course to their potential damage. This is due to the Appellate Body's concern with a positivist approach to the WTO rules rather than its developmental objective.[79] Although the WTO's concessionary decision-making process is noteworthy, some are worried about the consensus's character. They contend that in order to produce just and equitable outcomes, there must be a "quality of consensus-making." Additionally, assistance services are only offered after a dispute has been legally filed, indicating a capacity gap in the case's proper preparation. The Appellate Body is also aware that governments in developing nations might not have the same level of trade expertise among their rank and file to effectively represent their interests, which is why it made a significant decision to permit private legal counsel to represent a state party in the European

[78]Ng'ong'ola, "Replication of WTO Dispute Settlement processes in SADC", p. 78

[79]Seth, *WTO och den internationellahandelsordningen*, pp 98-99.

Commission-Bananas case. The choice to permit legal private counsel to represent member states, however, emphasizes the reality that the DSB's system is so intricate that training is required to use it. Poorer members or nations find it difficult to use the DSB on the same terms as wealthier nations due to the high costs of legal battles and a lack of technical expertise.

All members are welcome to participate in the dispute resolution procedure, but each member is responsible for covering their own legal expenses, which can be very expensive for developing nations. In this situation, it would be highly expensive to file a lawsuit with the WTO. For instance, when the costs of lobbying and public involvement are added on, the amount needed to fund just one leg of litigation becomes extremely large. The majority of WTO issues are ultimately handled by the Appellate Body, and disagreements are rarely settled in a single session. As a result, the WTO advantages more developed countries who have the financial means to pay for these costs, which present a challenge for African countries. The WTO's dispute settlement procedures are not equally accessible to all parties under this strategy.[80] .

Because trade disputes are so complex and technically advanced, litigating a lawsuit involves both legal and technical expertise. Parties must take on the roles of both players and referees in order to identify violations of trade agreements and bring them for settlement. Some members struggle to recognize the problems clearly enough to solve them. The members, such as developed nations, on the other hand, have armies of qualified trade specialists from the public and private sectors that collaborate to ensure efficient case investigations. They also put a lot of effort into generating political interest, which is very helpful in determining whether or not the case decisions will ultimately be followed.[81]

Negotiations in the area of international trade, which are influenced by both political and economic forces that determine the tone of international relations, resulted in the WTO dispute settlement process. The GATT forum has been used by powerful trading states to advance their own interests. All members are free to

[80]Article IV:2 of the WTO Agreement

[81]Art 3 AfCFTA Dispute Settlement Protocol.

participate in meetings, to oppose or suggest ideas, and to accept or reject a consensus. The majority of WTO members are developing nations, and the WTO's credibility as an organization that defends the trade interests of all members depends on their successful involvement. Consensus-building techniques are used to reach decisions.

Due to unique political or economic relationships, members are unwilling to bring significant trading partners before the DSB. Receiving development support from a significant donor nation or participating in the same free trade agreements are examples of these special connections. A country is less likely to file a complaint against the nation that provided it with help, for instance, or a free trade agreement between two nations may have its own dispute resolution provisions that are independent of the DSB.

4.8.2 Limitations of the AfCFTA dispute settlement

Despite the AfCFTA's increasing inclusion of measures meant to solve the enduring issue of multiple and conflicting trading agreements, the practicality or method of operation for attaining the goal is still unclear given the historical trajectories and heterogeneity of the various African areas. The AFCFA is not the exclusive mechanism for resolving conflicts. For instance, the AfCFA's Protocol on Rules and Procedures on the Settlement of Disputes' Article 3(2) states that any specific supplementary rules and procedures created in other areas of the AfCFTA for the resolution of disputes take precedence over the provisions in the Protocol. Therefore, and quite crucially, a key distinction between the dispute resolution systems of the AfCFTA and the World Trade Organization is that the WTO's dispute resolution system does not contain competing methods for resolving disputes. It is the single forum for the official resolution of disputes between WTO members, in accordance with Article 23(1) of the DSU. The AfCFTA acknowledges that judicial resolution of disputes is unlikely to be the sole tool for resolution of the majority of trade disputes by providing various avenues for dispute resolution.

