THE ROLE OF WORLD TRADE ORGANIZATION (WTO) IN SUSTAINABLE DEVELOPMENT OF AFRICA UNDER INTERNATIONAL TRADE LAW.

CASE STUDY EAC MEMBER STATES.

By

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A Thesis submitted in partial fulfillment of the academic requirements for the award of Master's Degree of Laws (LLM) in International Economic and Business Law.

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DECLARATION

I, HABIYAREMYE Froduard, a student at Kigali Independent University (ULK), Post-graduate studies, Master's in International Economics and Business Law do hereby declare that this final dissertation entitled '' the role of world trade organization(WTO) in in sustainable development of Africa under international trade law. Case study EAC member states.; under the supervision of Dr. SHEMA PIERRE, is my original work to the fulfillment of Master's Degree in law and it has never been presented partially or fully by anybody else at any University or High Learning Institution nor elsewhere for any academic qualification. Where any other persons' works have been used, references and bibliography have been acknowledged.

Date……/……. /…….

Signature ……

APPROVAL

I, Dr. SHEMA PIERRE, appointed supervisor of the work presented in this dissertation entitled' the role of world trade organization (WTO) in in sustainable development of Africa under international trade law. Case study EAC member states, hereby confirm that I have supervised this thesis and that submission is made with my approval.

Date : ……/……. /……..

Signature : …….

Dr. SHEMA PIERRE

DEDICATION

To the almighty God;

To my beloved parent and siblings;

To my supervisor;

To All my classmates

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It is with my highest pleasure to take this opportunity to acknowledge all who have contributed to this study. First of all, I sincerely thank Almighty God and his Son Jesus Christ for strong protection and direction to me during my studies till at the completion of this dissertation.

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HABIYAREMYE Froduard

LIST OF ABBREVIATIONS AND ACRONYMS

WTO: World Trade Organization

EAC: East African Community

UN: United Nations

ITO: International Trade Organization

GATT: General Agreement on Tariffs and Trade.

PTAs': Preferential Trade Agreements

DSS: Dispute Settlement System

PTC: Permanent Tripartite Commission

RTA's: Regional Trade Agreements

DSM: dispute settlement mechanisms

CMT: Committee of Ministers responsible for Trade

EADB: East African Development Bank

SADC: Southern African Development Community

COMESA: Common Market for Eastern and Southern Africa

CET: Common External Tariff

LVFO: Lake Victoria Fisheries Organization

IUCEA: Inter-University Council for East Africa

CC: Coordination Committee

CET: Common External Tariff

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ABSTRACT

International trade law forms an influential (due to threat of trade sanctions) normative tier above domestic law in shaping the process of economic globalization. Its main components are multilateral agreements such as the World Trade Organization's General Agreement on Trade in Services and Agreement on Trade-Related Aspects of Intellectual Property Rights. Increasingly important are bilateral trade agreements. Although often termed free trade agreements, their inclusion of pro-monopolistic intellectual property components and provisions designed to alter the health systems of less important trading partners suggests a preferential strategic purpose favoring multinational corporate interests, with implications for applied ethics due to their limited democratic input and lack of engagement with bioethical and human rights norms.[1] One of the main problem areas for the identification and protection of global public goods has been their (often adverse) interaction with international trade law. Of course, a fair, welfare-promoting international trade regime that contains trade disputation may be seen as a global public good in itself, particularly if that facilitates the global dispersal of products and services that have community benefit.[2]

The Latin term lex mercatoria denotes transnational self-regulation among merchants at least as early as the Middle Ages. Legal scholars disagree about whether historical lex mercatoria constituted a legal system. Nowadays, transnational private governance is practiced and expanded. Modern formulating agencies like International Institute for the Unification of Private Law and UN Commission on International Trade Law work out systematic

[1] Trade Law and Globalization , T.A. Faunce, in Encyclopedia of Applied Ethics (Second Edition), 2012 available at https://www.sciencedirect.com/topics/social-sciences/international-trade-law accessed on 30 April 2023
[2] Global Public Goods, T.A. Faunce, in Encyclopedia of Applied Ethics (Second Edition), 2022 see also https://www.sciencedirect.com/topics/social-sciences/international-trade-law accessed on 30 April 2023

restatements, principles, and internationally standardized trade terms to further worldwide commercial transactions. Governmental and nongovernmental organizations formulate the so-called soft law, that is, guidelines and best practices, to bring about international norms in many areas where no global legislation is available. Historically and currently, parties in international business disputes avoid state courts and prefer arbitration. Arbitration tribunals apply lex mercatoria, the theoretical dispute about the qualification of the rules as law notwithstanding. In a global context, the private, self-governing Lex mercatoria approach is indispensable. Legal scholars and social scientists today are exploring the legitimacy of rules developed by private organizations and the interplay of law and private ordering.[3]

[3] Lex Mercatoria, Christine Windbichler, in International Encyclopedia of the Social & Behavioral Sciences (Second Edition), 2015 see also https://www.sciencedirect.com/topics/social-sciences/international-trade-law

CHAPTER I: GENERAL INTRODUCTION

1. BACKGROUND TO THE STUDY

Before to states details on the role of world trade organization (WTO) in Africa under international trade law. Case study EAC member states. To divide into the fascinating subject of international trade, let us take a moment to think about what international trade is and how it affects us. Many of the goods and services (intangible goods such as banking services, cellular phone service, etc.) we use on a daily basis are acquired through trade with different countries. Like any other economic activity, the trade of goods and services is governed by a set of rules and regulations. However, international trade is also governed by international organizations and international agreements.[4]

International trade exists when there is an international law, which exists because nations have willingly agreed that it is in their best interest to establish rules and regulations in order to improve and safeguard their political and socio-economic relations with one another. Of course, the willingness to cooperate with others for a common good is occasionally misperceived as a renunciation of sovereignty. On the contrary, the manifestation of the willingness of states to freely exercise their sovereign right is a preservation and extension of such a right for the collective benefit of states[5]. In effect, the sovereign willingness to cooperate with others for a common good or in a manner that is not injurious to others does not imply an abdication of the obligation to exercise political and economic authority within a defined geographic territory or region.

[4] *A. J. S. J., Antunes, (2012). The effects of international trade on economic growth: an empirical comparison between Portugal and the Netherlands, p.*
[5] *M., Amiti, (1996). International trade in the manufacturing sectors of industrialised countries: Theory and evidence (Doctoral dissertation, London School of Economics and Political Science (United Kingdom)).*

However, international trade is referred to as the exchange or trade of goods and services between different nations. This kind of trade contributes and increases the world economy. The most commonly traded commodities are television sets, clothes, machinery, capital goods, food, and raw material, etc.[6]

International trade has increased exceptionally that includes services such as foreign transportation, travel and tourism, banking, warehousing, communication, advertising, and distribution and advertising.[7] Other equally important developments are the increase in foreign investments and production of foreign goods and services in an international country. These foreign investments and production will help companies to come closer to their international customers and therefore serve them with goods and services at a very low rate[8]. All the activities mentioned are a part of international business. It can be concluded by saying that international trade and production are two aspects of international business, growing day by day across the globe.[9]

However, after the Second World War the world suffered an economic drain. Multilateral institutions such as the Bretton Woods institutions were created to promote international economic growth and cooperation[10]. There was a proposal to establish an International Trade Organization as a specialized agency of the UN, to regulate trade. However, the attempt through the Havana Charter to create the ITO in 1947, at the UN Conference in Havana, Cuba failed. Prior to this, in 1945 a group of fifteen countries engaged in negotiations to reduce tariffs and promote trade liberalization.[3] Upon failure of the creation of ITO, this group, which had

[6] *A. J. S. J., Antunes, Op cit., p. 345.*
[7] *P., Sun, & A., Heshmati, (2010). International trade and its effects on economic growth in China.*
[8] *R., Solow, (1956): A contribution to the theory of Economic Growth, Quarterly Journal of Economics, 70, February, pp 275-296;*
[9] *M., Amiti, (1996). International trade in the manufacturing sectors of industrialized countries: Theory and evidence(Doctoral dissertation, London School of Economics and Political Science (United Kingdom)).*
[10] WorldTradeOrganization,*Past, PresentandFuture* <*http://www.wto.org/english/thewto_whatis_e/tif_e/fact4_e.htm*> *accessed on 26/2/2023.*

now increased to 23 countries, adopted a 'protocol on provisional application' that took effect in June 1948. This marked the genesis of General Agreement on Tariffs and Trade. The GATT was initially ratified in 1947 by twenty-three contracting parties; eleven amongst them were developing countries. The GATT was a group of contracting parties that came together to be governed by a set of rules on international trade they had adopted. The GATT regime evolved as a result of several multi-lateral trade negotiations termed as trade rounds. These multilateral trade agreements were subsequently adopted as a single undertaking by the contracting parties in 1995 upon the establishment of the World Trade Organization.

The WTO was established as an institution to govern the international trading system, unlike GATT which was simply a set of rules adopted by various countries.[5] The institution serves two major roles, legislating and adjudication. In the WTO, the Dispute settlement System was created to administer its adjudication function that was governed by the Understanding on Rules and Procedures Governing the Settlement of Disputes[11].

The WTO dispute settlement system became operational on the first of January 1995. However, the DSS was in existence prior to this date as trade disputes were resolved, before the WTO, under the GATT regime[12]. The Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) recognizes this in Article 3.1.

Which provides that 'Members affirm their adherence to the principles for the management of disputes heretofore applied under Articles XXII and XXIII of GATT 1947, and the rules and procedures as further elaborated and modified herein[13].

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[11] World Trade Organization, Understanding on Rules and Procedures Governing the Settlement of Disputes <http://www.wto.org/english/docs_e/legal_e/ursum_e.htm#Understanding> accessed on 20 April 2023.

[12] Peter Van Den Bossche, The Law and Policy of the World Trade Organization (first published 2005, Cambridge University Press) 174

[13] Article 3.1 Understanding on Rules and Procedures governing the settlement of disputes

The 1947 GATT dispute settlement system did not set out a detailed settlement process, It only entailed two provisions that is Article XXII, entitled 'Consultations' and Article XXIII, entitled 'Nullification or Impairment[14]. Where disputes could not be resolved under these two provisions, working parties were established to resolve the disputes. These working parties consisted of representatives of all interested contracting parties, including the parties to the dispute, and made decisions on the basis of consensus.

The panels reported to the GATT Council, which was composed of all Contracting Parties, that adopted the recommendations and rulings of the panel by consensus, making them legally binding on the parties to the dispute. This diplomatic way of resolving disputes was possible as a result of the small member number and like-minded trade officials within GATT at the time. However, it was abandoned and from the early 1950s onwards, disputes were usually first heard by 'panels' comprising of three to five independent experts from GATT Contracting Parties that were not involved in the dispute.

As the number of members increased in GATT, especially developing countries, and in the wake of the establishment of the European Economic Community by the 1970s the diplomatic way of dispute settlement by negotiations could not be sustainable. The GATT Secretariat was expanded by including a legal office in 1983 to support the panels in drafting of reports, thus confidence in the panel system was restored as the application of rules of interpretation of public international law were applied as the basis of their rulings rather than diplomacy.

Hudec christened the GATT's Dispute Settlement System as a ''A Diplomat's Jurisprudence'' due to the system's ill-defined procedures and rulings in ambiguous prose. He however noted

[14] *P., Sun, & A., Heshmati, Op. cit.,*

that by the 1980's, the GATT dispute settlement procedure had transformed into an institution based primarily on the authority of legal obligations[15].

The GATT dispute settlement system gradually evolved from a power-based system of dispute settlement, through diplomatic negotiations, into a system that had many of the features of a rules-based system of dispute settlement through adjudication[16].

However, this new system did not lack its shortcomings, such as the susceptibility to stall dispute settlement as all decisions were made by consensus. These included the decisions for the establishment and composition of a panel and the authorization of the suspension of concessions[17]. This had an effect on how panels arrived at decisions as they would need to give a report that would be acceptable to all parties, regardless of whether they were legally sound. Besides, the fragmentation of dispute settlement procedures in the different GATT Agreements created an issue of varied application of procedures[18]. At the Uruguay Round, contracting parties agreed on the Understanding on Rules and Procedures Governing the Settlement of Disputes, which provides for an elaborate dispute settlement system. It improved the dispute settlement process within the GATT by creating the appellate structure for panel reports through the appellate review, as well as creating strict timelines for the various dispute settlement processes and quasi-automatic adoption of requests for the establishment of panels, panel reports and requests for the authorization to suspend concessions.

An effective dispute settlement mechanism is a vital component of trade governance as it ensures security for investors and traders. The lack of utilization by African Countries

[15] *R., Hudec, 'The New WTO Dispute Settlement Procedure', (Minnesota Journal of Global Trade, 1999, 4.)*
[16] *D. C., Kotlewski, (2013). Impact of International Trade on Economic Growth. Gospodarka Narodowa, 1, 5-29.*
[17] *United Nations Conference on Trade and Development. (2018). Evolution of the International Trading System and Its Trends from a Development Perspective. Trade and Development Board, Sixty-Fifth Session, 18. Item 7 of the provisional agenda*
[18] *P., Sun, & A., Heshmati, Op. cit.,*

especially EAC state members of a rule-based dispute settlement mechanism for trade disputes, does not guarantee traders and investors protection of their interests. The lack of predictability in the regime can be a deterrence essentially working against the objective of the AFCFTA, which is to promote intra-Africa trade. The study will recommend measures and approaches to dispute settlement that African Countries mainly EAC state members can adopt to ensure the utilization of the DSM under the AFCFTA framework.

The study also considers the adoption of the WTO DSS model by the African Continental Free Trade Area, in its protocol on rules and procedures on the settlement of disputes. The research analyses the possible challenges that may be transposed from the WTO DSS and recommends measures that EAC state member can take up to ensure utilization of a rule-based dispute settlement mechanism within the AFCFTA trade regime.

2. STATEMENT OF THE RESEARCH PROBLEMS

The liberalization of international trade pursuant to the World Trade Organization ('WTO') and preferential trade agreements ('PTAs') offers the potential for considerable welfare benefits at national and global levels, through economic growth, fairer competition among producers, increased access to a wider range of better-quality products and services, and the transfer of technology and knowledge.

The EAC members became, individually, original WTO Members on 1 January 1995. They are neither signatories nor observers to any of the WTO plurilateral agreements. EAC members have not been involved directly, either as complainant or defendant, in any WTO dispute settlement proceedings. However, both Kenya and Tanzania have participated as third parties in the disputes brought separately by Australia, Brazil, and Thailand, on "European Communities-export subsidies on sugar". The three EAC countries accord at least MFN

treatment to all their trading partners[19]. The dispute settlement system of the WTO aims at providing security and predictability to the multilateral trading system and preserving the rights and obligations of WTO Members.

The WTO and DSS is deemed as one of the most efficient dispute settlement mechanism as it is often termed as the 'jewel in the crown' for the multilateral trading system. However, it poses several hurdles, for EAC state members that render it ineffective for them. The effectiveness of the DSS for EAC state member can be measured by several parameters such as evaluating the utilization or participation levels in the system, period for settling disputes and ability to enforce recommendations.

These countries encounter several challenges that limit their utilization of the DSS. Some of the challenges include the high costs implication of participating in the DSS, the poor enforcement mechanism of the DSS, and the approach taken by EAC state members to disputes. The study seeks to explain why EAC state members like other EAC state members hardly utilize the DSS. One challenge that EAC State members may encounter is the lack of technical capacity to pursue claims due to the technical nature of the various agreements that make up the WTO regime. The WTO agreements are considered as a technical regime. Thus, in most cases, due to cost implications, such as high costs of legal fees, expert fees and costs in research and fact finding prior to the institution of a complaint, small EAC state members are not able to defend their rights against any violations. In some instances, it has been argued that EAC state members like EAC state members are not able to even recognize some of these violations[20]. These challenges hinder them from actively participating in the dispute settlement system and enforcing their rights. In Africa, Tunisia is the only country that has instituted a

[19] *ibidem*

[20] *S., Gregory, 'Developing Country Use of the WTO Dispute Settlement System: Why it matters, the barriers posed and its impact on bargaining ', Paper prepared for the WTO AT 10 :A look at the Appellate Body IN Sao Paulo , Brazil , May 16-17, 2005*

complaint against Morocco[21]. Other African countries have participated as respondents or third parties. Nevertheless, only thirteen African countries and five least developed countries have utilized the WTO dispute settlement system since its inception.[20]

The second major hindrance for EAC state members is the poor enforcement mechanism of the DSS. The main enforcement mechanism of the DSS is retaliation, and its effectiveness is dependent on the contracting party's market power. Thus, because of the weak enforcement structure, victory does not guarantee compliance, as the enforcement mechanism is also termed as enforcement by negotiation. Due to power dynamics, EAC state members cannot enforce the recommendations of the panels in instances of non-compliance by a developed country. As the weaker party economically, and because they do not trade in huge volumes, they cannot effectively pressure or leverage developed countries to comply. They are also highly dependent on access to the large markets of developed countries. Thus, retaliation does more harm than good to their economies. The power dynamics create undue influence in decisions for these African governments when considering pursuit of dispute resolution through the rule-based system[22].

Thirdly, the approach taken by EAC state members to disputes before the WTO is quite different from that taken by developed countries, which have stronger private sector and government relations. The private sector is the main driver and stakeholder in trade, while governments facilitate trade. The WTO regime affects the private sector, while locus stand before the dispute settlement system is for sovereign states and not private entities[23]. Thus, the lack of a strong partnership between government and private sector, within these African EAC

[21] *https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm Dispute by Member accessed on 25 th march 2023.*
[22] *B., Ulaşan, 2015.Trade openness and economic growth: panel evidence. Appl. Econ. Lett. 22 (2), 163–167*
[23] *R., Falvey, N., Foster, D., Greenaway, 2012.Trade liberalization, economic crises, and growth. World Dev. 40 (11),2177–2193.*

state members limits the integrated effort to utilize the DSS in cases of trade violations by other contracting parties. The jurisdiction of the DSS is for state-to-state disputes, strong private sector government relations must exist for the interests of investors to be taken up by their governments in pursuit of a resolution within the DSS.

There is also the issue of limited political will to institute complaints by these governments. The problem that exists is that EAC state members do not utilize a rules-based dispute settlement mechanism for trade disputes. The study examines the challenges that African countries encounter at the DSS that limit the utilization of the system and renders it ineffective for settling disputes.

The study will also consider the adoption of the WTO and DSS model by the African Continental Free Trade Area and whether the same challenges will persist or the dispute settlement mechanism will thrive within the AFCFTA framework. Basing on several challenges above mentioned, the research question is formulated as follow:

3. RESEARCH QUESTIONS

This research topic of the role of world trade organization (WTO) in sustainable development of Africa under international trade law. Case study EAC member states. The following research questions which will be developed bellow:

1. What are the challenges and shortcomings of the Dispute Settlement System of the WTO in EAC state members?
2. What are the measures should be taken to overcoming the challenges in regard to dispute Settlement System and the legal framework which applies on that disputes can arise on the WTO in relation to EAC state members?

4. HYPOTHESIS

The hypothesis on above questions I can suggest is that the dispute settlement of the AFCFTA will be to construct competitive industries which are underutilized by African countries as that required within the WTO practices. This is because EAC member state have many challenges within and outside which requires the dispute settlement system as the legal frameworks at the WTO and its transposition to the AFCFTA which will yield the same effect. Again it's better to adopt one laws applies in trade of EAC member states

5. RESEARCH OBJECTIVES

5.1. The general research objective

The general research objective is to ascertain the effectiveness of the WTO Dispute Settlement System for African countries.

5.2. The specific objectives

The specific objectives of the research will include critical analysis of the dispute settlement process, the challenges of the system and pre-assessment of effectiveness of a similar model of dispute settlement mechanism in the AFCFTA Protocol on rules and procedures in the settlement of dispute.

6. RESEARCH METHODOLOGY

The research methodology will be used in this research includes a textual analysis as primary and secondary sources, which included internet sources, library materials, published treaties, and scholarly writings.

In legal research methodology, such as The documentary method which used in collecting data from different written documents relevant to the topic including law texts, books, journal articles, reports, newspapers, magazines as mass media, etc.

The search undertaken is quantitative and the research design applied is both descriptive and causal. The descriptive part elaborates on the structure and process of the DSS, while the causal design analyses how the model adoption of the DSS in the AFCFTA framework, will have similar effect as that of the WTO for African Countries especially in EAC state members.

7. SCOPE OF THE STUDY

By method, we understand a set of ordered principles, rules of intellectual operations which do help for making of an analysis in order to get a result. This study used the comparative method, the exegetic method, the synthetic method and the analytical method, etc.

7.1. Comparative method

Comparative method is a method or process of comparing laws. It is a method of study and research in which the legal principles or methods of different systems of law are compared. This method was used in order to compare laws of different countries.

7.2. Exegetic method

Exegetic method consists in the critical explanation or interpretation of the texts of law. This process served the researcher mainly to interpret law texts.

7.3. Analytic method

This method enables to analyze the information got from the field and supplies more details about the general situation of the data collected. Based to this context, the researcher analyzed information gathered from law texts, books, journal articles, reports, newspapers, etc.

7.4. Synthetic method

This method was used to summarize the findings of the research and ease the general structure of this work.

The limitation encountered in the study is with regards to data collection on the international trade more especially in Dispute settlement system in the AFCFTA framework as the research is exploratory since the setting up of the dispute settlement mechanisms are underway. The impact on findings is that they are more speculative rather than factual. This therefore points to the need for continued research as the AFCFTA is operationalized.

8. STRUCTURE OF THE STUDY

Apart from general introduction this work is divided into five chapters, chapter one is entitled the general introduction; chapter two, is conceptual and Theoretical framework or Literature review while the chapter three is the analysis of International trade in EAC states members and WTO Dispute Settlement System, the chapter four relating to the mechanisms of overcoming challenges of international trade in EAC members in relation of WTO Dispute Settlement System. While the chapter five is focusing on the legal framework which applies on the disputes against WTO the EAC states members Lastly, this work is closed with a conclusion and recommendations on my thesis.

CHAPTER II: CONCEPTUAL AND THEORETICAL FRAMEWORK AND LITERATURE REVIEW

II.1. Conceptual and theoretical framework

II.1.1. Definitions of concepts related to the topic

II.1.1.1. International Trade Law

Today's global economy offers more products and services than were previously imaginable. With modern technology and advanced shipping methodologies, we are able to import and export goods and services of all kinds to every corner of the globe[24]. Naturally, the implications of international trade require the execution of detailed international trade agreements. This is especially true in light of the complex, multi-party nature of most international trade agreements in place today[25].

Today, international trade law consists of a body of international legislation, mainly comprised of international treaties and acts of international intergovernmental organizations. The traditional bodies of law and GATT still serve as the foundation for many laws governing international trade agreements today. A new area of international trade law that has developed only recently involves the international trade of intellectual property[26].

In order to facilitate the negotiation and execution of multilateral trade agreements, the World Trade Organization (WTO) was established. The WTO consists of member countries that have signed on to a multilateral agreement. The purpose of the WTO is to remove impediments and barriers to free trade, such as tariffs. A tariff is a tax that is applied to any foreign imports and

[24] *G., Valles, (2014). Evolution of the International Trading System and Its Trends from a Development Perspective. Trade and Development Board, Sixty-First Session, 13.*
[25] *R., Falvey, N., Foster, D., Greenaway, Op., Cit.,*
[26] *Idem*

is designed to encourage consumers to produce domestically produced products[27]. To counteract the effect of tariffs, the WTO requires member nations to guarantee that they will treat imports from other nations the same way that they would treat domestically produced goods and services. The WTO also develops rules and regulations governing trade and provides an international forum for discussing and resolving trade related issues. Today, virtually every nation is a member of the WTO.

International trade law also carries substantial tax implications. Any operation conducted among multiple jurisdictions is known as a cross-border transaction. Nations engaging in cross-border transactions and international business development must be thoroughly knowledgeable in tax law[28].

Each country enforces different tax requirements on foreign businesses activities, and the consequences of failing to comply with domestic tax laws can be severe.

II.1.1.2. International Trade

International trade is referred to as the exchange or trade of goods and services between different nations. This kind of trade contributes and increases the world economy. The most commonly traded commodities are television sets, clothes, machinery, capital goods, food, and raw material, etc., International trade has increased exceptionally that includes services such as foreign transportation, travel and tourism, banking, warehousing, communication, advertising, and distribution and advertising[29].

[27] *G., Valles, Op., cit.,*
[28] *D., Greenaway, & C., Milner, (2018). South-South trade: theory, evidence, and policy. The World Bank Research Observer, 5(1), 47-68*
[29] *A. J. S. J., Antunes, Op cit.,*

Other equally important developments are the increase in foreign investments and production of foreign goods and services in an international country. This foreign investments and production will help companies to come closer to their international customers and therefore serve them with goods and services at a very low rate. All the activities mentioned are a part of international business. It can be concluded by saying that international trade and production are two aspects of international business, growing day by day across the globe.

By defining International trade, it is very important to give its classification which is Import Trade, Export Trade and ENT repot trade which later express that import trade refers to purchase of goods from a foreign country. Countries import goods, which are not produced by them either because of cost disadvantage or because of physical difficulties or even those goods which are not produced in sufficient quantities so as to meet their requirements.

Export Trade also means the sale of goods to a foreign country. In this trade the goods are sent outside the country. Whereas ENT repot trade exists when goods are imported from one country and are exported to another country, it is called ENT repot trade. Here, the goods are imported not for consumption or sale in the country but for re- exporting to a third country. So importing of foreign goods for export purposes is known as ENT repot trade[30].

II.1.1.3. Liberalization of international trade

This is a removal or reduction of restrictions or barriers on the free exchange of goods between nations. Process by which world economy is increasing becoming integrated through goods trade movements with free or very low trade barriers and free flow of foreign capital movements. In economy has embraced this trade liberalization move right from 1991 and thus on way of crossing 25 years of economic globalization.

[30]*B., Los, P., McCann, J., Springford, & M. Thissen, (2019). The mismatch between local voting and the local economic consequences of Brexit. Regional Studies, 51(5), 786-799.*

Trade liberalization is the removal or reduction of restrictions or barriers on the free exchange of goods between nations. These barriers include tariffs, such as duties and surcharges, and nontariff barriers, such as licensing rules and quotas. Economists often view the easing or eradication of these restrictions as steps to promote free trade[31]. Proponents of trade liberalization, however, claim that it ultimately lowers consumer costs, increases efficiency, and fosters economic growth. Protectionism, the opposite of trade liberalization, is characterized by strict barriers and market regulation. The outcome of trade liberalization and the resulting integration among countries is known as globalization[32]. Trade liberalization promotes free trade, which allows countries to trade goods without regulatory barriers or their associated costs. This reduced regulation decreases costs for countries that trade with other nations and may, ultimately, result in lower consumer prices because imports are subject to lower fees and competition is likely to increase[33].

Increased competition from abroad as a result of trade liberalization creates an incentive for greater efficiency and cheaper production by domestic firms. This competition might also spur a country to shift resources to industries in which it may have a competitive advantage. For example, trade liberalization has encouraged the United Kingdom to concentrate on its service sector rather than manufacturing[34].

[31] *B., Los, P., McCann, J., Springford, & M. Thissen, Op cit., p. 760.*
[32] *A. W., Wolff, (2001). Problems with WTO Dispute Settlement. Chicago Journal of International Law, 2, Article 14.*
[33] *WTO. Historic Development of the WTO Dispute Settlement System, Dispute Settlement System Training Module: Chapter 2.https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c2s1p1_e.htm*
[34] *WTO. Legal Issues Arising in WTO Dispute Settlement Proceedings, Dispute Settlement System Training Module Chapter 10. https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c10s8p1_e.htm*

However, trade liberalization can negatively affect certain businesses within a nation because of greater competition from foreign producers and may result in less local support for those industries. There may also be a financial and social risk if products or raw materials come from countries with lower environmental standards.

Trade liberalization can pose a threat to developing nations or economies because they are forced to compete in the same market as stronger economies or nations. This challenge can stifle established local industries or result in the failure of newly developed industries there. Countries with advanced education systems tend to adapt rapidly to a free-trade economy because they have a labor market that can adjust to changing demands and production facilities that can shift their focus to more in-demand goods. Countries with lower educational standards may struggle to adapt to a changing economic environment.

II.1.1.4. Dispute Settlement system

Dispute settlement or dispute settlement system (DSS) is regarded by the World Trade Organization (WTO) as the central pillar of the multilateral trading system, and as the organization's "unique contribution to the stability of the global economy" [35].

A dispute arises when one member country adopts a trade policy measure or takes some action that one or more fellow members consider to be a breach of WTO agreements or to be a failure to live up to obligations. By joining the WTO, member countries have agreed that if they believe fellow members are in violation of trade rules, they will use the multilateral system of settling disputes instead of taking action unilaterally this entails abiding by agreed procedures Dispute Settlement Understanding and respecting judgments, primarily of the Dispute Settlement Board (DSB), the WTO organ responsible for adjudication of disputes[36]

[35] *WTO "Understanding The WTO", World Trade Organization, accessed December 1,*

[36] *Settling Disputes:a Unique Contribution, World Trade Organization*

II.1.2. Theoretical framework

This research is premised on sociological jurisprudence, the sub branches of critical legal theory and economic analysis of law. Sociological jurisprudence acknowledges the interaction of law and other disciplines, such as economics, culture, unlike positivism which premises itself on the 'separability principle', that the law should be viewed strictly as detached from morals, politics or other influences. The sociology of law states that law must be viewed in a sociological context.

The sociological methodology involves an analysis of the structure, functions, values and effects of the legal system in a society. The sociological school of thought propounds the notion of the living law, that the law in action is the true law, that which comes out of judicial pronouncements. Roscoe Pound noted that law is a social engineering tool that through the adjudication process there can be a paradigm shift of society's legal system[37].

This research considers the structure, process and function of the dispute settlement system of the WTO and its impact in Africa. It examines the challenges that these countries encounter at the DSS, and how that ultimately affects their trade relations, rights and obligations. Thus, the sociological jurisprudential theory is vital in this research when evaluating the implications of utilization of a rule based dispute settlement system[38].

Geoffrey Shaffer argues that developing countries' lack of utilization of the DSS is to their detriment. As the Jurisprudence of the WTO continually grows, it will ultimately affect them whether or not they participate; he terms this as the shadow effect of the law[39].

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[37] Roscoe Pound, 'The Scope and Purpose of Sociological Jurisprudence: Schools of Jurists and Methods of Jurisprudence,' Harvard Law Review, Vol. 24, No. 8 (Jun., 1911), pp. 591-619

[38] Gregory Shaffer, 'Developing Country Use of the WTO Dispute Settlement System: Why it matters , the barriers posed and its impact on bargaining', Paper prepared for the WTO AT 10 :A look at the Appellate Body IN Sao Paulo , Brazil , May 16-17, 2005

[39] M D A Freeman, 'Lloyd's Introduction to Jurisprudence,' (8thedn, Sweet & Maxwell 2008) p.96

This research is also premised on the critical legal theory that stems from the legal realism school of thought. It asserts the concept of the indeterminate nature of the law. The one key tenet of critical legal theory is that the law justifies and reinforces those in power in society thus laws and legal systems serve political purposes this claim could be ascertained by social science theories such as economics and political philosophies.[23] Critical theory jurists' basic assumption is that law is politics. The critical theory is applicable in seeking to ascertain why EAC state members fail to utilize the rule based dispute settlement system.

II.2. Literature reviews

II.2.1. Literature review on WTO and dispute settlement system

Peter Van Den Bossche, gives one a basic introduction to the WTO law and the underlying principles of the world trade system[40]. He gives an in-depth analysis of the WTO Dispute Settlement System. He takes us through the evolution of the WTO Dispute Settlement System, the underlying principles of the system, the various institutions of the DSS and its proceedings. He also gives an analysis of the practice at the WTO DSS and the challenges of the system. The literature however does not address these challenge from the perspective of EAC state members to the Dispute Settlement System. This work is relevant in elucidating the history, evolution and underlying principles of the WTO Dispute Settlement System.

Arie Reich conducted a statistical analysis on the cases that have been before the DSS of the WTO for the past two decades to gauge the effectiveness of the system[41]. He also considered the issue of the inability to remand cases by the Appellate Body of the DSS, and its effect in frustrating the conclusion of some cases.

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[40] Peter Van Den Bossche, The Law and Policy of the World Trade Organization: Texts, Cases and Materials, Cambridge University Press,2005

[41] Arie Reich, The effectiveness of the WTO Dispute Settlement System: A Statistical Analysis, European University Institute 2017

His work is significant as the statistical analysis applied by the author will apply to support the issue of effectiveness of the DSS from the perspective of EAC state members in this research.

Nonetheless the literature analyses the effectiveness of the system through one parameter participation. On the other hand this research will be specific to the participation of EAC state members in Africa and enunciate other parameters that measure effectiveness of the system.

Sharif Bhuiyan, discusses the WTO Dispute settlement procedures and the interaction of the institutional framework with national law[42]. He gives a general overview of the WTO dispute settlement mechanism, and elaborates the institutional mandate of the various organs in the dispute settlement system. He also discusses the enforcement mechanism of the WTO dispute settlement rulings and recommendations. He considers the instances where the DSS of the WTO interacts with members' domestic laws and policies, such as through rulings of the DSB, and whether members alter their domestic policies in compliance. The text will be relevant in the second chapter of this research paper as the chapter considers the role, structure and process of the DSS. This study however considers how the process of adjudication and compliance can be difficult for EAC state members in Africa.

Asif H. Qureshi, considers the principles of treaty interpretation in the WTO Dispute settlement system.[43] He considers the interpretation of the institutional framework of the DSS. He views the DSS as a disaggregated structure and examines the different characteristics the system. He also examines the dispute settlement system procedure, participatory rights, jurisdiction and implementation of its recommendations[44]. The text will be relevant in this research as we consider the dispute settlement process and interpretations of the DSU, its objectives, and

[42] *Sharif Bhuiyan ,National Law in WTO Law Effectiveness and Good Governance in the world trading system, Cambridge press 2007*
[43] *Qureshi A H, 'Interpreting WTO Agreements: Problems and Perspectives,' (Cambridge University Press 2006)*
[44] *Idem*

purposes. The gap in this literature that this study fills is the interpretation of the institutional framework of the dispute settlement system as it pertains to EAC state members in Africa and its practical utilization by these countries.

Asif H. Qureshi and A.R. Ziegler, discuss the following in detail with regard to the dispute settlement system that is the accessibility, jurisdiction, causes of action and remedies available[45]. They analyze the institutional framework for implementation of the WTO dispute settlement mechanism and the trade Policy Review Mechanism. They discuss the various proposals for reform of the DSU, such as the issue of lack of framework for the Appellate Body to remand case to the original panel in instances where factual issues arise at the appellate stage, and the issue of introduction of procedural rules for compliance to rulings. The text will be of significance as we consider the process of the dispute settlement system, the challenges that EAC state members face and reforms to the DSU. The literature does not address the perspective of EAC state members to the Dispute Settlement System.

Gregory Shaffer, considers the barriers that small EAC state members encounter that limit their utilization of the WTO dispute settlement system[46]. He states that utilization of the DSS by EAC state members is hampered by various factors, such as costs of litigation, complex procedures and limited effective remedies for smaller developing countries. He asserts that the participation of smaller EAC state members in the DSS may be realized where legal resources are mobilized, simplified procedures are adopted, and compliance mechanisms are strengthened. The text will be relevant when addressing the challenges of EAC state members

[45] *Qureshi A H & Ziegler A R, 'International Economic Law', 3rd edition Sweet & Maxwell Publishers, 2011*

[46] *Gregory Shaffer, 'Developing Country Use of the WTO Dispute Settlement System: Why it matters , the barriers posed and its impact on bargaining', Paper prepared for the WTO AT 10 :A look at the Appellate Body IN Sao Paulo , Brazil , May 16-17, 2005*

in the WTO DSS. This study will focus on whether such challenges for EAC state members will persist in the AFCFTA framework.

Linimose Nzeriuno Anyiwe, considers the dispute settlement rules specific to developing country disputes, and the challenges that EAC state members face[47]. Linimose also looks at the role of the advisory center on WTO law, an independent international organization that provides legal advice and support for EAC state members and least developing countries. The article will be applicable in this research as we discuss the various challenges that EAC state members face and their inability to participate in the dispute settlement system. Jim call Pfumorodze's, focuses on the DSS enforcement mechanism[48]. He states that the implementation and enforcement of rulings of the WTO dispute settlement body are weak and serve the interests of developed countries at the expense of developing countries. He considers the challenges that EAC state members face when they are respondents to disputes at the WTO DSS[49].

The work is relevant as we consider the enforcement mechanism of the DSS and its shortcomings that limit its effectiveness for developing countries. The gap within this literature is that it only considers the challenge of enforcement while this study will highlight other challenges that African EAC state members encounter at the WTO DSS.

Shah ram Shoraka, discusses the development aspect in WTO law interpretation[50]. He considers the implication of interpretation of this regime on developing countries. The work

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[47] Linimose nzeriuno anyiwe, Developing countries and the WTO dispute resolution system: a legal assessment and review, Journal of Sustainable Development Law and Policy, Vol. 2 Iss. 1 (2013), pp 121-138

[48] Jimcall Pfumorodze, 'WTO Dispute Settlement: Challenges faced by developing countries in the implementation and enforcement of the dispute settlement body recommendations and rulings' , Post Graduate Degree in Master of Laws Thesis, University of Western Cape Law Faculty,2007.

[49] Idem.

[50] Shoram Shoraka, 'World Trade Dispute Resolution & Developing Countries Taking a development approach to fair adjudication in the context of the WTO Law', Doctorate Degree in Law, London School of Economies, June 2006.

focuses on three agreements within the regime, that is, the TRIPS agreement, Antidumping and DSU. The relevance of this work to this research is that we also consider the dilemma that EAC state members face in a dispute settlement system in which their levels of participation are quite low, but the burgeoning jurisprudence of the system eventually affects any future cases or bargaining positions with developed member countries.