If AfCFTA signature states do not additionally investigate non-litigious settlement of trade disputes to complement it, the AfCFTA's dispute resolution mechanism is

likely to become obsolete. In other words, by failing to strategically incorporate the effective components of the global trading system within the current institutional architecture of the African Union, such isolation will limit the likelihood that the AfCFTA's dispute settlement system will be successful. A completely new and parallel system of dispute settlement in Africa also faces resource challenges due to its lack of local relevance and rootedness, as well as its high start-up, administrative, and bureaucratic costs in a situation where contributions from African States to existing regional economic communities have not always been timely or sufficient to fund their operations. The African Union's institutional reforms under Kagame, notably the Union's move toward self-financing, must hopefully go into effect if the AfCFTA is to have the funding it needs to be implemented.

The failure to creatively combine the dispute resolution processes that already exist at the subregional level with what has been successful with disputes in the global trade system is likely to be the biggest drawback of the new dispute settlement system created by the AfCFTA. However, there is little harm in trying out this strategy given that the majority of experience and expertise in resolving trade disputes and issues have been at the sub-regional level. In this case, the AfCFTA Dispute Resolution Mechanism may learn a lot from the sub-regional level.

4.9 The possible reforms critical to the WTO and AfCFTA disputeenforcement mechanisms

Parties are able to participate in the DSB through the WTO Mechanisms as interested third parties or as complainants. It is challenging for a developing nation to begin procedures since it is costly financially and demanding in terms of legal and technological requirements. However, if developing nations take part as interested third parties, the cost of dispute resolution is reduced, and they also gain crucial first-hand knowledge of how conflicts are resolved by the WTO. Although the interested party approach is open, emerging nations have rarely used it. The WTO's dispute processes will be reasonably equally accessible to members if this approach is employed more frequently.

Additionally, the AfCFTA-DSM must be implemented in a way that prevents it from being seen as an ADR system. To prevent state parties from choosing another venue, its originality, uniqueness, and distinctness from other same regional conflict mechanisms, such as those in the SADC and TFTA, must be explicitly stated in its practice instructions. The persistent hostility and mistrust between these areas contributes to the slow rate of economic growth. In this way, the principle of pan-African solidarity is crucial for policing and limiting the actions of African governments toward one another. [82]

Member nations must completely execute the earlier judgments against them before being permitted to start WTO proceedings in order to guarantee greater adherence to the WTO rules. Although this is a good idea, it will not level the playing field in dispute resolution and will instead make it much more difficult for weaker parties to challenge rulings that they disagree with. In order to prevent them from being denied access to the advantages enjoyed by the rest of the WTO, mandatory compliance will be implemented.

The application of the most-favoured-nation (MFN) principle under the general WTO rules may serve as a deterrent to the involvement of all interested parties in a dispute. Korea litigated in the United States - Safeguard on Circular Welded Pipes case, but other parties chose not to participate as interested parties. Instead, they waited for the dispute to be resolved before taking advantage of the benefit and incurring any associated costs. Due to the application of the MFN principle, when a member complies with the decision of the dispute settlement body and provides additional concessions to the complainant in the dispute, it is required to provide the other WTO members with the same treatment. This implies that the party who has paid for all litigation expenses did so in vain because all other participants will reap the benefits as free riders.

The awarding of compensation serves as an example of this situation's inherent injustice. The MFN concept shall be followed and all parties involved will gain if a

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

decision orders the payment of compensation. However, if trade concessions are to be suspended, only the real disputing parties will be affected. As a result, complainants are treated unfairly by the system because they do not directly benefit from the dispute's initiation.

It has been suggested that compensation be utilized as both a suggestion and a noncompliance remedy since compensation is now used as a response to non-compliance. The party with the right to compensation should also have the option to pick which concessions and under what conditions it wants those concessions to be executed in its favour.

The application of retroactive damages is the subject of several modifications that have been suggested. The granting of retroactive damages, however, would jeopardize the protectionist measures that a nation can implement before a WTO decision. Retrospective damages will be calculated in three stages: "(a) the date the measure was implemented; (b) the date the consultation request was submitted; or (c) the date the Panel was established.