Kristin Bohl, considers the hindrances that EAC state members face that limit their access to the dispute settlement system[51]. She highlights some of these constraints, such as the issue of fact finding, and examines its relevance in WTO jurisprudence and the challenge that EAC state members face with regards to it. She also identifies the issue of lack of political will in participation in the DSS and the non-existence of government and private sector partnerships in these countries that would ensure active participation in the system. The work will be relevant as we consider some of the reform proposals in the WTO DSS and EAC state members approach to the dispute settlement system. Clement Ng'ong'ola considers the replication of the WTO dispute settlement rules and procedures in the SADC Protocol on Trade[52]. He discusses the WTO DSS, the structure and process of dispute settlement, and the features replicated in SADC. The author supports the incorporation of the WTO rules in the SADC regime. However, he suggests the review of certain provisions to strengthen them, especially those relating to adoption, implementation, and surveillance of decisions of rulings. He also advocates for the authorization of panel establishment without interference from political institutions, such as the Committee of Ministers responsible for Trade (CMT). The significance of the article is that it indicates the apathy to settle disputes through a rule based mechanism by African countries

[51] *Kristin Bohl, Problems of Developing Country Access to WTO Dispute Settlement, 9 Chi.-Kent J. Int'l & Comp. Law 131 (2009)*
[52] *Clement Ng'ong'ola, Replication of WTO dispute settlement processes in SADC, SADC Law Journal Vol I-2011*

within SADC, despite the benefits and security that such a system provides. This study will focus on similar issue within the context of the AfCFTA.

Olabisi Akinkugbe considers the dispute settlement mechanism of the AFCFTA, against the backdrop of the discontent and unsupportive practices of African countries to legalized settlement systems[53].[37] The author highlights the main provisions of the AFCFTA Protocol on Dispute Settlement and asserts that the DSM will have the same non-litigious experience as other dispute settlement mechanisms in Africa. He suggests certain amendments to the DSM protocol such as the inclusion of private parties. He also raises the concern of geopolitical challenges and power dynamics amongst the Francophone, Anglophone and Lusophone within Africa, and the tension and distrust amongst the region that may contribute to slow integration. This work is relevant to this research as we conduct a similar study on the extent of effectiveness of the AFCFTA DSM. However, this study takes a step further and considers the implications of non-utilization and practical measures that can advance or encourage utilization.[54]

James Gathii analyses the flexible nature of regional trade agreements in Africa[55]. [38] He asserts that African Regional Trade Agreements (RTA's) have altered the theory of comparative advantage because of two features namely the application of variable geometry and distributional equity. He examines the vinerial model to which most African RTA's are modeled. The vinerial model was conceptualized for an industrial context, while Africa is mainly in an agrarian or raw material producing context. He argues that majority of the African countries have largely similar products. Thus, they cannot reap comparative cost advantages

[53] *Olabisi D. Akinkugbe, Dispute Settlement under the African Continental Free Trade Area Agreement* <*https://ssrn.com/abstract=3403745*>

[54] WTO. A Unique Contribution, Understanding the WTO: Settling Disputes available on https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm

[55] *James Thuo Gathii, African Regional Trade Agreements as Flexible Legal Regimes, University of North Carolina Journal of International Law and Commercial Regulation. 2010*

through trade liberalization. Most African RTA's are modeled as cooperation regimes where they apply the principle of variable geometry, that is, transitional liberalization depending on the economic ability and interests of the members. They also apply the principle of distributional equity, which provides for compensation for losses caused from liberalization commitments.[56]James Gathii also maintains that the overlapping of membership in African Regional Trade Agreements also illustrates the flexibility of these regimes. He asserts that flexibility has undermined the economic gains of regional trade integration, as African countries prefer the short term benefits. These cooperation models seek integrated development of common resources such as natural resources like river basins and common projects. This work is relevant in this study as we consider the AFCFTA regional integration model and the cooperation and flexible approach to regional integration by African countries. It gives a background understanding of regional integration in Africa from a historical, social and economic perspective. The shortcoming in this literature is that for the AFCFTA a continental bloc agreement that seeks to form a single market not a cooperation model and it can yield the economic gains of trade liberalization, as the issue of overlapping membership or limited comparative advantages will not exist. The study also has not considered dispute resolution mechanisms within these African regional trade agreements and their effectiveness.[57]

This research will add to the wealth of knowledge on the WTO dispute settlement system, from the perspective of EAC state members in Africa as fall as EAC states members is concerned.

[56] WTO. Legal Texts: The WTO Agreements. Available on https://www.wto.org/english/docs_e/legal_e/ursum_e.htm#Understanding accessed on 15 October 2023
[57] WTO. Legal Issues Arising in WTO Dispute Settlement Proceedings, Dispute Settlement System Training Module Chapter 10. Available on https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c10s8p1_e.htm accessed on 15 October 2023

It will aim to address the problem of why the WTO dispute settlement system is not an effective system for African countries and why its replication in the AfCFTA will not work.[58]

II.2.2. The East African Community (EAC) and WTO

II.2.2.1. Introduction

East Africa has a long history of regional integration. Kenya and Uganda first formed a customs union in 1917, which the then Tanganyika (Tanzania without Zanzibar) joined in 1927. Subsequently, the three countries had close economic relationships in the East African High Commission (1948-61); the East African Common Services Organization (1961-67); the East African Community (1967-77); and the East African Cooperation (1993-1999).[59]

The current treaty for the Establishment of the East African Community (EAC) was signed on 30 November 1999, and entered into force on 7 July 2000. The present EAC has its origins in the Mediation Agreement for Division of Assets and Liabilities of the original EAC, which collapsed for a variety of political and economic reasons in 1977. In that Mediation Agreement, signed on 14 May 1984, Kenya, Tanzania, and Uganda agreed to explore areas of future cooperation, and to make concrete arrangements for such cooperation. Subsequent meetings of the three Heads of State led to the signing of the Agreement for the Establishment of the Permanent Tripartite Commission (PTC) for East African Cooperation on 30 November 1993. Full-fledged cooperation started on 14 March 1996 when the Secretariat of the PTC was launched at the headquarters of the EAC in Arusha, Tanzania.[60]

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[58] WTO. Introduction to the WTO Dispute Settlement System, Dispute Settlement System Training Module: Chapter 1. Available on https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c1s1p1_e.htm

[59] *IMF (2005).*

[60] *East African Community Secretariat online information. Available at: www.eac.int/history.htm.*

In addition to the EAC, Kenya, Tanzania, and Uganda are also members of the African Economic Community (AEC), the African Union (AU), and the Regional Integration Facilitation Forum (RIFF), and participate in different regional trade agreements. Kenya and Uganda are members of the Inter-Governmental Authority on Development (IGAD), and the Common Market for Eastern and Southern Africa (COMESA); Tanzania is considering re-entering COMESA after its withdrawal in 2000. Kenya and Tanzania participate in the Indian Ocean Rim-Association for Regional Cooperation (IOR-ARC). Unlike Kenya and Uganda, Tanzania is member of the Southern African Development Community (SADC). This overlapping membership poses certain difficulties for the EAC members, mainly because of differences in, inter alia, origin criteria, and intra-regional trade liberalization scenarios under the various agreements.

Under the EAC, each member is free to negotiate new bilateral trade agreements, subject to notification to the other two members. Only Kenya has signed bilateral trade agreements. EAC members are also eligible for non-reciprocal preferential treatment under the Generalized System of Preferences (GSP); the Cotonou Agreement with the EC; and the U.S. African Growth and Opportunity Act (AGOA). As least developed countries (LDCs), Tanzania and Uganda are eligible for the Everything-but-Arms (EBA) initiative of the EC; Kenya is not. Tanzania is a signatory to the Agreement on the Global System of Trade Preferences among EAC state members (GSTP); Kenya and Uganda are not.

II.2.2.2. Legal Framework of EAC

The EAC's legal framework consists mainly of: the Treaty for the Establishment of the EAC; the 2001-05 EAC Development Strategy; the EAC Protocol; and the EAC Customs Management Act. The key objective of the EAC is to develop policies aimed at widening and deepening cooperation in all fields for the mutual benefit of its members (Article 5 of the EAC Treaty). The EAC is thus to be an economic area (including customs and monetary unions,

with harmonized macroeconomic policies, and ultimately a political federation), although no timetable has been established.[61]

The EAC's specific objectives include: (a) promoting sustainable growth and equitable development for its members, including rational use of the region's natural resources and protection of the environment; (b) strengthening and consolidating the long-standing political, economic, social, cultural, and traditional ties of its members; (c) enhancing the participation of the private sector and civil society; (d) mainstreaming gender in all its programmes and enhancing the role of women in development; (e) promoting good governance, including adherence to the principles of democratic rules of law, accountability, transparency, social justice, equal opportunities, and gender equality; and (f) facilitating peace and stability within the region.

The 2001-05 EAC Development Strategy identifies twelve areas of cooperation: macroeconomic policies, including monetary and fiscal; trade liberalization and development; promotion of key economic sectors (i.e. agriculture and food security, investment and industrial development, tourism and wildlife, and environment and natural resources); infrastructure and supportive services; human resource development, science, and technology; social sectors, immigration, and labor policies; legal and judicial affairs; political matters, including peace, security. and defense; broad participation of women, private sector and civil society; relations with other regional and international organizations (e.g. COMESA, SADC); institutional arrangements at the level of member states and the EAC Secretariat; and managing distribution of benefits and costs as a cross-cutting issue.[62] The 2006-10 EAC Development Strategy is currently in draft format and is expected to be adopted at the end of 2006.

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[61] *The Committee on Fast Tracking East African Federation, established on 26 November 2004, is examining ways and means to expedite the process of EAC integration so that a political federation is achieved as quickly as possible (The Community, Issue 3, June 2005).*

[62] *East African Community Secretariat online information. Available at: www.eac.int/strategy.htm.*

Under the Protocol on the Establishment of the EAC Customs Union (Article 3), the objectives of the customs union are: further liberalization of intra-regional trade in goods on the basis of mutually beneficial trade arrangements among member states; promotion of efficiency in production within the EAC; enhancement of domestic, cross-border and foreign investment in the EAC; and promotion of economic development and diversification in industrialization in the EAC. The Protocol's Annexes I to IX are on: common external tariff (CET); internal tariffs; rules of origin; anti-dumping measures; subsidies and countervailing measures; safeguards; export processing zones; free port operations; and dispute settlement mechanism.

In accordance with provisions of Article 75 of the EAC Treaty, the Protocol provides for: asymmetry in the liberalization of intra-EAC trade; elimination of internal tariffs and other charges of equivalent effect; elimination of non-tariff barriers; establishment of a CET; rules of origin; anti-dumping measures; subsidies and countervailing duties; security and other restrictions to trade; competition; drawback, refund, and remission of duties and taxes; customs cooperation; re-export of goods; simplification and harmonization of trade documentation and procedures; exemption regimes; harmonized commodity description and coding system; and free ports.[63] However, EAC members have not yet fully implemented some of these provisions. Areas still to be harmonized are internal taxes, customs procedures, other duties and charges on imports, and fees on production. The EAC certificate of origin is not yet operational; the COMESA certificate is currently used.

Under the Protocol, the customs union is to be established progressively over five years from the entry into force of the Protocol, which was signed on 2 March 2004, and entered into force on 1 January 2005. The EAC CET, adopted as from 2005, has three bands (0, 10%, and 25%),

[63] *Article 2 of the Protocol.*

although rates above 25% apply to a number of "sensitive" products (Chapter III(3)(i)). EAC members are to review the maximum rate of the CET after 1 January 2010.[64]

The free-trade area component of the EAC customs union is yet to be established. Trade in goods between Tanzania and Uganda, as well as imports from Tanzania and Uganda to Kenya, has been duty free since 1 January 2005, while goods from Kenya to Tanzania and Uganda are under either Category A (for immediate duty-free treatment) or Category B (gradual tariff reduction). Internal tariffs on Category B goods (some 880 tariff lines at the HS six-digit level in the case of Tanzania, and some 443 lines in the case of Uganda), specified in Annex II of the Protocol, are to be phased out as follows: a 10% tariff rate in 2005; 8% in 2006; 6% in 2007; 4% in 2008; 2% in 2009; and zero thereafter.[65]

The EAC Customs Management Act was enacted on 16 December 2004. It governs the administration of customs, including administrative and operational matters. According to the Act, the day-to-day operations of customs, including collection of revenue, will continue to be managed and administered by the respective national revenue authorities. The revenue authorities in each member state, in conjunction with the ministries responsible for EAC affairs, Finance, Trade and Industry, are responsible for the gradual establishment of the EAC customs union EAC negotiations on trade in services are to commence in 2006 as part of the EAC common market. Burundi and Rwanda have applied to join the EAC, and high-level negotiations on their accession are advanced. They are expected to become EAC members before the end of 2006.

II.2.2.3. Institutional framework

[64] Article 12 of the Protocol. However, the Council of Ministers of the EAC is mandated to review the CET structure, and approve measures to remedy any adverse effects, on any member state, induced by the implementation of the CET or, by exceptional circumstances.

[65] Internal tariffs must not exceed the CET on any of the specified products (Article 11 of the Protocol). The EAC Council may decide, at any time, that tariff rates may be reduced more rapidly or abolished earlier than provided for by the schedule.

The main institutions of the EAC are: the Summit of Heads of State and/or Government; Council of Ministers; Coordination Committee; sectoral committees; East African Court of Justice; East African Legislative Assembly; and the Secretariat.

In addition, Article 24 of the Protocol established the EAC Committee on Trade Remedies to handle: rules of origin; contingency trade remedies; dispute settlement mechanism; and any other matter referred to the Committee by the Council. The EAC has the following autonomous institutions: Lake Victoria Development Programme[66]; the East African Development Bank (EADB)[67]; Lake Victoria Fisheries Organization (LVFO)[68]; and the Inter-University Council for East Africa (IUCEA).[69]

The Summit is responsible for, inter alia: the overall policy direction and functioning of the EAC; considering the annual progress reports and other reports submitted to it by the Council; and reviewing the state of peace, security, and good governance within the EAC, and the progress achieved towards the establishment of a political federation. Subject to the Treaty, the Summit may delegate the exercise of any of its functions to one of its members, to the Council or to the Secretary General. The Summit meets at least once a year, and may hold extraordinary meetings at the request of any member. It is chaired in turn by each member state for one year. The decisions of the Summit are taken by consensus.

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[66] The Lake Victoria Development Programme, established in 2001, provides a mechanism for coordinating the various interventions on the lake and its basin, and serves as a centre for promotion of investments and information sharing. It is focusing on, inter alia, harmonizing policies and laws on the environmental management of the lake and its catch area (East African Community Secretariat online information. Available at: www.eac.int/programme.htm).

[67] The EADB was first established in 1967 under the former East African Community. Following the breakup of the EAC in 1977, the Bank was re-established under its own Charter in 1980. It offers a broad range of financial services to EAC members (EADB online information. Available at: www.eadb.org/background).

[68] The LVFO, established in 1994, aims to foster cooperation amongst EAC members in matters regarding Lake Victoria; harmonize national measures for the sustainable use of fisheries and other resources; and develop and adopt conservation and management measures to assure the lake's ecosystem health and sustainability (LVFO online information. Available at: www.inweh.unu.edu/lvfo/Default.htm).

[69] The IUCEA, established in 1980, aims to facilitate contact between the universities of East Africa, provide a forum for discussion on academic and other matters relating to higher education, and help maintain high and comparable academic standards (IUCEA online information. Available at. www.iucea.org).

The Council of Ministers is the main policy decision-making institution. It initiates and submits bills to the Assembly; gives directions to the member States and to all other organs of the EAC other than the Summit, Court, and the Assembly; makes regulations, issues directives, takes decisions, and gives opinions in accordance with the provisions of the Treaty; considers the budget; submits annual progress reports to the Summit, for which it prepares the meetings agendas; establishes sectoral committees provided for by the Treaty; and implements the decisions and directives of the Summit. The Council consists of ministers responsible for regional cooperation and any other minister's members may designate. It meets twice a year, immediately after the Summit, or at the request of a member state or the chairperson of the Council. It is chaired in turn by a minister of each member state. The decisions of the Council are taken by consensus.[70]

The Coordination Committee (CC) is responsible for regional cooperation and coordinates the activities of the sectoral committees. It also, inter alia, submits reports and recommendations to the Council either on its own initiative or upon the Council's request; implements the decisions of the Council; receives and considers reports by the sectoral committees; and may request a sectoral committee to investigate any particular matter. The CC consists of the permanent secretaries responsible for regional cooperation and any other permanent secretaries' members may designate. It meets at least twice a year (before the meetings of the Council), and may hold extraordinary meetings at the request of the chairperson of the Committee. It is chaired in turn by a permanent secretary from each member State.[71]

[70] http://www.e-ir.info/2013/08/28/ developing countries and cross retaliation in the WTO

[71] The Coordination Committee (CC) is responsible for regional cooperation and coordinates the activities of the sectoral committees. available at https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s1p1_e.htm accessed on 14 October 2023

The sectoral committees formulate programs and monitor their implementation. They meet as often as necessary and are responsible for setting out sectoral priorities; and submit, from time to time, sectoral reports and recommendations to the CC. The CC recommends to the Council the composition of the sectoral committees.[72]

The East African Court of Justice, established under Article 9 of the Treaty, ensures that EAC law is interpreted and implemented in line with the Treaty. The Court has jurisdiction to hear and determine disputes between member states on the interpretation and application of the Treaty (if the dispute is submitted to it under a special agreement), and between the Community and its employees. The Court became operational on 30 November 2001, and is temporarily located in Arusha, until the Summit determines its permanent seat. The six judges, two from each member, are appointed by the Summit from among sitting judges of any national court of judicature or from recognized jurists, while the Registrar is appointed by the Council.[73]

The East African Legislative Assembly provides a democratic forum for debate. It has a watchdog function, and ultimately is responsible for the legislative process. The Assembly interacts with the national assemblies of member states on EAC matters; debates and approves the EAC budget; considers annual reports, annual audit reports, and any other reports referred to it by the Council; makes recommendations to the Council on the implementation of the Treaty; and recommends to the Council the appointment of the Clerk and other officers. The Assembly has 27 elected members, and five ex-officio members consisting of the three ministers for regional cooperation, the Secretary General and the Counsel to the Community. A Speaker presides over the Assembly.[74]

[72]The CC recommends to the Council the composition of the sectoral committees. Available on http://www.wipo.int/ip-development/en/agenda/pcda07_session4.html accessed on 14 October 2023
[73] *East African Community Secretariat online information. Available at: www.eac.int/strategy.htm.*
[74] *East African Community Secretariat online information. Available at: www.eac.int/strategy.htm.*

The Secretariat, based in Arusha, is the executive organ of the EAC. As the guardian of the Treaty, it ensures that regulations and directives adopted by the Council are properly implemented. It is responsible for: the day-to-day administration of the Treaty; coordinating and monitoring the implementation of Council and Community decisions; arranging meetings, disseminating information, and keeping minutes of meetings of the EAC institutions (it is the depositary of all records of EAC); assisting in the harmonization of national policies and strategies of member states in so far as they relate to EAC; and assisting in the negotiation of trade agreements with third parties. The Secretariat is headed by a Secretary General, who is a citizen of a member State, and serves a fixed five-year term. The core budget of the Secretariat is funded by equal contributions from the member states.[75]

[75] The Secretariat, based in Arusha, is the executive organ of the EAC available at http://www.wto.org/english/thewto_e/countries_e/euroean__union_or_communities_popup.htm. accessed on 14 October 2023

CHAPTER III: THE LEGAL ANALYSIS OF INTERNATIONAL TRADE IN EAC STATES MEMBERS AND WTO DISPUTE SETTLEMENT SYSTEM

III.1. Analysis of trade arrangements involving EAC state members and overseeing of WTO

The EAC members became, individually, original WTO Members on 1 January 1995.[76] They are neither signatories nor observers to any of the WTO plurilateral agreements. EAC members have not been involved directly, either as complainant or defendant, in any WTO dispute settlement proceedings. However, both Kenya and Tanzania have participated as third parties in the disputes brought separately by Australia, Brazil, and Thailand, on "European Communities-export subsidies on sugar".[77] The three EAC countries accord at least MFN treatment to all their trading partners. The EAC members attach great importance to the Doha Development Agenda (DDA).

Their priorities in the DDA include: improved market access for their agricultural products through bound duty-free and quota-free access for all their products, and the removal of other non-tariff barriers, export subsidies and domestic support; the reduction of high tariffs and tariff escalation on non-agricultural products of interest to developing and LDCs; greater opportunities in services, particularly through the movement of natural persons, including less skilled labour; extension of geographical indications coverage beyond wines and spirits, in order to maintain the identity of indigenous export products; strengthening of S&D provisions; and the provision of meaningful technical assistance, including in capacity building, which will allow DCs and LDCs to participate fully and effectively in all negotiations, and ultimately to take advantage of the opportunities offered by the multilateral trading system.

[76] *Kenya joined the GATT on 5 February 1964, Tanzania on 9 December 1961, and Uganda on 23 October 1962.*
[77] *WTO documents WT/DS265/R, WT/DS266/R, and WT/DS283/R, 15 October 2004.*

According to the EAC members, to achieve a truly developmental outcome, the DDA must ensure that the outcome of the Doha negotiations supports poverty-reducing economic growth, and provide space for DCs and LDCs to pursue appropriate national policies that enhance welfare and foster economic development. The outcome of these negotiations must also strengthen and support the regional integration initiatives in the EAC countries and other regional trading arrangements on the African continent. To determine how to participate fully in the Doha development process, the EAC countries have indicated that technical assistance and capacity building must support analytical and operational research at the country and regional levels, be aimed at mobilizing constituencies that have an interest in domestic policy reform, and be provided through multilateral initiatives.[78]

The EAC member states' technical assistance requirements relate to: the harmonization of laws and regulations with WTO requirements; notifications; staff training, and establishment of institutional structures to facilitate the implementation and observance of Agreements; and the formulation of policies that allow maximum benefit from trade reforms and the application of the WTO Agreements, and minimize costs.[79] A trade reference center has been established by the WTO in the EAC Secretariat.

Customs reform and capacity-building have been long-standing items on EAC countries' policy agenda. The implementation of modern, WTO-consistent customs procedures is a priority. Some of the main technical assistance needs in relation to customs are: the training of officials in the implementation of the WTO Customs Valuation Agreement, including training on post-clearance auditing, and anti-fraud techniques and control; and the drafting or revision of

[78] *ibidem*

[79] *Tanzania and Uganda were two of five countries (with Bangladesh, Haiti, and the Gambia) to have held trade-related roundtables under the first version of the Integrated Framework for Trade-Related Technical Assistance and Capacity Building for LDCs. The main outcome from this roundtable has been the preparation of an Export Development Strategy and specific-sector studies on fisheries, groundnuts, horticulture, niche manufacturing, and tourism.*

legislation in specific areas. The delivery of technical assistance in these areas would be part of a wider program for the development of customs capacity, which is being supported by the IMF and bilateral donors.[80]

The development and implementation of standards and other technical requirements, including sanitary and phy to sanitary (SPS) measures, are a key priority. Regulations in these areas are still to be harmonized across EAC countries. Technical assistance thus could focus on ensuring that revised or newly drafted legislation is in conformity with rules and practices provided for in relevant international agreements, the development of implementing legislation, and the development of institutional capacity required for enforcement.[81]

Technical assistance needs for intellectual property protection relate to the revision of existing legislation, the drafting of new legislation, the development of implementation capacity, and enforcement issues for Kenya. As LDCs, Tanzania and Uganda were granted an extension of the transition period for the implementation of the TRIPS Agreement until 1 July 2013, which was due to expire on 1 January 2006.[82]

The EAC countries are currently involved in trade negotiations with regional partners, such as the Cotonou Agreement; and within the WTO under the Doha Development Agenda. The different negotiating mandates and timetables are liable to place considerable stress on EAC countries' institutional capacities. Technical assistance could focus on helping them to identify negotiating priorities, and to anchor these in their overall program of trade reform. [83]

Supply-side constraints affecting the EAC members are both of a generic (cross-cutting) nature and a sector-specific nature. The former includes the high cost and unreliability of certain

[80] *WTO documents WT/DS265/R, WT/DS266/R, and WT/DS283/R, 15 October 2004.*
[81] *P. Zahonogo, (2016). Trade and economic growth in developing countries: Evidence from sub-Saharan Africa. Journal of African Trade, 3(1-2), 41-56.*
[82] *WTO document IP/C/40, 30 November 2005.*
[83] ibid

public services – notably electricity and telecommunication services and the high cost of private credit. Most sector-specific constraints are discussed in detail in Chapter IV of the respective Annexes. The most frequently identified needs are training in modern production and marketing techniques, and the provision of inputs and physical support facilities.

Despite recognition by the EAC member states of the importance of trade and trade policy reform to their development prospects, trade policy has yet to be integrated systematically into their development strategies. The discussion of trade policy tends to be dispersed across a number of policy statements whose relationship to each other is unclear.[84] One reason for this lack of integration is that trade-policy-making it is not fully coordinated, as there is no operational structure to coordinate the work of the various departments and agencies involved in the formulation and implementation of trade policy, either at the national or EAC level[85]. A critical first step would be to achieve such coordination in trade policy making.

III.2. Analysis of Challenges in the WTO DSS in EAC state members

The dispute settlement system of the WTO has both institutional and procedural challenges that limit its effectiveness in the resolution of disputes.

III.2.1. Institutional challenges

The institutional challenges relate to the function and composition or structure of the DSS. As regards the function of the DSS an institutional challenge of imbalance between the DSS and other organs of the WTO arises. While as regards the composition of the DSS, the institutional challenge arises with regards the composition of the Appellate Body.

[84] *P. Zahonogo, Op. cit., p. 60.*
[85] *Idem*

III.2.1.1. The institutional imbalance between the judicial and political organs of the WTO vis a vis EAC

According to Peter Van Den Borsches, the main challenge of the WTO DSS is the imbalance in effectiveness between the WTO judicial body and the WTO political body and, subsequently, its impact on dispute resolution[86]. The imbalance between the WTO's highly efficient judicial arm and its far less effective political arm, occurs where countries do not pursue political solutions through active diplomacy to resolve political and controversial issues. As a result, they set out ambiguous rules to govern politically sensitive issues such as on public health, taxation and environmental protection[87]. The lack of political solutions, through negotiations and compromise, to these issues before the political organs of the WTO has overburdened the dispute settlement system, as it is forced to resolve political and controversial issues, thus there is excessive reliance on adjudication even on issues that ought to be resolved politically[88] diminishing to some extent its efficiency.

The practice of institutional imbalance has also been an issue in the WTO's judicial review, the question being whether, the judicial organ of the WTO considers the deliberations of political organs or in exercise of their power, they give due regard to the jurisdiction of other organs of the WTO[89].

The principle was raised by India in the case of Quantitative Restrictions on imports of Agricultural, Textile and Industrial Products before the Appellate Body. India argued that the panel should consider the competence conferred on other WTO organs in order to establish an institutional balance between the judicial and political organs of the WTO. In this case the

[86] *Peter Van Den Bossche, Op cit., p 456.*
[87] *Asif H Qureshi, 'Interpreting WTO Agreements: Problems and Perspectives,' (Cambridge University Press 2006)*
[88] *Idem.*
[89] *WTO document IP/C/40, 30 November 2005.*

dispute was about the balance of payment restrictions and whether review of the justification of such issues was to be left to the political organ, the BOP Committee and the General Council[90]. India's rationale was that the judicial organ has a duty to cooperate with other organs to achieve the WTO obligations and should refrain from reviewing matters that were subject to review in another organ[91].

The Appellate Body differed and relied on the scope of the competence of the panel as provided in the DSU to consider trade restrictions from Balance of Payment problems.[92] According to Asif Qureshi, the principle of institutional balance can be discerned from the process of interpretation. The principle encompasses the recognition that different organs have different functions, such as the Balance of Payment Committee and the Panels. It also recognizes that the judicial findings need to be without prejudice to the role of political organs, such as the General Council or the Balance of Payment Committee. Thirdly it recognizes that the judicial organ cannot substitute itself for the political organ. Thus, panels can review the justification of a BOP measure and not substitute themselves for the BOP Committee. Lastly it recognizes that judicial organs cannot ignore the determinations of political organs.[93]

This imbalance has created a different outlook on the DSS, as a system of judicial activism or overreach. The Chairman of the WTO Appellate Body, Mr. Ujal Singh Bhatia, in his address in June 2017, on the emerging problems of the WTO dispute settlement system, noted that certain member countries believed that the interpretation of certain provisions by the panels failed to consider the political pillar of the WTO, such as the negotiation history of how such

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[90] WTO. The Process-Stages in a Typical WTO Dispute Settlement Case, Dispute Settlement System Training Module: Chapter 6. https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s1p1_e.htm
[91] WTO. WTO Bodies Involved in Dispute Settlement Process, DSS Training Module: 3.https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c3s1p1_e.htm#decision_making
[92] WTO. Legal Texts: The WTO Agreements. Available on https://www.wto.org/english/docs_e/legal_e/ursum_e.htm#Understanding
[93] WTO. Legal Issues Arising in WTO Dispute Settlement Proceedings, Dispute Settlement System Training Module Chapter 10. Available on https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c10s8p1_e.htm

provisions were created and the compromises that were made. They thus imposed their specific reasoning on provisions that were meant to be broad and open ended[94]. He stated that Panels and the Appellate Body have to provide answers to questions and claims raised by WTO Members in their dispute. WTO Members should refrain from seeking judicial solutions to issues which are essentially political and which negotiators agreed upon with constructive ambiguity. Members ought to engage in political discussions and try to reach mutually satisfactory solutions. He also recognized the need for the negotiation or political pillar of the WTO to be revived so as not to place more strain on the dispute settlement pillar of the WTO.[95]

III.2.2. Procedural challenges

Some of the procedural challenges of the WTO DSS include the sequencing issue, the inability to remand cases back to the original panels, the lack of a procedure to terminate concessions and the prolonged time frames for settling disputes.

III.2.2.1. Sequencing Issue

The sequencing issue is the conflict between parallel proceedings which include the enforcement procedure for authorization for retaliation from the DSB under Article 22.6 and the compliance procedure under Article 21.5 that confirms whether the respondent has complied with the panel recommendations[96].

The conflict of the timeframes for these procedures displays disconnect of the DSU. Under Article 21.5, the compliance panel circulates its report within 90 days after the date of referral of a matter to it. Article 22.2 provides that the prevailing complainant can request authorization to retaliate from the 20th day after the expiry of the reasonable time period. The classic case of

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[94] *Ujal Singh Bhatia, 'The Problems of Plenty: Challenging Times for the WTO's Dispute Settlement System', Public Address by Chairman of the Appellate Body made on 8 June 2017 at the release of the annual report of the Appellate Body*

[95] *ibidem*

[96] *Ujal Singh Bhatia Op. cit., p. 280*

US and EC Banana III illustrates this issue, where the USA insisted on the right to obtain authorization to retaliate, while the EU sought compliance proceedings under Article 21.5 to confirm that the implementing measures taken by them were not WTO inconsistent. Parties unblocked the situation by agreeing that the compliance proceedings were a prerequisite to the enforcement proceedings[97].

There is no common understanding about sequencing and, hence, this creates tensions as disputing parties no longer seem to be adopting ad hoc agreements on the sequencing of procedures.

III.2.2.2 Procedure for the termination of concessions

The other challenge is that the DSU does not provide for a procedure to terminate suspension of concessions where a prevailing complainant retaliated.[98] There is need for a procedural provision that outlines withdrawal process and the timeframe once the respondent country is in compliance.

III.2.2.3. Remand of Cases

The inability of the Appellate Body to remand cases to the original panel because of its ad hoc nature and the lack of a procedural provision for the same limits the system's effectiveness. This is because some issues are left unresolved after the appellate review, as the original panel is the only one that can complete the factual findings to conclude on the legal analysis. Appeals are brought on issues of law or on legal interpretations by the panel.[99]

[97] *Ibidem p. 281*
[98] *Arie Reich, 'The effectiveness of the WTO Dispute Settlement System: A statistical analysis', (European University Institute 2017) 29*
[99] *Arie Reich, Op. cit., p.26.*

III.2.2.4. Time Frame for dispute resolution

The prescribed timeframes of the DSU for the resolution of disputes is also a challenge for panels and Appellate Body. In principle, panel proceedings should not exceed nine months. Arie Reich, in a statistical analysis of the same, found that the average duration from the consultations phase to the recommendation phase of a dispute in the WTO was gradually increasing[100]. As analyzed, between 1995 and 1998 disputes took 23 months, those between 2007 and 2011 took an average of 28 months, and disputes from 2013 would take up to 34 months.[101]

The increase in dispute resolution timeframes is, thus, a challenge as the complainant continues to suffer economic harm from the violation. There is also no interim relief provision to protect their economic and trade interests[102].

This chapter analyses how the problem of limited utilization by EAC state members arises by examining the WTO dispute settlement system, its structure and procedures. It also highlights the systemic and institutional challenges of the system. As compared to the GATT dispute settlement mechanism, the WTO DSS can be viewed as a more effective dispute resolution mechanism, as its quasi-judicial and quasi-automatic nature allows it to resolve complex cases.

However, effectiveness of the system should be determined by the system's ability to guarantee the achievement of the DSU's objective of preserving the rights and obligations of all members of the WTO. This includes EAC state members in Africa.

[100] *Ibidem p, p. 29*
[101] *ibidem*
[102] *Ibidem p. 117*

In the next chapter, we consider the interaction of African countries with the WTO dispute settlement system and how the challenges unique to EAC state members limit the system's effectiveness.

III.2.3. Dispute settlement by EAC state members in the WTO and under the AFCFTA framework

The benefits of utilization of the DSS are numerous for EAC state members as the decisions of the DSS have tangible effects on the socio-economic welfare of a country such as its trade interests through the provision of market access for specific industries[103]. Further, developing countries should actively utilize the system because the jurisprudence of the DSS affects future cases[104]. Even though precedents do not apply, the jurisprudence from the DSS ultimately affects the interpretation, application and eventual meaning of the law[105].

The practical benefit for developing countries' participation is the wealth of experience they gain on WTO practice, even as third parties to cases, as they are able to understand litigation strategies at the DSS[106]. Finally, the participation of EAC state members has an impact on their future bargaining positions. As Geoffrey Shaffer opines, the DSS has a shadow effect on both domestic and bilateral bargains of a country[107]. This is because even without full adjudication of a complaint, at the consultation phase of the dispute settlement process, concessions may be

[103] *Gregory Shaffer, 'Developing Country Use of the WTO Dispute Settlement System: Why it matters, the barriers posed and its impact on bargaining ', Paper prepared for the WTO AT 10: A look at the Appellate Body in Sao Paulo, Brazil, May 16-17, 2005 p.14*
[104] *Idem*
[105] *WTO. A Unique Contribution, Understanding the WTO: Settling Disputes available on https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm*
[106] *WTO. Introduction to the WTO Dispute Settlement System, Dispute Settlement System Training Module: Chapter 1. Available on https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c1s1p1_e.htm*
[107] *WTO (2018). "Unprecedented Challenges" Confront Appellate Body, Chair Warns. https://www.wto.org/english/news_e/news18_e/ab_22jun18_e.htm*

made. Further, because of the weak enforcement system, settlement is usually by negotiations and with a favorable ruling, a country may have better bargains[108].

The limited participation at the DSS is usually as a result of the various hurdles encountered in the process of dispute settlement and within the system, such as retaliatory trade threats, reliance on bilateral trade aid and the high litigation costs[109]. The challenges unique to African countries are addressed in the subsequent sections of the chapter.

This chapter analyzes the specific challenges African countries encounter that limit their participation at the DSS. The chapter also looks at the dispute settlement mechanism of the African Continental Free Trade Agreement that is modeled after the WTO dispute settlement system, and considers whether the same challenges persist and the extent to which African countries will utilize it.

III.2.3.1. Extent of effectiveness of the DSS for African countries

The hypothesis of this research is that the power dynamics of the WTO and the numerous challenges that the small EAC state members face render the DSS an ineffective system for settling disputes for African countries.

The extent of effectiveness of the DSS is herein considered by looking at both the utilization of the system by African countries and the power based bargains of the system.

III.2.3.2. Participation in the Dispute Settlement System

African countries hardly institute any complaints before the Dispute Settlement System, mainly because of the numerous systemic, institutional and procedural challenges of the DSS.

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[108] *World Trade Organization (2000). Report of the Panel, European Communities-Antilumpimg Duties on Imports of Cotton-Type Bed-Linen from India, XVT/DS141/R.*

[109] *Disputes by Members available on<https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm>*

Some of these challenges undermine the access and utilization of the DSS by African countries. The WTO provides statistics on their utilization. The figure below[8] indicates the participation levels of African countries.

African countries mostly participate as third parties to complaints. Third party participation allows interested parties to join in a complaint as they can substantively submit on the issues; such participation does have its own benefits for the third party for instance lower litigation costs and positive effect on trade bargains with the respondent country[110]. Third party status may also be taken up in support of the defendant or trade restriction, or as a neutral party. Neutral third parties benefit from direct access to relevant information of the dispute as an observer. They are able to formulate expectations for when they could be in violation of the WTO law and the concessions available[111].

III.2.3.3. Power based bargains within the dispute settlement system

The enforcement mechanism of the DSS is impractical for African countries. Enforcement through retaliation is highly dependent on large trade volumes for the complainant to have any clout. Thus, where there exists a power imbalance between the complainant and respondent, the rulings are not likely to be implemented.

Recent demonstration of a power based DSS can be seen in the trade wars between developed countries, such as the USA and China, where members embark on retaliatory measures before beginning the process of dispute settlement[112]. Such actions have gone against the norms of

[110] *Gregory Shaffer, 'Developing Country Use of the WTO Dispute Settlement System: Why it matters, the barriers posed and its impact on bargaining ', Paper prepared for the WTO AT 10: A look at the Appellate Body in Sao Paulo, Brazil, May 16-17, 2005 p.16*

[111] *A., Medhat Mahmoud (2019). US-China Trade War 2018. Cairo University. DOI: 10.13140/RG.2.2.29727.41121*

[112] *Rachel Brewster, Can International Trade Recover? WTO Dispute Settlement: Can we go back again? American Journal of International Law , vol. 113, 2019 p.62*

the WTO DSS of prohibition on counter retaliation and the DSS's mandate on regulation of remedies.

The unilateral trade sanctions by USA to invoke a GATT exemption on China in June 2018 for alleged trade violations in intellectual property and subsidies, and the retaliatory sanctions by China without the use of the WTO DSS demonstrate the disregard for the rule-based system.[113]

Also the veto block on the appointment of Appellate Body members by the USA in a bid to push for reforms based on their systemic concerns of the DSS will paralyse the Appellate Body Post December 2019 when only a single appellate member remains. This further demonstrates the power-based distinctiveness of the WTO DSS.[114]

The function of the Appellate Body is pivotal in seeking appellate redress to panel rulings. Thus, where it is not functional WTO members are forced out of the adjudication system; because a member state cannot wait upon an appeal, they will likely take unilateral retaliatory measures.[115]

African countries are also highly dependent on non-reciprocal trade relations with developed countries. This dependence on the market access that is provided creates a power imbalance, as one cannot bite the hand that feeds him.