CHAPTER FIVE

Conclusion, Recommendations, and Summary

5.0 Introduction

In the last chapter, an analysis of the WTO dispute enforcement mechanisms and AfCFTA dispute enforcement mechanisms was presented. This chapter gives reaffirmation of the research objectives, research summary, conclusions, and recommendations of the study.

5.1 Reaffirmation of the Objectives

This study sought to:

- Establish the similarities between the WTO dispute resolution system and the AfCFTA dispute resolution system.
- Understand what underpins the WTO dispute settlement system and AfCFTA dispute settlement system
- Establish the challenges faced with WTO dispute enforcement mechanisms and AfCFTA dispute enforcement mechanisms
- Articulate the possible reforms critical for dispute settlement systems in trade law.

5.2 Summary

Chapter one

The study's opening chapter, Chapter 1, essentially provided the research's direction. It provided an introduction that acquainted the reader with the entire research investigation. The main goal was to clarify the problem statement, lay out the study's objectives, and provide justification for why it was required to conduct this investigation.

Chapter Two

In chapter two the researcher articulated the notion of dispute settlement, provided an overview of WTO and its dispute settlement system. Further the essence of WTO' system, procedures and implementation of the rulings of the board of the WTO were also elucidated in this chapter.

Chapter Three

The researcher covered the AfCFTA, its dispute resolution system, the fundamentals of the Protocol that controls disputes, the AfCFTA's dispute resolution procedures, and the application of the board's recommendations and decisions in this chapter.

Chapter Four

In this chapter the researcher also made a comparative analysis of the WTO and AfCFTA dispute settlement systems and how effective are the WTO and AfCFTA dispute enforcement mechanisms.

Chapter Five

In this chapter the researcher summarised arguments advanced in this study. In addition, the researcher also gave an overall conclusion and recommendations.

5.3 Conclusion

A free trade area's ability to function effectively as well as an effective investment framework both depend on dispute resolution systems. Because the WTO's methods have been tried and tested, investors and traders have faith in them, and the AfCFTA structure, which is modeled after that of the WTO, offers predictability and confidence, particularly for foreign investors. The dispute resolution body is in charge of running the WTO dispute system (DSB). There are four basic steps in the WTO dispute resolution process. Which are: Panel stage, consultations, and appellate review Proceedings and appeals are only allowed to address matters of law that are covered and are restricted to legal concerns. No matter their economic standing, any member can challenge other members over trade infractions according to the WTO's mechanisms for dispute settlement. The system has flaws in that, despite the deadlines, it can still take a long time to resolve a disagreement, during which the complainant may continue to suffer financial injury if the challenged action takes a while to be implemented. The economic and commercial interests of the successful complainant during the dispute settlement process are not subject to any interim remedies. Additionally, even after winning in dispute resolution, the complainant would not be compensated for damages incurred while the respondent was implementing the decision. The "winning party" is also not entitled to any payment from the opposing party to cover its legal costs.

Not all Members have the same practical competence to use the suspension of obligations in the case of non-implementation. And last, in a few instances, implementation has not been sped up by suspending concessions.

Contrarily, the AfCFTA's dispute resolution process entails conciliation or mediation, panels, good offices, consultations, and an appellate body. First-instance arbitration might be considered by disputing parties as a possible resolution. The basic and particular goals of the AfCFTA complement one another. I think the decision to establish a dispute resolution mechanism in the pattern of the WTO represents the opinions of a select number of African states and technical experts who want a strong dispute resolution system as a guarantee of upholding the AfCFTA's obligations. If AfCFTA signature states do not also look towards non-litigious settlement of trade disputes to complement the AfCFTA's dispute resolution mechanism, it is likely to become ineffective. In other words, by failing to strategically incorporate the effective aspects of the global trading system within the current institutional architecture of the African Union, such isolation will limit the likelihood of success of the AfCFTA's dispute resolution process .

Retaliation is one of the implementation methods used by the WTO DSS. However, it is an ineffective method of enforcement that constantly sparks trade conflicts among the participants. Thus, maintaining such a system under the DS Protocol can lead to commercial conflicts, which will weaken the sense of brotherhood and unity among African States. Furthermore, there is no means to retaliate when trade disputes arise between nations that do not do business together. The DSU of the WTO is also constrained by lengthy deadlines for conducting consultation and submitting written comments. The work of the Panel is done on an as-needed basis, and the AB only works part-time. The WTO DSS is in a terrible state as a result of WTO countries' failure to update the DSU and nominate members of AB.