III.2.3.4. Challenges of EAC State members at the WTO DSS

EAC state members face several challenges within the WTO Dispute Settlement System. This part discusses these challenges to understand the perspective of African countries on the factors that limit their utilization of the system.

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[113] *Ibidem*

[114] *Professor Joost Pauwelyn, WTO Dispute Settlement Post 2019: What to expect? What choice to make?, (7th July 2019) Available at SSRN: https://ssrn.com/abstract=3415964 or http://dx.doi.org/10.2139/ssrn.3415964*

[115] *J. A., Frieden, & R., Rogowski, (2016). The impact of the international economy on national policies: An analytical overview. Internationalization and domestic politics, 15, 25-47.*

III.2.3.4.1. Costs Implications

The procedures of the DSS demand a lot of resources the exports of EAC state members have lower aggregate value hence they benefit less from a successful claim unlike a developing country that trades globally in large volumes[116]. This means that the potential trade benefits of a successful claim does not outweigh the cost of instituting a claim for the developing country. They also have less legal capacity. They often need to hire foreign law firms that practice WTO law, this increases their cost implication[117]. Therefore, because the benefits of instituting a claim rarely exceed litigation costs, small EAC state members shy away from the DSS to address any trade violations. For instance, the only African country that has instituted a complaint at the DSS is Tunisia.

III.2.3.2. Fact Finding Problem

The preliminary phase before launching a complaint at the DSS involves intense fact finding that is highly technical. This is because WTO cases are more factually contextualized. Panels do not just apply general legal principles; they analyze on a case by case basis[118]. For instance, cases brought under the Sanitary and Phyto-sanitary Agreement rely on factual analysis of the scientific evidence[119]. Developing countries, therefore, also incur pre-litigation costs that include both resources for fact finding and technical expertise, depending on the nature of the complaint.

III.2.3.3. Inapt approach to disputes

WTO disputes are only brought forth by a complaint from countries because the jurisdiction of the WTO is only for states, thus private entities or litigants can only seek recourse for trade

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[116] G. C., Hufbauer, Y., Wong, & K. Sheth, (2019). US-China trade disputes: Rising tide, rising stakes. Peterson Institute.
[117] Idem.
[118]Kristin Bohl, Problems of Developing Country Access to WTO Dispute Settlement, 9 Chi.-Kent J. Int'l & Comp. Law 131 (2009) 139
[119] Kristin Bohl, Problems of Developing Country Access to WTO Dispute Settlement, 9 Chi.-Kent J. Int'l & Comp. Law 131 (2009)

violations through their governments by lobbying. However, more often than not, trade barriers affect private sector industries within a country and it is private industries that recognize these barriers. The lack of clear domestic procedures for private industries and entities to lobby their government to initiate complaints at the WTO DSS is another hurdle that limits the participation of developing countries[120].

The USA and European Community both have models of communication with private sector industries and public-private partnerships in this regard[121]. This ensures the safeguarding of their trade interests as the private sector plays a critical role by providing human and financial resources and independent investigations of the violation, thereby taking part in the pre-litigation costs[122]. The EU model can be found under Article 133 of the European Union Treaty and the Trade Barrier Regulation. The regulation provides a petition mechanism for private sector that can urge the European Community to investigate foreign trade barriers and initiate claims before the WTO[123].

III.2.3.5. Inadequate technical assistance and capacity building or lack of expertise

The WTO Appellate Body requires the use of statistical trade data as opposed to legal presumptions; consequently, the cost of legal expertise has increased[124]. EAC state members have had difficulties engaging relevant expertise for litigation purposes.

According to the billing policy and time budget for the Advisory Centre on WTO Law, EAC state members as other developing countries are charged a maximum cost between 23,652 and

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[120] Junichi Ihara (2017). WTO, WTO Dispute Settlement Body-Developments in 2017. See also https://www.wto.org/english/tratop_e/dispu_e/ihara_17_e.htm
[121] The GATT Years: From Havana to Marrakesh. Available on https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm
[122] Kristin Bohl, Problems of Developing Country Access to WTO Dispute Settlement, 9 Chi.-Kent J. Int'l & Comp. Law 131 (2009) 161
[123] Idem.
[124] ACWL Billing Policy and Time Budget <https://www.acwl.ch/download/basic_documents/management_board_docs/ACWL-MB-D-2007-7.pdf> accessed on 17-september 2019 at 9:21 p.m.

47,304 Swiss francs for panel proceedings, depending on their classification, while for appellate proceedings, the costs range between 14,418 and 28,836. The Advisory Centre on WTO Law provides subsidized technical assistance to developing countries. The Centre also maintains the Technical Expertise Fund, as it acknowledges the strain of litigation and costs of technical experts for developing countries. However, the Centre is highly dependent on donor funding and the large economies, such as the United States, refuse to support it[125].

III.2.3.6. Poor enforcement mechanism

The enforcement system of the DSS has been discussed at length in the previous chapter. However, we now consider the same from the perspective of a small developing country. Geoffrey Shaffer argues that WTO trade remedies limit utilization of the system because of structural disadvantages, such as low trade volumes, and how the rulings are referred to as recommendations. They, thus, tend to be ambiguous and to largely favor the party with more bargaining power. Further, an ambiguous ruling allows such party to shape compliance while retaining the protectionist measure, they took up[126].

Another disadvantage is the enforcement mechanism by retaliation, a trade remedy that is highly dependent on bargaining power or market power to be effective. Small countries wield no clout.[27]

The prospective nature of trade remedies covers losses from the date of the ruling and not the date of the trade violation. This allows the respondent party to drag out the legal case, with the aim of closing its markets for years[127]. The same can be illustrated in safeguards, where a party

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[125] Kristin Bohl, Problems of Developing Country Access to WTO Dispute Settlement, 9 Chi.-Kent J. Int'l & Comp. Law 131 (2009) 150

[126] Gregory Shaffer, 'Developing Country Use of the WTO Dispute Settlement System: Why it matters , the barriers posed and its impact on bargaining', Paper prepared for the WTO AT 10 :A look at the Appellate Body IN Sao Paulo , Brazil , May 16-17, 2005 p.24

927 Ibid (fn 9) p.24

[127] Sharif Bhuiyan, National Law in WTO Law Effectiveness and Good Governance in the world trading system, Cambridge press (2007) 25

in trade violation can close off its market for years without any consequence as it drags out the case. Thus, Shaffer suggests effectiveness of the system should also be measured by its impact on a party's behavior[128].

III.2.3.7. Lack of political will power

A challenging political environment exists for EAC state members with regards to their utilization of the DSS. EAC state members do not hire trade experts as their representatives at the WTO. Unlike developed countries, they appoint career diplomats with inadequate trade expertise to advance and safeguard their trade interests. Some countries lack a mission presence in Geneva[129]. Some of these countries may not even recognize trade barriers in the first place, let alone challenge them.

In most instances, developing governments will be reluctant to pursue trade remedies through the DSS because of financial constraints, as they would rather utilize their resources on pressing national economic concerns.

The DSS does not guarantee them successful claims. They are, however, guaranteed of encountering political and trade reprisals from developed countries because of their need for market access in developed countries. Further, most EAC state members are reliant on development assistance and aid initiatives from developed countries. They thus face more than WTO retaliation; they risk losing the non-reciprocal preferential trade arrangements that they have with developed countries[130].

[128] *Evaluation of the WTO Dispute Settlement System: Results to Date, DSS, Training Module: Chapter 12. Availbel on https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c12s2p1_e.htm*
[129] *N.G., Mankiw, D., Romer, D.N., Weil, 1992.A contribution to the empirics of economic growth. Q. J. Econ. 107 (2), 407–437.*
[130] *Idem.*

They also fear counterclaims from developed countries that have the capacity to accommodate high litigation costs. The political context of trade disputes is indicative of the power dynamics of the WTO DSS.

III.3. legal Issues on enforcement mechanism towards EAC member's states

Direct effect, direct applicability and enforcement of EAC Regional law states that; The EAC Treaty, its Protocols and legislation and the decisions of the Court of Justice represent regional law of the Community that requires application and enforcement. Enforcement denotes assessing state compliance with the Treaty and regional law and naming infringement and violation, thereby increasing the costs of non-compliance. Enforcement and application is an obligation of the Partner States in the first instance and of national institutions within whose territory the regional law is to be enforced.[131] Two doctrines underlie applicability and enforceability of regional laws: these are the principles of direct applicability and direct effect. Specifically, the mechanisms

III.3.1. Issues relating to compliance as mechanism of enforcement

The issue of effective compliance with WTO dispute settlement reports has been at the spotlight in recent years within the academic and practitioner circles. The debates on this topic have culminated into academic writings that have effectively settled the long – standing contemplated question on the international law nature of an adopted WTO dispute settlement Body (DSB) report.

Thus, with the clinching of these debates, it may now be contended that the traditional international law remedies for a continuous non respect of a convention by a state party to that convention (which may be collective in nature), may now be well fitted into the WTO dispute settlement enforcement system. We therefore discuss this complicated question in this writing

[131] EAC Treaty, arts 8(2)(b), 44 and 29(1).

in WTO dispute settlement context with inspiration taken from the 2001 International Law Commission's (ILC) Articles on the Responsibility of States for internationally Wrongful Acts.[132]

The issue of effective implementation of WTO Dispute Settlement Body (DSB) rulings within a reasonable period of time is a subject of increased attention and scrutiny by scholars and practitioners internationally.[133]This emphasis on surveillance and implementation of decision Clearly indicates that the present procedures of the Dispute Settlement Understanding (DSU) fail to provide WTO Members with an effective protection in case of no or delayed implementation of DSB Recommendation. In this respect, "it must be admitted that most disputes involving adopted reports take considerable time from consultation request to implementation. Thus, experience to date suggests that one problem with WTO dispute settlement system is that in too many cases, it takes too long to resolve disputes".[134]

In this perspective of things, one can identify some structural features of the DSU that creates incentives for delaying the implementation of DSB recommendations, which requires adjustment to make these delays costlier for the non-compliant Member. "Although an expedition procedure cannot substitute for retroactive imposition of costs of violators, it contributes to limiting the time of free riding".[135]

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[132] *Yenkong Ngagioh H, and Roberto Rios – Herran, WTO Dispute settlement system and the issue of compliance Multilateralizing the Enforcement Mechanism, p.1.*
[133] *http:/www.wti.org.media*
[134] ***WTO,*** *understanding on rules and procedures governing the settlement of disputes*
[135] *Hudec, The Adequacy of WTO Dispute Settlement Remedies for Developing Country Complainants, in DEVELOPMENT, TRADE AND THE WTO: A HANDBOOK 81, at p. 81 (Bernard Hoekman et al., eds. 2002)*

These structural features are the current prospective nature of existing compensation, and the current system of retaliation. Regarding the former, the possibility of introducing in the current system monetary compensation and retroactive remedies[136] may create a greater incentive for compliance. "Monetary damages may induce compliance more effectively than trade retaliation because governments would have to pay the costs, rather than shift them."[137]

Regarding the later, it is necessary to understand that the WTO legal system covers aspects considerably affecting both governments and individuals, and therefore has to be conceptualized as an entity providing legal rules as public goods, which requires collective enforcement to secure the correct functioning of the system. "Two steps in this direction need to be considered: First, WTO rules can and should be considered to be normal international legal obligations that are part of public international law. Second, the enforcement of WTO rules can and should be seen as a collective rather than a mainly bilateral exercise."[138].

Strengthening the bindings of the DSB and providing for increased and more collective retaliation appear to be important issues to be analyzed to try to solve the perceived problem of delays in the implementation of DSB rulings and recommendations.

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[136] Shaffer, supra, at p. 58. He suggests that developing countries could say that they will only accept proposals for transparency (only those aspects that are not structurally biased against developing country interests) if developed countries accept improvements in remedies: at p. 57.

[137] Hudec: Remedies, supra, at p.10.

[138] See Bronckers and Broek, supra, for a good discussion on financial compensation and a summary of the key elements of a mechanism for financial compensation in the WTO. While recognizing that it might not be easy to get all Members to support the introduction of financial compensation, they urge developing countries and private business to rally around the proposal.

III.3.2. Issues of sequencing

Although many TWO rulings have been satisfactorily implemented, difficult cases have tested DSU implementation articles, highlighting deficiencies in the system and prompting suggestions for reform. For example, gaps in the DSU have resulted in the problem of "sequencing", which first manifested itself in 1998-1999 during the compliance phase of the successful U.S Challenge of the European Union's banana import regime.

Article 22 allows a prevailing party to request authorization to retaliate within 30 days after a compliance period ends, while Article 21.5 provides the disagreements over the existence or adequacy of compliance measures are to be decided using WTO dispute procedures, including resort to panels. A compliance panel's report is due within 90 days after the dispute is referred to it and may be appealed. The DSU does not integrate the Article 21.5 procedure into the 30-day Article 22 deadline, nor does it expressly state how compliance is to be determined so that a prevailing party may pursue retaliatory action under Article 22.[139]

Absent the adoption of multilateral rules on the matter, disputing parties have entered into ad hoc procedural agreement in individual disputes under which compliance panel proceedings and procedures involving retaliation request, including the arbitration of retaliation proposals, advance in sequence.

III.3.3. Issues applicability of removal of retaliatory measures

The DSU is also silent on how authorized retaliation is to be terminated in the event a defending Member believes that it has compiled in a dispute. this issue was the subject of United States Continued Suspension of Obligations in the EC-Hormones Dipute (DS320), a dispute initiated by the European Union (EU)[140]against the United States in 2004 for continuing to maintain

[139] *T., Daniel Shedd, Brandon J. Murrill, Jane M. Smith, Dispute Settlement in the Word Trade Organization (WTO): An overview , November 26,2012.p.10.*
[140] *http://www.wto.org/english/thewto_e/countries_e/euroean _union_or_communities_popup.htm.*

increase (i.e…100% ad valorem) tariffs on EU goods frist imposed in 1999 in retaliation for the EU's failure to comply with the adverse WTO ruling on the EU's ban on hormone –treated beef.

The EU also initiated a separate case against Canada on the same basis.[141] The Appellate Body and modified panel reports in the underlying beef hormone case, EC - Hormones[142], found that an EU ban an import of meat and meat products from cattle produced from six specific growth promotion hormones violated the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement); the reports were adopted by WTO in February 1998.

Claiming that a 2003 European Union Directive rendered it WTO-compliant, the EU argued that the United States and Canada were violating the following WTO obligations in continuing to impose their retaliatory tariffs:(1) the GATT most – favored – nation article; (2) the GATT prohibition on tariffs surcharges, and (3) various DSU provisions , including Article 23, which permits sanctions to be imposed only until the defending Member's WTO inconsistent measures have been removed or the dispute is mutually resolved[143]

In separate panel reports issued March 31, 2008 the WTO panel found that the EU was maintaining bans on certain hormones without a sufficient scientific basis in violation of the SPS Agreement, and that the United States and Canada had breached Article 23 requirements to resort WTO dispute settlement and to refrain from unilateral actions by (1) not initiating a WTO proceeding to resolve the EU compliance issue and (2) determining unilaterally that the EU was still in violation of the EC-Hormones decision. The panel also found, however, that to the extent that the challenged EU measure had not been removed, the United States and Canada

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[141] Canada- continued suspension of obligations in the EC-Hormones Dispute, WT/DS321.
[142] , European communities – Meausres Affecting Livestock and Meat (Harmones), WT/DS48(complaint of Canada).
[143] T., Daniel Shedd, Brandon J. Murrill, Jane M. Smith, Dispute Settlement in the Word Trade Organization (WTO): An overview , November 26,2012.p.11

had not violated Article 22.8, which requires that sanctions be removed once the offending measure is withdrawn.[144] The panel noted that it had functioned similarly to a compliance panel for the sole purpose of determining whether Article 22.8 was violated and, because it did not have jurisdiction to make definitive determination in this regard, it suggested that the United States and Canada initiate a compliance panel proceeding against the EU under Article 21.5 in order to comply with their DSU obligations and to promptly resolve the dispute.[145]

The appellate body , in separate reports issued October 16,2008, reversed that panel's findings that the United States and Canada were in breach of the DSU as well as the panel's findings that the EU was still in violation of the SPS Agreement[146].

Because the Appellate Body could not complete the analysis needed to determine whether the contested EU measure had been withdrawn , however, it recommended that the parties initiate an Article 21.5 compliance panel proceedings to resolve their disagreement as to whether the EU is in compliance with the EC- Hormones decision and thus whether the US and Canadian countermeasures have a legal basis.[147]

The EU Requested consultation under Article 21.5 in December 2008,[148] but the proceeding involving the United States has been suspended under a bilateral agreement. In a May 2009 memorandum of understanding (MOU) intended to resolve the underlying beef hormone dispute, the United States and EU agreed, inter alia, that the EU will expand market access for exports of US beef in three phases. In the first phase, the United States may maintain retaliatory tariffs currently applied by EU products and will not impose the new duties that it announced

[144] *Panel repor , united states – continued suspension of obligations in the EU Dispute (March 31,2008)*
[145] *ibidem*
[146] *Appellate Body report, United States — Continued Suspension of Obligations in the EC — Hormones Dispute*
[147] *T., Daniel Shedd, Brandon J. Murrill, Jane M. Smith, op-cit, p.11.*

[148]*http:// ec. europe.eu/trade/issues/respect rules/dispute/pr221208_en.htm.*

in January 2009 under its "carousel" retaliation provision (see below). The two parties also agreed that they will suspend WTO litigation (i.e.., not request a compliance panel) for the first 18 months of the agreement.[149] The USTR delayed the imposition of the additional duties on new items until September 19, 2009, and officially terminated these duties as of this date.[150] As a result of these actions, the duties were never imposed.[151]

III.3.4. Comparison to the case of EAC with the one of The Rwanda-Canada Case: The First Agreement of the TWO Waiver on Patents and Medicines.

On july 17,2007, Rwanda notified the World Trade Organizations' (WTO) Council for Trade Related Aspects of Intellectual Property Rights (TRIPS) that it plans to import the HIV-drug TriAvir from Canadian company Apotex and will not enforce any patents granted in that respect in Rwanda.[152] Two months later, Canada issued a compulsory license allowing Apotex to use nine patented inventions for manufacturing and exporting TriAvir to Rwanda. On October 4, 2007, Canada notified the council for TRIPS of the compulsory license[153].These actions constitute the first application of a mechanism set up by WTO to safeguard access to medicines for countries lacking the capacity to manufacture drugs.

The mechanism was meant to balance countries' obligations to grant patents under the TRIPS Agreement and their ability to provide cheap drugs to their populations.[154] This insight will explain the legal background of Canada's and Rwanda's notifications, describe the facts of the case , and explain their implications for the debate.[155]

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[149] *http:// ec.europe.eu/trade/issues/respect rules/dispute/memo 140509_en.htm.*
[150] *At the **time** of the **May 2009 agreement**, **some products had been removed** from the **list** of **covered items** pursuant to the USTR's January 2009 announcement.*
[151] *T., Daniel Shedd, Brandon J. Merrill, Jane M. Smith, op-cit,p.11.*
[152] *Notification under Paragraph2(a) of the decision of 30 August 2003 on the implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health , Doc. IP/N/9/RWA/1(19 July 2007).*
[153] *The implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public health , Doc, 1P/N/10/CAN/1(8Cotober 2007).*
[154] *http://www.wipo.int/ip-development/en/agenda/pcda07_session4.html*
[155] *www.asil.org/insights/volume/11/issue/28/canadian-made-drugs-rwanda-first-application-wto-waiver-patents*

III.3.4.1. The Legal Background of the case

Patents are national rights, usually granted by the national patent office, with effects only in the area for which they have been granted. The TRIPS Agreement, one of the main WTO Agreements, prescribes a minimum level of patents protection that WTO Members must provide. In the area of interventions, Members must grant patents "for any inventions (…) in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application.[156] To obtain a patent, applicants must file an application disclosing the invention.[157] If the invention is patentable, the investor obtains a patent with a term of at least twenty years from the date of filling.[158] A patent on a product allows the patent-holder to prevent third parties from "making , using , offering for sale, selling or importing" the product in the territory of the grant without its consent.[159] To secure protection of an invention in several countries, inventors must file for patents in all of them. Pharmaceutical companies generally patent their inventions in all major markets[160].

The TRIPS Agreement gave members some time to adapt their national laws to the new standars. Thus , India- the developing world's most important producer of generic(off-patent) medicine – had until January 1,2005 to start granting product patent protection for pharmaceuticals.[161]

Now only least-developed country (LDC) Members remain exempt from the obligation to grant pharmaceutical patents.[162]

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[156] *Art.27.1 TRIPS Agreement.*
[157] *Art.29 TRIPS Agreement.*
[158] *Art.30 TRIPS Agreement.*
[159] *Art.28.1(a) TRIPS Agreement.*
[160] *www.asil.org/insights/volume/11/issue/28/canadian-made-drugs-rwanda-first-application-wto-waiver-patents*
[161] *Art.65.4 TRIPS Agreement.*
[162] *www.asil.org/insights/volume/11/issue/28/canadian-made-drugs-rwanda-first-application-wto-waiver-patents*

As quasi-monopolies, patents generally allow investors to sell their product at higher prices , creating an incentive to invest in research and development, but also a threat for access to medicines for the poor. The issue was recognized by WTO in its 2001 Doha Declaration on the TRIPS Agreement and public health[163]. It pointed out that the TRIPS Agreement provides for a number of so-called "flexibilities" allowing Members to weaken patents, including compulsory licenses.

A compulsory license is a license granted by the government allowing the use of the invention without the patent holder's authorization. The beneficiary can produce the patented product or import it from a country where it is not patented. Article 31 of the TRIPS Agreement allows members to grant compulsory licenses under several conditions, such as authorization on the individual merits, payment of adequate remuneration and unsuccessful efforts to obtain the authorization from the patent holder on reasonable commercial terms within a reasonable period of time. The latter requirement may be waived, e.g,. in time of national emergency[164].

According to Article 31(f) of the TRIPS Agreement, the grant of compulsory licenses must be predominately for the supply of the domestic market. That provision creates the problem for countries with insufficient manufacturing capacities for drugs. These can only make use of a compulsory license by allowing the import of the drug fro a generic manufacturer in another country. Until recently that usually meant importing the drug from India, which did not grant product patent protection for the drugs and is home to several generic manufacturers. Now, however, all EAC state members have to grant patent protection for new patentable drugs. A generic manufacturer thus needs a compulsory license in its home country to produce and

[163] *www.asil.org/insights/volume/11/issue/28/canadian-made-drugs-rwanda-first-application-wto-waiver-patents*
[164] *www.asil.org/insights/volume/11/issue/28/canadian-made-drugs-rwanda-first-application-wto-waiver-patents*

export a new patented drug. However, under the Article 31(f) such a "compulsory license for exports" is not permissible.[165]

The problem was identified in the Doha Declaration and on 30 August 2003, the WTO adopted a mechanism meant to solve it. The decision contains three waivers and several additional provisions. The main provision of the decision, and the only one that shall be discussed in depth, waives an exporting WTO Members obligation under article 31(f) of the TRIPS Agreement for Members for health problems.[166]

To put the mechanism into operation, the importing member must notify the WTO's council for TRIPS of the name and expected quantity of the product, confirm that it has established that it has insufficient or no manufacturing capacity for the product in question (unless it is an LDC), and confirm that it has granted or intends to grant a compulsory license if the product is patented in its territory. The exporting member can then issue a compulsory license limited to the quantity of the drug necessary for the notifying importing member with the whole production going to that member. It must require the beneficiary to identify the drugs to prevent re-imports, e.g. by adding a special color, and to post quantities and distinguishing features of the drug on a website before shipment begins. Several importing members can pool as importers.[167]

The exporting member has to notify the council for TRIPS of the grant of the license and its conditions. The notification by importing and exporting members do not send approval by the WTO. The mechanism is subject to an annual review by the council for TRIPS.[168]

[165] *www.asil.org/insights/volume/11/issue/28/canadian-made-drugs-rwanda-first-application-wto-waiver-patents*
[166] *The Doha declaration on the TRIOS Agreement and Public Heath, Doc.WT/L/540*
[167] *The chairman's statement provides examples in the form of "best practices"guidelines.*
[168] *There is also a special waiver for regional trade agreements of mostly LDSC Members.*

As compulsory license for exports are granted under national law, exporting Members must amend their patent laws for the mechanism to work. Several Members have done so, albeit not in a uniform manner. In December 2005, Members decided on an amendment to the TRIPS Agreement to make the mechanism permanent.[169] The amendment transforms the mechanism of the 30 August 2003 decision into an Article 31 bis of the TRIPS Agreement and an Annex to the Agreement, using identical wording wherever possible.

Under the rules of the WTO Agreement, the amendment will take effect for the members that have accepted it upon acceptance by two thirds of the WTO Members. Members set themselves an extendable deadline of 1 December 2007 to reach the third threshold. Currently 12 of 151 members have accepted the amendment.[170] Canada has been at the forefront of the mechanism' implementation, amending its national law in May 2004.[171] The amendment came into force in May 2005. It imposes a number of conditions for obtaining a compulsory license for export, including the conditions of the 2003 WTO decisions but also additional ones. Thus, the Canadian law is only applicable to a product listed in its schedule 1, requires review of the drug according to the Canadian Food and Drugs Act,[172] and provides only a two-year term for the compulsory license.[173]

The road towards the first application of the mechanism started when the NGO Medicines Sans Frontiers (MSF) committed itself to test the new law. In December 2004, the Canadian company Apotex agreed to produce a fixed –dose combination of the three HIV/AIDS drugs zidovudine, lamivudine, nevirapine later to be known as Triavir. Nine Canadian patents are related to the drugs. Four of these are owned by the Glaxo Group, two by the Welcome

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[169] *www.asil.org/insights/volume/11/issue/28/canadian-made-drugs-rwanda-first-application-wto-waiver-patents*
[170] *Amendment of the TRIPS Agreement, Doc. WT/L/641(8 December2005).*
[171] *http://?www.wto.org/english/tratop_e/trips_e/amendement_e.htm*
[172] *21.02 Patent Act .*
[173] *21.04(3)(b) Patent Act.*

Foundation, two by Shire Biochem and one by Boehringer Ingelheim and Dr. Karl Thomae GmbH. A similar combination drug did not exist in Canada.[174]

As schedule 1 of the Canadian Patent Act originally did not include fixed – dose combinations, it had to be amended, which was done in September 2005. Health Canada did not approve the new drug until august 2006.[175] Apotex attempts to negotiate voluntary licenses with the patent holders stalled. It complained that the innovative companies could attach any condition preventing a deal.[176]Also, Apotex failed to fulfill the requirements for a compulsory license under the Canadian Patent Act because there was no importing country. MSF could not find such a country, as no developing country government it worked with was willing to be named, possibly because of the criticism that Brazil and Thailand encountered after they had resorted to compulsory licenses.[177]

Rwanda was not the country MSF was originally working with, but in May 2007 it signaled its willingness to use the mechanism. One 13July 2007, Apotex sought a voluntary license from the four patent-holders, as required by the Canadian Patent Act before a compulsory license for export can be raised.[178] Apotex specified that it wants to sell and export 15.6miliion tablets at its own cost of US Dollars 0.405 per tablet and requested a royalty – free license. On July 17 the Council for TRIPS received and circulated the Rwandan request.

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[174] 21.09 Patent Act.
[175] www.asil.org/insights/volume/11/issue/28/canadian-made-drugs-rwanda-first-application-wto-waiver-patents
[176] Apotex , Life Saving AIDS Drug for Africa Gets Final Clearance, Press release (21 September 2007).
[177] Canada Issues Compulsory License for HIV/AIDS Drug Export to Rwanda in first Test of the WTO Procedure, 11 BRIDGES WEEKLY TRADE NEWS DIGEST 32(26 September 2007).
[178] Rwanda becomes first country to try to use WTO Procedure to import potential HIV/AIDS Drugs, 1 BRIDGES WEEKLY TRADE NEW DIGEST 27(25july 2007)

Apotex filed for and on 19 September 2007 obtained a two –year – compulsory license on the nine Canadian patents for manufacturing 15.6 million tablets and exporting them to Rwanda. Canada notified the council for TRIPS of the license on October 4, 2007.[179]

III.3.4.2. Implications

The first application of the mechanism shows that it is too cumbersome to work effectively. Rwanda could have imported a similar combination drug from India's new patent legislation. It would only have had to impose a compulsory license in its own territory, and possibly not even need this step, as it is not clear whether any of the nine inventions have been patented in Rwanda.

Apotex concluded that the Mechanism would have to be changed to work effectively.[180] The process proved cumbersome and the generic manufacturer has few incentives to go through with it. It is not economic to produce for merely one importing country, and it is difficult to convince countries to notify the WTO of their need to import. Additionally, Canada imposes a maximum term of two years for the compulsory license, not enough to recoup the investment for producing a generic drug.[181] Given the defects of the mechanism, the Director General of the European Generic Medicines Association concluded at a hearing of the European Parliament that it is unlikely that any company in Europe would make use of the mechanism.[182]

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[179] 21.04(3)(e) Patent Act.
[180] Notification under paragraph 2(c) of the decision of 30 august 2003 on the implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health, Doc.IP/N/10/CAN/1(8October 2007).
[181] Apotex, Life savings AIDS Drugs for Africa Gets Final Clearance, Press release (21 September 2007).
[182]Presentation by Greg Perry to the European Parliament 's Mini-Hearing on TRIPS and Accessed to Medicines , 5 July 2007, Brussels.
mir attaran , AIDS Drugs Fiasco a Tale of Ed Tape, TORONTO STAR (9 August 2007)

III.3.5. Issues relating to compensation as a mechanism of enforcement

The DSU allows for voluntary compensation as an alternative to retaliatory measures.[183]Article 22.1, however, places limits on the use of compensation: Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time.

However, neither compensation nor the suspension of concessions or other obligation is preferred to full implementation of a recommendation to bring a measure into consistent with the covered agreements.

The remedy of compensation in the TWO is not the payment of monetary damages, as the term would ordinarily imply. Rather, it is the granting of additional trade benefits such as favorable tariff terms to the injured party[184]. For example, the offending nation might agree to extend zero or law tariffs to the imports of the aggrieved nation. Such low tariffs would lead to increased trade flows, which would provide a financial benefit or compensation to the injured party. Compensation is a voluntary arrangement, to which both parties agree under consultation.[185] It is meant to be temporary, with the view of inducing the offending party to bring its measures and laws into compliance with WTO rules.[186]Compensation has been used only once since the creation of the WTO in 1995.[187]

Even though trade compensation is an efficient form of rebalancing concessions in that it increases liberalization and economic welfare in the complaining country, for the respondent

[183] *see , e.g; report of the Panel, EEC-Restrictions on the Imports of Dessert Apples, BISD 36S/93 (L/6491) adopted 22 June 1989*
[184] *DSU , supra note 9, art , 22(2)-22(3).*
[185] *Idem, art , 22(1)*
[186] *Idem*
[187] *William j.Davey, compliance Problems in WTO Dispute Settlement , 42 CORNELL INT'L L.J, 119,122 (2009)*

country, and even in third countries (due to the fact that trade compensation must be offered in accordance with MFN principle)[188] it is not the preferred retaliatory method.

In contrast, the preferred retaliatory method trade retaliation almost always involves the complainant Member raising its import barriers on certain products exported by the respondent Member and thereby harming the economic welfare in both countries (and likely globally). While there may be numerous reasons for the preference toward retaliatory trade measures, two of the more persuasive reasons are as follows. first, a complaining Member prefer trade retaliation over compensation as its exporters are not necessarily the exporters that benefits – exporters in third countries also benefit from responding member's tariff reductions and , if they are more efficient exporters, they will take the majority of the benefit.

The other reason that Members prefer trade retaliation over compensation is that while in the former the complaining Member retains control over both the level of suspension of concessions as well as the targeted products, the latter hands over control to the responding Member, who can unilaterally end the trade compensation when it believes it has complied with the rulings of the DSB(or otherwise decides it no longer wants to offer trade compensation)[189].

There are several hurdles to the introduction of mandatory compensation, with the most significant being the enforceability of mandatory compensation. The TWO is a member driven organization, with tariff schedules and all other commitments contained in the covered agreements being the product of countless hours complicated negotiations. In most if not all countries, these decisions are taken after much consultation with business and other interests and made only after a careful balancing of all competing interests. Allowing another Member

[188] *See Anderson (2002:5). The theory holds even though some third ountries that import those or like producst may lose from a terms of trade deterioration due to the fact that world as a whole will be better off economically, see ibid.*
[189] *Id., at 5-6.*

or the panel / Appellate Body to dictate the sector in which compensation must be offered raises a number of practical concerns, and does not appear to be politically viable in most Member countries (whether they be democratically elected or an authoritarian dictatorship)[190].

Moreover, as any form of compensation is, by its nature, an act that must be performed by a non-complying Member, it will always essentially be a voluntary act. Neither a harmed Member, nor the WTO, can force another Member to provide compensation. The consequences of this being that "mandatory" compensation depends upon the good faith compliance of the Member concerned. But of course, the fact that mandatory compensation is sought is solely due to the fact that the offending member failed to abide by the rulings and recommendations of the DSB and remained in violation of its WTO obligations. The question must therefore be asked whether a non – compliant Member would feel any obligation to comply with these requirements[191].

Thus, regardless of whether there is an obligation to comply with the rulings and recommendations of the DSB, without an effective enforcement mechanism, all methods of compensation remain voluntary in nature in that they are dependent upon compliance by the non – compliant Member. Furthermore, in the long term, as an international tribunal the legitimacy of the DSU depends upon the value members place upon it.

To date, both the usage of the system and a high compliance rate demonstrate that members place a high value on the institution. DSB rulings regarding mandatory compensation, however, would likely face increased enforceability issues and decrease the overall rate of Member compliance. As such, mandatory compensation orders have the potential to threaten the long-term viability of an effective dispute settlement mechanism[192]

[190] *Ibidem*
[191] *Ibidem*
[192] *Ibidem*

Moreover, requiring the DSB to recommend compensatory sectors would fundamentally alter the nature of WTO adjudicative tribunals. To date, panel and Appellate Body reports have been limited to making rulings as to the consistency of the measures at issue with the WTO agreement and, if applicable, making recommendations which "may suggest ways to implement the recommendations"[193]

In practice, this means that it is generally the responsibility of the Member concerned to choose whatever course of action will bring its measures into conformity with WTO obligations. under the system of mandatory compensation, however, both the panel and the Appellate Body report would need to prescribe remedies (which would become binding on the parties to the dispute after the report were adopted by DSB). Again, this intrusion into the trade policy determination of a member government may be an unwelcome step too far[194] .

While mandatory trade compensation may be economically efficient and in line with the aims and objectives of the multilateral trading regime, it does little to remedy the other perceived problems of trade retaliation. There is nothing to suggest that mandatory trade compensation will assist the aggrieved industry or reduce the harm retaliatory measures cause to innocent parties any more than trade retaliation that does not allow either the complaining party or the panel / Appellate Body to recommend or prescribe which sectors should be offered compensation. Providing such a level of policy control to either another Member or to a panel / Appellate Body would be an unwelcome, undesirable, intrusive step into domestic trade policy.[195]

[193] *DSU Article 19.1.*
[194] *B, MERCURIO, (2009). Why compensation cannot replace trade retaliation in the WTO Dispute settlement understanding . World Trade Review, p.326.*

[195] *Ibidem*

There is also nothing that mandatory trade compensation will encourage a greater level of compliance than trade retaliation. Remembering that compensation is by its very nature necessarily a voluntary act, the issuance of mandatory compensation orders would perhaps actually result in a decrease in the DSU's overall compliance rate. Therefore, the case for instituting mandatory trade compensation is unpersuasive as it fails to significantly improve upon trade retaliation and could potentially have several negative consequences.[196]

[196] *Ibidem*

CHAPTER IV: MECHANISMS TO OVERCOMING CHALLENGES OF INTERNATIONAL TRADE IN EAC STATES MEMBERS IN RELATION OF WTO DISPUTE SETTLEMENT SYSTEM

It has often been observed that fundamental disadvantage of the WTO dispute settlement system for EAC state members is the inability for many of them to enforce positive rulings against larger WTO Members. When there is an asymmetry in the market size of the developing country and the non-complying WTO Member, the WTO's enforcement measures have been characterized as "virtually meaningless".[197]

The WTO legal system envisages the right of retaliation through the suspension of trade concessions or obligations as well as countermeasures.[198] The critiques of these retaliation rules, form developing country perspectives, is that EAC state members with small domestic markets are not able to impose sufficient economic or political losses within the lager WTO Members to generate the requisite pressure to induce compliance. In fact, the suspension of trade concessions may be more detrimental to the developing country than the non-complying Member. Consequently, there is a common perception that shortcomings in the WTO retaliation rules undermine the utility of WTO dispute settlement for developing countries.

It observes that while legal and economic theory illustrates the potential shortcomings of WTO retaliation for developing countries, GATT and WTO dispute settlement practice demonstrates a high rate of compliance with dispute settlement rulings. Thus, the paper queries whether the ability to effectively retaliate is a key determinant for WTO Members complying with the dispute settlement rulings. It ponders Robert Hudee's observation that "enforcement is a more

[197] *M. Footer, Developing Country Practice in the Matter of WTO Disputr Settlement 2001 Journal of World Trade 35(1)55,at 94.*
[198] *Article 22 of the understanding on the Rules and Proceedures Governing the settlement of Disputes (dsu) and rticle 4.10 and 7.9 of the Agreement on Subsidies and Countervailing Measures (CSM Agreement).*

complex process than mere retaliation" and puts forward the proposition that governments comply with WTO disputes settlement rulings for a multitude of reasons of which retaliation is often not a key ingredient. Thus, the paper argues that the theoretical shortcomings of the WTO retaliation rule for EAC state members should not significantly affect developing countries' decisions to utilize the WTO dispute settlement system.[199]

IV.1. Suspension of Concessions or Retaliation

If the reasonable period of time for compliance has lapsed and the parties cannot agree on compensation, then the aggrieved party may seek authorization[200]. From the DSB to suspend concessions, in other words, to temporally revoke trade concessions granted to the offending part.[201] This type of retaliation must be specifically requested and can be used only by parties directly involved in the dispute as complaints and interested third parties. In other words, it is clear that it is not available on MFN basis. The level of suspension authorized by the DSB must be "equivalent" to the nullification or impairment (harm) suffered by the aggrieved part.