On the other hand, by signing the AfCFTA, which serves a purpose quite similar to that of the WTO, namely the introduction of FTA, members of African countries established a regional trade system. AfCFTA, however, also contains some peculiar characteristics. The DSU of the WTO, which was embraced 25 years ago and hasn't been changed since, was approved by the DS Protocol of the AfCFTA. Adopting a problematic DSS is completely inappropriate in light of the possibility of developing

a DS Protocol that is up to date enough to settle ongoing and future trade disputes, considerate of the African context, and able to circumvent WTO DSU limitations.. As a result, there is a worry that the AfCFTA DSS could become unusable.

5.4 Recommendations

Considering the conclusion above, one can note that gaps exist in the DS Protocol. The following would be recommended by the writer;

- The WTO and AfCFTA dispute settlement mechanisms must include a variety of means for the victorious party to impose the panel report's recommendations. This will provide the party the freedom to implement these suggestions without necessarily changing its local law.
- Instead of wasting time getting the parties' approval for the Secretariat's nominees, the AfCFTA should set up a DSS where Panel members are chosen from a shortlist, and in the event that the parties are unable to agree, the nomination of Panelists should be given to the DSB chairperson and the Secretariat Head.
- In order for the remedy to be more effective, the WTO dispute settlement system must work together to allow for criminal penalty to be an option open to poor states. Conciliation and mediation have also been suggested as ways to lower the cost of entry to the DSB. However, as voluntary mediation is an attempt to revive the GATT's dispute settlement procedures, it will be a step back.
- The WTO and AfCFTA dispute settlement mechanisms must provide compensation for the harm incurred while the respondent was implementing the decision, and AfCFTA must be operated or operate in a way that disqualifies it from being an alternate dispute resolution method.
- Because it will be difficult to find candidates with the necessary experience to handle these issues, the panel should be full-time. This is significant because it buys time while the task is being completed.
- There is need for the WTO and AfCFTA dispute settlement systems to ensure affordability and access among the members.

- There is need for the WTO and AfCFTA dispute settlement systems to reduce the time frame to finalise disputes.

BIBLIOGRAPHY

Chapters in Books

a) Brink G, 'South Africa's Experience with International Trade Dispute Settlement', inGregory C. Shaffer and Ricardo Melendez-Ortiz (eds), Dispute Settlement at the WTO, the Developing Country Experience (CUP, 2010).

b) Delich V, 'Developing Countries and the WTO Dispute Settlement System' in BernardHoekman, Aaditya Mattoo, and Philip English (eds), Development, Trade, and The WTO (A Handbook World Bank 2002).

c) Nottage H, '*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, (CUP 2010).

d) Shaffer G and Ganin D, *'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).

e) J. G. Merrills, '*International Dispute Settlement*' (University of Sheffield, 4th edn, CUP 2005).

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

g) WTO | Disputes - Dispute Settlement CBT - Historic development of the WTO dispute settlement system - The system under GATT 1947 and its evolution over the years

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

i) GATT 1947 article XXIII:2, A WTO Secretariat Publication, *A Handbook on the WTO Dispute Settlement System*, p 12.

j) Van den Bossche, *The Law and Policy of the World Trade Organization – Text, Cases andMaterials*, pp 273-277.

k) J. G. Merrills, '*International Dispute Settlement*' (University of Sheffield, 4th edn, CUP 2005).

l) 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)

m) Cofelice, 'African Continental Free Trade Area: Opportunities and Challenges' (2018) 3 The FederalistDebate, 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

n). 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.htmlaccessed 10 April 2022

o) Karen J. Alter, Laurence Helfer, and James ThuoGathii, "*Backlash against International Courts in West, East and Southern Africa: Causes and Consequences*", (2016), European Journal of International Law, Vol. 27 No. 2, 293–328

JournalArticles

a. Akinkugbe O D, '*Dispute Settlement under the African Continental Free Trade Area Agreement: A Preliminary Assessment'*available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3403745

b. Cofelice A, '*African Continental Free Trade Area: Opportunities and Challenges'*, (2018)(3) The Federalist Debate available at 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

c. Crochet V, Jacques F, Oduor C, and Mbabazi A, Georgetown University, '*Dispute Settlement Mechanisms in Free Trade Agreements',* (2016) available at https://www.tradelab.org/single-post/2018/03/02/Dispute-Settlement-Mechanisms-in-Free-Trade-Agreements

d. Steger D P and Van den Bossche P, '*WTO Dispute Settlement: Emerging Practice and Procedure'*, (1998) 92https://www.jstor.org/stable/25659196

e. Bore O, '*The Dispute Settlement Mechanism under the African Continental Free Trade Area'*, available at https://www.tralac.org/blog/article/13529-the-dispute-settlement-mechanism-under-the-african-continental-free-trade-area.html

f. Marc D. Froese, "Regional Trade Agreements and the Paradox of Dispute Settlement" (2014) 11 Manchester J. Int'l Econ. L. 367 at 367 (HeinOnline).

g. Marc D. Froese, "Regional Trade Agreements and the Paradox of Dispute Settlement" (2014) 11 Manchester J. Int'l Econ. L. 367 at 367 (HeinOnline).

h. TetyanaPayosova, 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 on 27 April 2022.

i. Malcolm McKinnon, Peter Draper and CreckBuyongeMirito, A Business Guide to the African Continental Free Trade Area Agreement (ITC, 2018) available at https://intracen.org/uploadedFiles/intracenorg/Content/Publications/AfCFTA%20Business%20Guide_final_Low-res.pdf Accessed on 27 April 2022

j. 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 on 27 March 2022.

k. Emilia Onyema, '*Reimagining the Framework for Resolving Intra-African Commercial Disputes in the Context of the African Continental Free Trade Area Agreement*' (2020) CUP available at 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

l. . YafetYosafatWilbenRissy, *'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 on 21 April 2022

m. Gregory Shaffer, *'Weaknesses and Proposed Improvements to the WTO Dispute Settlement System: An Economic and Market-Oriented View'* (2005) University of California, available at https://www.researchgate.net/publication/228380122_Weaknesses_and_Proposed_Improvements_to_the_WTO_Dispute_Settlement_System_An_Economic_and_Market-Oriented_View accessed on 27 April 2022.

n. 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.htmlaccessed 10 April 2022.

o. Karen J. Alter, Laurence Helfer, and James ThuoGathii, "*Backlash against International Courts in West, East and Southern Africa: Causes and Consequences",* (2016), European Journal of International Law, Vol. 27 No. 2, 293–328

p. Retaliation means action taken by a country whose exports are adversely affected by the raising of tariff or other trade-restricting measures by another country.

q. Old.zimli.org

r. Etd.aau.edu.et

s. Digitalcommons.schuilichalaw.dalca

t. Hdl.hande.net

u. Ir.uz.ac.za.8080

v. Uir.unisa.ac.za

w. Gupea.ub.gu.se

x. Afronomicslaw.org

y. Centurionlg.com

z. Fcthighcourtelibrray.com

Treaties/Agreements

a) The Agreement Establishing the African Continental Free Trade Area (AfCFTA Agreement), adopted on 21 March, 2018, entered into force on 30 May 2019
b) The Dispute Settlement Understanding of WTO (DSU), adopted on 15 April 1994,entered into force on 1 January 1995.
c) The General Agreement on Tariff and Trade 1994(GATT), adopted on 30 October 1947, entered into force 1948.
d) The Protocol on Dispute Settlement (DS Protocol) of the Agreement Establishing theAfrican Continental Free Trade Area, adopted on 21 March 2018.
e) The Treaty Establishing the African Economic Community (Abuja Treaty), adoptedon03 June 1991, entered into force, 12 May 1994
f) Ng'ong'ola, "Replication of WTO Dispute Settlement processes in SADC", p. 69
g) 4 th Ed; see also Keith v. Levi C.C.Mo.2 F. 745.
h) DS Protocol, Article 19(4) 17
i) DS Protocol, Article 19(5) 18 Ibid, Article 21(5) 19
j) DS Protocol, Article 22(9)
k) DS Protocol, Article 23
l) DS Protocol, Article 4(1). 8
m) DS Protocol, Article 1 (e). 9