The remedy is only prospective; it extends forwards only for the period of time authorized by the DSB for the recouping of "equivalent" harm. It does not cover the period in which the offending measure was in place or even for the duration of the dispute.[202] Suspension of concessions or retaliation can take three forms, in a strict order of preference, as dictated by the DSU. Retaliation, also referred to as count measures, must take place in the same sector[203] in which the offending violation occurs. For instance, the case of EC- Banana III(retaliation by the United States against the European Communities), (2) EC – Measures Concerning Meat

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[199] Hunter Nottage , Evaluating the Critique that WTO Retaliation Rules undermine the utility of WTO Dispute Settlement for developing countries, ,pp.2.
[200] Retaliation is allowed only with prior DSB authorization. However, some members and trade experts have argued that Articles 8(2) and 8(3) of the Agreement on Safeguards provide an exception that allows the suspension of concessions immediately after the adoption of the Panel or Appellate Body report without prior authorization, see WTO HANDBOOK, Supra note 2, at 81 n.97.
[201] DSU, Supra note 9, art.,22(2).
[202] MAKING WTO REMEDIES WORK FOR DEVELOPING NATIONS: THE NEED FOR CLASS ACTIONS
[203] WTO HAND BOOK , Supra note 2,at 82.

and Meat products (hormones) retaliation by the United States and Canada against the European Communities) (3)US – Tax Treatment for Foreign Sales Corporations (retaliation by the European Communities against the United States) and (4) US –Continued Dumping and Subsidy Offset Act of 2000 (Byrd Amendment) (retaliation by Canada , the European Communities, Japan and Mexico against the United States).

Thus, if the underlying dispute is related to Country A's discriminatory treatment of automobile parts from country B, country B may impose countermeasures on automobile parts imports of country A in retaliation. Obviously, sometimes this is not feasible. Country A might not produce or export any auto parts. In such cases, it is possible to impose retaliation in a different sector covered by the same agreement.[204]

The WTO recognizes three actors: goods, services, and intellectual property[205]. In our example, country B may choose to impose its countermeasures on the agricultural imports of country A into country B. As both automobile parts and agricultural products are goods covered by the same agreements GATT this would be the second-best option.[206]

The third option is cross retaliation, or the imposition of countermeasures on a different sector covered by another agreement.[207] In our example above, it might entail a response by country B against the intellectual property or services trade of country A. this response is allowed only if the first two options are impracticable or ineffective in order to avoid trade restricting spillover effects into other sectors of trade. Even though cross – retaliation is a remedy of last resort, its availability is particularly important for small economies, which may not benefit from the other two types of countermeasures.

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[204] *Idem art, 22(3)(b).*
[205] *Idem art, 22(3)(f).*
[206] *See DSU , supra note p, art.22(3)(b). in a TRIPS Dispute, this would entail th imposition of countermeasures on copyrights or trademarks in an underlying patent dispute.*
[207] *Idem art.22(3)c.*

A country that engages in a limited volume of trade, in only a few sectors, may not, as a practical matter, be able to make use of same – sector retaliation. For example, in Ecuador's case against the European Communities in EC –Banana III[208], the remedy of imposing countermeasures on imports of European bananas would have been illusory. Similarly, it was likely to do the imports Ecuadorian economy more than good to impose count measures on other imported European goods[209] on which Ecuadorian industries and consumers depend. Doing so may have crippled segments of the Ecuadorian economy by depriving industry and consumers of critical goods and materials. As a matter of necessity, Ecuador was authorized to suspend concessions on European trade of services and intellectual property under GATTS and TRIPS, respectively[210]

There is another reason why cross-retaliation is an important remedy for smaller and developing nations. Even when it is possible to impose same sector countermeasures, doing so may not be effective due to asymmetries in trade flows. Developing nations may not trade imported goods in sufficient quantities for a suspension of concession in those areas to be felt by exporters in the offending nation, especially if the opposing party is a developed nation. For example, it would not make sense for Ecuador to impose trade sanctions on European fruit imports into Ecuador. Furthermore, an authorization to Ecuador to impose sanctions on other common European goods such as electronics, cosmetic products and wine is unlikely to be felt by Europe due to the low volume of Ecuadorian trade in such products. In such a situation, the ultimate goal of retaliation, to compel compliance in the form of cessation, would not be

[208] *Decision by the Arbitrators, European Communities Regime for the Importation, Sale and Distribution of Bananas, WT/DS27/ARB/ECU (Mar.,24,2000).*
[209] *Suspension of concessions in such a case would likely lead to a decrease in supply or an increase in prices of the affected goods.*
[210] *Ecuador, Decision of Arbitrators, supra note 140, p.173.*

advanced. When trade volumes in the affected sector are negligible, the impact of retaliation is likewise negligible.

Thus, cross retaliation may be the only means to advance compliance. Retaliation is very rarely used. In the thirteen years since the formation of WTO, and in the course of over four hundred cases, countermeasures have been authorized in only eight cases.[211] Of these, very few have involved developing nations.[212] Because resort to commeasures is quite rare, it serves primarily a threatening function. The possibility of retaliation is used as a bargaining chip to force implementation. Of course, for it to be useful as a threat, the level of retaliation needs to be painful enough to have persuasive power.

Notwithstanding the theoretical bases for retaliation, especially for developing nations, it is also imperfect as a remedy. Fundamentally retaliation is at odds with the WTO's underlying trade liberalization philosophy. Retaliation is no more than the sanctioned imposition of a new trade barrier in response to an unauthorized trade barrier[213], the remedy is as trade- restricting as the violation. Moreover, retaliation comes at a cost not only to the trading system as a whole, but also to the nation imposing the measure as well as the one suffering it. Both bear economic losses, perhaps unevenly. Lastly, it is unclear if retaliation is compatible with the goal of promoting compliance in the form of cessation or other implementation of DSB recommendations. On one hand, it is clear that such implementation is the ultimate goal because the DSB will monitor retaliation until it is achieved.[214]

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[211] C.K. Daniel & Thomas Schoenbaum, international trade law: problems, cases, and materials 58(2008).
[212] See , e.g:, Decision by the arbitrators , United states – Subsidies on Upland Cotton, WT/DS267/ARB1, (Aug.31,2009).
[213] http://www.wto.org/english/tratop_e/dispu_settlement_cbt_e/
[214] DSU, Supra note 9, art.22(8).

On other hand, retaliation can also be viewed as running counter to the goal because the offending member can simply choose to "pay the price" and accept retaliation.[215] The potential results of retaliation can thus be twofold. First, implementation and a restoration of the status quo prior to the violation might not occur. Second, retaliation introduces a new balance of trade, at low and less liberal levels. For these reasons, retaliation is perhaps the most problematic of the WTO remedies.[216]

IV.2. Necessity to WTO retaliation rules for EAC member states

The critique that shortcomings in WTO retaliation rules undermine the utility of WTO dispute settlement for EAC state members is based on three arguments. firstly, that EAC state members with small domestic markets are not able to impose sufficient economic or political losses within the larger WTO Members to generate the requisite pressure to induce the compliance. Secondly, that the suspension of concessions may be more detrimental to the developing country than the non-complying Member. Thirdly, as a consequence, WTO trade sanctions undermine the utility of WTO dispute settlement for EAC state members.[217]

IV.2.1. Providing moderated sanctions to EAC state members for high level of compliance

Trade retaliation under the GATT and WTO has typically envisaged the withdrawal of tariff concessions with the effect of raised tariffs for specific imports from non-complying member. The theory being that by raising tariffs to inflict economic harm on exporters in the non-complying Member respondent government will be place under domestic pressure to remove the measures inconsistent with WTO law.[218]

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[215] *John H. Jackson, International Law Status of WTO Dispute Settlement Reporst: Obligations to comply or Option to Buy out?98 AM.J.INT'LL.109,121-22(2004).*
[216] *MITSUO MATSUSHITA ET ALL., THE WORLD TRADE ORGANIZATION LAW, PRACTICE AND POLICY 94(2003).*
[217] *Ibidem*
[218] *Ibidem*

The case of United States – Measures Affecting the cross border supply of gambling and betting services (US – Gambling) WT /DS285/22,22 June 2007.

This ideal scenario, however, is dependent upon the size of the domestic market of the retaliating Member in relation to that of the non-complying member. The retaliation request of Antigua and Barbuda (Antigua), one of the smallest WTO Members with approximately 80,000 inhabitants, against the United States provides an illustration of retaliation difficulties where there is an asymmetry in market size. As Antgua stated in its request for retaliation, "ceasing all trade whatsoever with the United States (approximately 180 million US dollars annually, or less than 0.02 per cent of all exports from the United States) would have virtually no impact on the economy of the United States, which could easily shift such a relatively small volume of trade elsewhere.[219]

A similar statement was made by the Arbitrators examining the ability of Ecuador to effectively retaliate against the European Communities (EC) by withdrawing tariff concessions. Ecuador imports less than 0.1 per cent of total EC exports, leading the Arbitrator to observe that "given the fact that Ecuador, as a small developing country, only accounts for negligible proportion of the EC's exports of these products, the suspension of concessions is unlikely to have any significant effect on demand for these EC exports.[220]

The arbitrator then queried whether the objective of inducing compliance "may ever be achieved where a great imbalance in the terms of trade volume and economic power exists between the complaining party seeking suspension and other party".[221] For these reasons, it has been observed that EAC state members with small markets are unlikely to be able to induce

[219] *Recourse by Antigua and Barbuda to Article 22.2 of the DSU, United States – Measures Affecting the Cross border supply of Gambling and Betting (US – Gambling), WT/DS285/22,22June 2007,para.3.*
[220] *Decision by the Arbitrators , European Communities- Regime for the importation , Sale and Distribution of Bananas, WT/DS27/ARB/ECU/24 March June 2000.*
[221] *Ibid, para.73*

compliance by larger trading Members. As one commentator stated, traditional retaliation "therefore cannot offer a realistic option to enforce WTO obligations if performed against considerably larger economies.[222]

IV.2.2. Providing non harmed sanctions to EAC state members

A further concern with retaliation through the withdrawal of tariff concessions is that the remedy may in fact have detrimental effects on consumers and economic welfare in the retaliating Member. It has been commented that perhaps the biggest disadvantages of WTO sanctions is that they bite the country imposing the sanction[223]. Other rue that the suspension of concessions goes against the very trade liberalizing principles the GATT/WTO system stands for "and is bad policy" that amounts to "shooting oneself in the foot".[224]

IV.2.3. Application of non - skewed WTO Retaliation rules against EAC member states

These two arguments have led to commentators and EAC state members to contend that the WTO retaliation rules are skewed against them. In the context of DSU Review negations, the LDC Group for instance has commented that the lack of an effective enforcement mechanism and the potential impact of retaliatory measures for poor economies is well documented[225]. The African group similar, has observed that one of the major problems African Members face in utilizing the WTO dispute settlement is that "the means provided for enforcement of findings and recommendations (trade retaliation) are skewed against and disadvantages African Members.[226]

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[222] H.Grosse Ruse-Kahm, A Pirate of the Caribbean? The Attractions of Suspending TRIPS Obligations , 2008 JIEL,11(2),313-364, at 332.
[223] S. Charnovizz, "should the Teeth be Pulled? An analysis of WTO Sanctions; in DLM Kennedy and JD Southwick, Political economy of international trade law: Essays in honor of Robert E.Hudec (Cambridge , UK, Combridge University press0 602-35 at 621.
[224] M. Bronkers and N. Van den Brock, "Financial Compensation in the ETO: Improvising Remedies of WTO Dispute settlement"2006 JIEL 8(1)101-126, at 103.
[225] TN/DS/W/17, paras.12 and 15
[226] TN/DS/W/17, paras.2 and 6
Ibid, paras,2-3.

According to those members, the "realities are such that developing country Members cannot practically utilize this ultimate sanction" as they "would probably suffer further injury if they adopted retaliatory measures.[227]

Commentators appear to agree. It has been observed that the WTO sanctioning power tends to favor large economies over smaller ones"[228], that "as a practical matter" trade sanctions " can probably only be adopted by developed country Members, or large , advanced Developing Countries[229]" and that the adoption of count measures is simply not an option for the poorer WTO Members.[230] Trade retaliation by EAC state members against industrialized countries has been characterized as "not available to them" with the possible exception of the largest among them.[231] And counterproductive as they would mostly harm the former, not induce compliance by the latter.[232]For all these reasons, it has been argued that "countermeasures are a more or less ineffective instrument in the hands of smaller players,[233] and that there is indeed a practical problem for small countries and EAC state members when they attempt to carry through with effective retaliation within the WTO system.[234]

The WTO Word Trade Report for 2007 synthesis these various critiques in the following manner:

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[227] Ibidem
[228] S. Charnovizz, "should the Teeth be Pulled? An analysis of WTO Sanctions; in DLM Kennedy and JD Southwick, Political economy of international trade law: Essays in honor of Robert E.Hudec (Cambridge , UK, Combridge University press0 602-35 at 621.
[229] Y. Renouf, A brief Introduction to countermeasures in the WTO Dispute Settlement system, p.118.
[230] P.Marvoidis, Remedies in the WTO Legal system: Between a Rock and Hard Place, 2000 Eur.J.Int'l. law 11(4),763-813.
[231] M. Bronkers and N. Van den Brock, "Financial Compensation in the ETO: Improvising Remedies of WTO Dispute settlement"2006 JIEL 8(1)101-126, at 103.
[232] J. Pauwelyn"Enforcement and Countermeasures in WTO : Rules are Rules- Towards a more collective Approach, 2000, American Journal of International Law 94(2), pp.335-47 at 338.
[233] K. Bagwel , P. Mavroidis , R.Staiger, the case for Tradable Remedies in WTO Dispute settlement (Washington, DC: World Bank Policy Reasearch Paper No.3314,2004), at 14-15.
[234] P.Marvoidis, Remedies in the WTO Legal system: Between a Rock and Hard Place, 2000 Eur.J.Int'l. law 11(4),763-813.

In applying retaliatory measures, large countries can cause economic harm to the party found not to be in compliance with its obligations conversely, small countries, in view of their limited size are unable to exert sufficient pressure on larger Members to alter their behavior.[235]

IV.2.4. Applicability of non-undermined WTO Retaliation rules to the utility of WTO dispute settlement for EAC member state

The final element in the critique is that WTO retaliation rules skewed against EAC state members undermine the utility of the WTO dispute settlement system for those countries.

The linkage between the WTO retaliation rules and the utility of WTO dispute settlement is based on the premise that one of the "main attractions" of WTO dispute settlement system is that "it explicitly envisages remedies in the event of continued non-compliance when a country loses a dispute settlement procedure".[236]

The promise results in what has been characterized as the "conventional wisdom' that is " a waste of time and money for EAC state members to invoke the WTO's dispute settlement procedures against industrialized countries because the developing country among them EAC state members include have no effective way to enforce the ruling.[237]

The inability of EAC state members to effectively retaliate has been argued to mean that their access to WTO dispute settlement "is not equal to that of developed countries, and in fact largely illusory.[238] Certainly , in the context of DSU Review negotiations , the LDC group noted that " the question of little or no utilization of the DS by developing and least developed

[235] *World Trade report 2007, WTO , at 284.*
[236] *M. Bronkers and N. Van den Brock, "Financial Compensation in the ETO: Improvising Remedies of WTO Dispute settlement"2006 JIEL 8(1)101-126, at 103.*
[237] *TN/DS/W/17, para.12*
[238] *Idem*

country Members has been linked to the inadequacies and structural rigidities of the remedies available to poor countries.[239]

The LDC Group recommending that changes are required in order to "enable LDCs to use the DS meaningfully.[240] The concern that shortcomings in the WTO retaliation rules for EAC state members undermine the utility of the WTO dispute settlement for those countries may explain the various proposals by EAC state members for review of those enforcement provisions. DSU Review proposals including promoting the use of compensation, [241] as well as introducing collective retaliation [242] and tradable retaliation rights.[243]

Thus, critics have been occurring accordingly, there are that the retaliation undermines the dispute settlement for developing countries such as EAC state members. The arguments that the current WTO retaliation rules are skewed against EAC state members appear to have considerable merit. The positions articulated by Antigua and Ecuador in the WTO regarding the economic costs of trade sanctions on EAC state members are economically sound. It is also logical that traditional trade sanctions imposed by EAC state members with small markets are unlikely to generate significant economic or political losses in larger no complying Members.

The consequential argument that these deficiencies undermine the utility of the WTO dispute settlement system for EAC state members is, however, more controversial. Two differing perspectives can be discerned. On the one hand, a number of studies and commentaries contend that the capacity to retaliate is a critical component in ensuing that WTO Members comply with dispute settlement rulings. These analyses suggest that, if EAC state members do not have the capacity to credibly retaliate , the likelihood of EAC state members achieving successful

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[239] E,g TN/DS /W/33(Ecuador) TN/DS/W17 and TN/DS/W/37 (LDC Group) and TN/DS/W/15 and TN/DS/W/42 (African Group)
[240] E,g TN/DS /W/47(India, Cuba, the Dominican Republic, Egypt , Honduras , Jamaica and Malaysia)
[241] Idem
[242] E,g TN/DS /W/23(Mexico)
[243] Idem.

outcomes through WTO dispute between 1973 and 1998 finds "substantial evidence that the threat of retaliation is an important influence determining a defendant country's ability commit to liberalization"[244] its results were interpreted to "suggest that the successful economic resolution to disputes is influenced by the concern for retaliation[245]

Another study finds that "implementation is much more likely in a developed against developing country scenario than vice-versa[246].As a result, that study concludes that 'there is indeed a problem in the functioning of the DSU in this respect" and that proposals to reform the retaliation rules to address these failing "are addressing a real issue and not a ghost[247].The WTO World Trade Report for 2007 reflects the view that "retaliation fails to deter economically powerful countries from committing a violation against small countries.[248]

On the hand, other evaluations of the GATT and WTO dispute settlement data demonstrate a high rate of compliance with WTO dispute settlement rulings. One analysis of the first ten years of the WTO dispute settlement system indicates a successful implementation rate of adopted panel and Appellate Body reports of 83 per cent.[249]Only 10 of the 181 initiated disputes examined resulted in no implementation or disagreement over implementation[250]. As the author of that analysis concluded, it is the case that most reports are eventually implemented.[251]

A separate study, covering the period until march 2007, describes the generally positive record of members in complying with adverse rulings. That study notes that of 109 panel and Appellate Body reports adopted during that period, 90 per cent found violations of WTO law,

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[244] C. Bown. On the Economic Success of GATT/WTO Dispute settlement, 2004 Review of economics and statistics 86, (at 17).
[245] Ibid , at 4.
[246] K . Baguell, P. Marvoidis, R. Staiger , The case for Tradable Remedies in WTO Dispute settlement (Washington , DC: World Bank Policy Reaserch Paper No 3314,2004),at 4.
[247] Id , at 4
[248] World Trade Report 2007, WTO, at 284.
[249] W. Davey The WTO Dispute Settlement System; The first Ten years' 2005 JIEL 8(1) 17, at 46-48.
[250] Ibid, at 47.
[251] W. Davey, The WTO: Looking forward 2006, JIEL 9(1)3, at 12

and that in "virtually all of these cases the WTO Member found to be in violation indicated its intention to bring itself into compliance and the record indicates that in most cases has already done so.[252]

A key finding for the purposes of this paper is that these high compliance rates with adverse DSB rulings are not limited to those disputes brought by developing countries. Similar compliance rates have been observed when smaller and EAC state members have obtained favorable rulings. As one study recently found:

The WTO Dispute settlement experience to date does not suggest that responding Members have a manifestly worse record of compliance with DSB rulings n case where the complaining member was a small or developing country than in case where the complaining member was another type of developing country or developed country.[253]

This practice of high compliance with dispute settlement rulings, even when the complainant is a small or developing country, is hard to reconcile with the above-mentioned perspectives that the capacity to retaliate is an important influence in the resolution of WTO disputes. If retaliation were a material factor for compliance with adverse rulings, one would expect low rates of compliance in those disputes where smaller or EAC state members were complainants.

Based on the high compliance rate with dispute settlement rulings, even when complainant is a small or developing country, this paper puts forward the proposition that the capacity to effectively retaliate may not be a significant factor for government compliance with adverse panel and Appellate Body rulings.

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[252] B. Wilson, "Compliance by WTO Members with Adverse WTO Dispute Settlement Rulings, 2007 JIEL 10(2) 397, at 397.

[253] R. Malacrida, Towards Sounder and Fairer WTO Retaliation: Suggestions for possible Additional Procedural Rules Governing Members preparation and Adoption of Retaliatory Measures 2008 JWT 42(1)3-60, at 20.

GATT practice supports this proposition. One of the key distinctions between dispute settlement under the GATT and the WTO dispute settlement procedures required consensus permitting the defendant to veto both adverse rulings and any request for retaliation. As the defendant had the ability to veto retaliation, under the GATT regime complainants effectively did not have the capacity to retaliate against countries that did not wish to comply with adverse rulings.[254]

Thus, GATT practice appears to provide an environment to test the extent to which the capacity to retaliate induces compliance with adverse rulings.[255] GATT practices suggest that retaliation capacity is not a necessary component for compliance. Hudec's comprehensive study of GATT disputes found almost a 100 percent success rate" in producing satisfactory responses to legal rulings in the first three decades of the GATT. While this fell to 81 per cent in the following period it was characterized as "still a very impressive performance for an international legal regime: Significantly, 10 of the 11 GATT panel rulings in favor of EAC state members had a successful outcome. Interpretation of this data was the following: The paradoxical contrast between the voluntary procedures and weak remedies of the GATT dispute settlement system, on the one hand, and its rather strong record of success, on the other hand, contains a lesson. It teaches that the enforcement of international legal obligations cannot be explained by superficial analysis of dispute settlement procedures and remedies.[256]

While the lesson from this GATT practice ought to be tempered somewhat when applied to the WTO environment,[257] the practice nonetheless suggests that there are factors other than

[254] *A., Amin, African and WTO 'S Dispute Settlement Mechanism, Development Policy Review,2007,p.33*
[255] *The lumber disputes between US and Canada, the banana dispute beteen latin amarican countries and the EU and the airplane cases between Canada and brazil illustrate this point*
[256] *A., Amin, Op cit p.34*
[257] *H.Grosse Ruse-Kahm, Op. cit., p. 434*

retaliation capacity that result in governments complying with adverse dispute settlement rulings.[258]

these other factors include that: (i) some parts of the defendant government and its constituents usually want the conduct found inconsistent with WTO law to be removed simply because it is good policy; (ii) the defendant government is likely to see a long term value in preserving the legitimacy of the legal system for when it may need to rely on it for its own purposes; and (iii) and the shaming pressure caused by other governments wishing to preserve the legitimacy of the legal system should not be underestimated.[259]

WTO practice also illustrates that the high compliance rate observed in WTO dispute settlement practice has not required Members to regularly request or impose retaliatory measures. Of the sixty WTO disputes where retaliation was possible, as the reasonable period of time to comply sixty WTO disputes where retaliation was possible, as the reasonable period of time to comply had expired without compliance being achieved, Members only requested the right to retaliate in seventeen disputes. In only nine of the disputes the complainant pursued and gained retaliation rights from the DSB with retaliatory measures being imposed in only five of those disputes.[260]

Netherlands Measures of suspension of Obligations to the United, BISD IS /32-33. On four other occasions, the request for retaliation authority were voted. See, e.g., the request voted by the United States following the adverse ruling in the GATT Panel Report, United States- Taxes on Petroleum and Certain Imported Substances, L/6175, adopted 17 June 1987, BISD 34S/136.

Thus, while the DSB has authorized retaliation on occasion, it is seeming fair to say that retaliation has been the exception rather than the rule. From these figures one might extrapolate

[258] *A., Amin, Op-cit, p.34*
[259] *The dispute pursued by developing countries being US – Upland Cotton (Article 22.6-110, US-Gambling*
[260] *W., Davey, The WTO: Looking forward 2006, JIEL 9(1)3, at 12*

that, even in the WTO environment where retaliation can no longer be voted, in the vast majority of disputes the catalyst for compliance does not appear to have been the threat of retaliation.[261] As one observer noted, the overall positive record of Members in complying with adverse rulings is reflected in, and confirmed by, the low number of cases where Members have sought and received authorization to impose retaliatory measures.[262]

The above analysis permits certain conclusions. First, that in both the GATT and WTO there has been a high rate of compliance with adverse dispute settlement rulings. Second, that this high rate of compliance has occurred even in situations where the complainant had little capacity to effectively retaliate (whether because a developing country or because retaliation was subject to a veto under the GATT). WTO dispute settlement can still be an effective mechanism in EAC state members wishing to remove total violations by larger WTO Members. These conditions are not to say that the enforcement would not be more effective with retaliation capacity, it is simply to highlight that shortcomings in retaliation capacity may not significantly undermine the utility of WTO dispute settlement for developing countries.

IV.2.5. Necessity of Cross – Retaliation as an Option of Improvement strategy

Given the preceding debate, one option that has risen to the fore in the academic literature is the use of cross-retaliation (mainly via TRIPS). Astute scholars have observed that the power asymmetries between developing and developed countries reside in EAC state members not having serious international obligations in the first place. The threat of a tariff increase does not have much potency when a country has no WTO obligations or when such a large difference between bound and applied tariffs devalues such an action (Subramanian and Vital 2003). As

[261] *24. Maddala, G.S., Wu, S., 1999.A comparative study of unit root tests with panel data and a new simple test. Oxf. Bull. Econ. Stat.61, 631–652*
[262] *27. Pedroni, P., 1999.Critical values for cointegration tests in heterogenous panels with multiple regressors. Oxf. Bull. Econ. Stat.S1 (61), 653–670*

such, retaliation under the General Agreement on Trade in Services (GATS) would be ineffective.[263]

On other hand, EAC state members have undertaken serious commitments on TRIPS particularity in the pharmaceutical, biotechnological, information and technology, and software sectors. Hence, an argument can be made for the use of cross-retaliation. Theoretically, the rationale for such cross-retaliation appears sound: developed WTO –Member countries are not likely to be affected by a suspension of trade concessions in goods and services by developing WTO-member countries which are less economically powerful. Is TRIPS then a feasible option for developing countries? While, theoretically, an elegant argument, the data has shown otherwise which argue are for the following reasons.[264]

We argue, as mentioned in the earlier section, that there are two main reasons why EAC state members do not systematically use cross-retaliation to secure compliance with favorable WTO rulings. Firstly, the economic incentives from retaliation (cross- retaliation) do not marginally benefit developing countries. Rational actors/ states weigh the marginal benefits and marginal costs from cross -to cross retaliation, and will only choose to cross –retaliate if it is marginally beneficial for them.

The low percentage of non-compliance cases and the relatively high percentage of settled or terminated cases within the WTO indicate that cross – retaliation is not in their interests. We also argue that accurately measuring the economic benefits/ costs of the effect of changes to intellectual property rights on the national economy is highly complex[265]. This is a potential roadblock for the use of cross-retaliation as the effectiveness of retaliatory action is also a

[263] *http://www.e-ir-info?2013/28developing-countries and cross retliation in the wto.*
[264] *http://www.e-ir-info?2013/28developing-countries and cross retliation in the wto.*
[265] *Abbott (2004), however, argues that establishing the value of TRIPS Cross-retaliation is not an obstacle to building a successful cross retaliation programme as the valuation of "IP Assets".*

function of time. The longer it takes to alter incentives and change preferences, the less effective retaliatory action will be.[266]

Secondly, the preceding cases, all of two complete cases, have not been successful models for EAC state members to follow. WTO arbitrators have so far approved TRIPS cross – retaliation on two occasions; in favor of Ecuador (against the EC) and most recently in favor of Antigua (against the United States).[267]

The seminal case of cross- retaliation in north-south relations was between Ecuador and the European Commission (EC) in relation to the EC's banana trading regime. In this case, Ecuador requested authorization pursuant to Article 22.2 of the DSU to suspend concessions or other obligations under GATT and GATS, with respect to findings of inconstancies' regarding the EC's banana regime under the GATT and GATS.[268]

The arbitrators found that Ecuador could request and obtain authorization to retaliate on the "consumer goods" category. Ecuador could also request and obtain authorization to retaliate under the GATS with respect to wholesale trade services. Furthermore, Ecuador could request and obtain authority to retaliate under the TRIPS Agreement with respect to copyrights and related rights, geographical indications, and industrial designs. This could be for a number of reasons, as we have stated in earlier section that enforcement / compliance is a function of several factors.[269]

In the case of Antigua, the Antiguan authorities managed to secure an arbitral ruling allowing the use of cross-retaliation against the United States. Antigua requested and was granted authorization to suspend its obligations under the TRIPS Agreement. Despite the right to cross-

[266] *http://www.e-ir.info/2013/08/28/dveloping countries and cross retakiation in the WTO*
[267] *There is a third case of cross retaliation involving the countries of Brazil and the United States, this request however, is presently suspended by aggrement of the parties to the dispute*
[268] *See WTO Dispute settlement DS27*
[269] *Ecuador , L, and FA Spadano,2008. Word Trade Review. 7(3):511-545.*

retaliate however, it is still uncertain if Antigua will indeed implement a suspension of intellectual property rights against the US. Such models of uncertainty put into question the effectiveness and efficiency of actually implementing cross – retaliation. Given the evidence above, we conjecture that cross – retaliation, on its own, is not an effective instrument.[270] In light of evidence presented above, we view the effect of cross – retaliation as a poor instrument for EAC state members to secure compliance and as a result have only been requested on very few occasions. Even if cross-retaliation or the threat thereof can be effective as an enforcement mechanism, it is only one of several factors that may contribute to induce compliance. In addition, we posit that perhaps the most effective retaliation is for rational agents (states) to target voters at the margin. Economically, this tends to be groups involved within the GATS as opposed to TRIPS or TRIMS. Politically, however, these groups lie within the intellectual property realm. The relative power between the competing groups could have significant policy implications. This is an interesting avenue for future research.[271]

[270] *Mark Phoon, Developing countries and Cross retaliation, in the WTO , 2013*
[271] *Mark Phoon, Developing countries and Cross retaliation, in the WTO , 2013*

CHAPTER V: THE LEGAL FRAMEWORK WHICH APPLIES ON THE DISPUTES AGAINST WTO IN EAC STATE MEMBERS

V.1. The Legal Framework

The EAC's legal framework consists mainly of: the Treaty for the Establishment of the EAC; the 2001-05 EAC Development Strategy; the EAC Protocol; and the EAC Customs Management Act. The key objective of the EAC is to develop policies aimed at widening and deepening cooperation in all fields for the mutual benefit of its members (Article 5 of the EAC Treaty). The EAC is thus to be an economic area (including customs and monetary unions, with harmonized macroeconomic policies, and ultimately a political federation), although no timetable has been established.[272]

The EAC's specific objectives include: (a) promoting sustainable growth and equitable development for its members, including rational use of the region's natural resources and protection of the environment; (b) strengthening and consolidating the long-standing political, economic, social, cultural, and traditional ties of its members; (c) enhancing the participation of the private sector and civil society; (d) mainstreaming gender in all its programmes and enhancing the role of women in development; (e) promoting good governance, including adherence to the principles of democratic rules of law, accountability, transparency, social justice, equal opportunities, and gender equality; and (f) facilitating peace and stability within the region.[273]

The EAC's legal framework consists mainly of: the Treaty for its establishment; its Protocol; and its Customs Management Act. The framework provides for, inter alia, a common external

[272] The Committee on Fast Tracking East African Federation, established on 26 November 2004, is examining ways and means to expedite the process of EAC integration so that a political federation is achieved as quickly as possible (*The Community*, Issue 3, June 2005).
[273] *ibidem*

tariff (CET); asymmetry in the liberalization of intra-EAC trade; rules of origin; contingency trade remedies; restrictions to trade for security and other reasons; competition; duty drawback, refund and remission of duties and taxes; exemption regimes; customs cooperation; re-exportation of goods; simplification and harmonization of trade documentation and procedures; use of the harmonized commodity description and coding system; and free ports. However, EAC members are yet to fully implement some of those provisions, such as harmonization of customs procedures, other duties and charges on imports, internal indirect taxes, and of fees on production;[274]

The EAC's main institutions are: the Summit of Heads of State and/or Government; Council of Ministers; Coordination Committee; sectoral committees; East African Court of Justice; East African Legislative Assembly; and the Secretariat (based in Arusha, Tanzania). In addition, the EAC Protocol established the Committee on Trade Remedies to handle: rules of origin; contingency trade remedies; dispute settlement mechanism; and any other matter referred to it by the Council. The EAC currently has the following autonomous institutions: Lake Victoria Development Programme; the East African Development Bank (EADB); Lake Victoria Fisheries Organization (LVFO); and the Inter-University Council for East Africa (IUCEA).

EAC countries are all original WTO Members. They are neither signatories nor observers to any of the WTO plurilateral agreements. All EAC countries accord at least MFN treatment to all their trading partners. They have not been directly involved, either as complainant or as defendant, in any WTO dispute settlement proceedings. However, both Kenya and Tanzania have participated as third parties in the "European Communities-export subsidies on sugar" disputes brought separately by Australia, Brazil, and Thailand.[275]

[274] East African Community Secretariat online information. Available at: www.eac.int/history.htm.
[275] *Ibid*

Under the Protocol on the Establishment of the EAC Customs Union (Article 3), the objectives of the customs union are: further liberalization of intra-regional trade in goods on the basis of mutually beneficial trade arrangements among member states; promotion of efficiency in production within the EAC; enhancement of domestic, cross-border and foreign investment in the EAC; and promotion of economic development and diversification in industrialization in the EAC. The Protocol's Annexes I to IX are on: common external tariff (CET); internal tariffs; rules of origin; anti-dumping measures; subsidies and countervailing measures; safeguards; export processing zones; free port operations; and dispute settlement mechanism.

In accordance with provisions of Article 75 of the EAC Treaty, the Protocol provides for: asymmetry in the liberalization of intra-EAC trade; elimination of internal tariffs and other charges of equivalent effect; elimination of non-tariff barriers; establishment of a CET; rules of origin; anti-dumping measures; subsidies and countervailing duties; security and other restrictions to trade; competition; drawback, refund, and remission of duties and taxes; customs cooperation; re-export of goods; simplification and harmonization of trade documentation and procedures; exemption regimes; harmonized commodity description and coding system; and free ports.[276] The EAC members have not yet fully implemented some of these provisions. Areas still to be harmonized are internal taxes, customs procedures, other duties and charges on imports, and fees on production. The EAC certificate of origin is not yet operational; the COMESA certificate is currently used.

V.2. Institutional Structure of the EAC

The main institutions of the EAC are: the Summit of Heads of State and/or Government; Council of Ministers; Coordination Committee; sectoral committees; East African Court of Justice; East African Legislative Assembly; and the Secretariat. In addition, Article 24 of the

[276] See Article 2 and 75 of the Protocol of EAC Treaty.

Protocol established the EAC Committee on Trade Remedies to handle: rules of origin; contingency trade remedies; dispute settlement mechanism; and any other matter referred to the Committee by the Council. The EAC has the following autonomous institutions: Lake Victoria Development Programme[277]; the East African Development Bank (EADB)[278]; Lake Victoria Fisheries Organization (LVFO)[279]; and the Inter-University Council for East Africa (IUCEA).[280]

The East African Court of Justice, established under Article 9 of the Treaty, ensures that EAC law is interpreted and implemented in line with the Treaty. The Court has jurisdiction to hear and determine disputes between member states on the interpretation and application of the Treaty (if the dispute is submitted to it under a special agreement), and between the Community and its employees. The Court became operational on 30 November 2001, and is temporarily located in Arusha, until the Summit determines its permanent seat. The six judges, two from each member, are appointed by the Summit from among sitting judges of any national court of judicature or from recognized jurists, while the Registrar is appointed by the Council.

The East African Legislative Assembly provides a democratic forum for debate. It has a watchdog function, and ultimately is responsible for the legislative process. The Assembly interacts with the national assemblies of member states on EAC matters; debates and approves

[277] The Lake Victoria Development Programme, established in 2001, provides a mechanism for coordinating the various interventions on the lake and its basin, and serves as a centre for promotion of investments and information sharing. It is focusing on, *inter alia*, harmonizing policies and laws on the environmental management of the lake and its catch area (East African Community Secretariat online information. Available at: www.eac.int/programme.htm).

[278] The EADB was first established in 1967 under the former East African Community. Following the breakup of the EAC in 1977, the Bank was re-established under its own Charter in 1980. It offers a broad range of financial services to EAC members (EADB online information. Available at: www.eadb.org/background).

[279] The LVFO, established in 1994, aims to foster cooperation amongst EAC members in matters regarding Lake Victoria; harmonize national measures for the sustainable use of fisheries and other resources; and develop and adopt conservation and management measures to assure the lake's ecosystem health and sustainability (LVFO online information. Available at: www.inweh.unu.edu/lvfo/Default.htm).

[280] The IUCEA, established in 1980, aims to facilitate contact between the universities of East Africa, provide a forum for discussion on academic and other matters relating to higher education, and help maintain high and comparable academic standards (IUCEA online information. Available at. www.iucea.org).

the EAC budget; considers annual reports, annual audit reports, and any other reports referred to it by the Council; makes recommendations to the Council on the implementation of the Treaty; and recommends to the Council the appointment of the Clerk and other officers. The Assembly has 27 elected members, and five ex-officio members consisting of the three ministers for regional cooperation, the Secretary General and the Counsel to the Community. A Speaker presides over the Assembly.[281]

V.3. Competition Policy and Regulatory Issues

Article 21 of the Protocol on the Establishment of the EAC Customs Union obliges member states to prohibit any practice, undertaking or agreement that has as its objective or effect the prevention, restriction or distortion of competition within the Community. This provision, however, does not apply to a practice, undertaking or agreement that improves the production or distribution of goods, or promotes consumer welfare or technical or economic development. An EAC Competition Bill is under consideration by the East African Legislative Assembly (as at July 2006). The Bill prohibits anti-competitive practices, including price collusion, collusive tendering and market allocation, and quantitative restraints on investment or sales. It establishes an EAC Competition Committee, composed of one representative from each member state, which has the power to investigate and to compel evidence, hold hearings, and to impose sanctions and remedies. The Bill also contains provisions on mergers and acquisitions, consumer welfare (including unfair competition), and subsidies.

[281] *Ibidem*

CHAPTER VI: GENERAL CONCLUSION AND RECOMMENDATIONS

6.1. The summary of findings of the precedent chapters

thesis it is the role of world trade organization in Africa under international trade law. (case study EAC member states.

This thesis is composed into five chapters, the chapter one is entitled the general introduction; chapter two, is conceptual and Theoretical framework or Literature review while the chapter three is the analysis of International trade in EAC states members and WTO Dispute Settlement System, the chapter four relating to the mechanisms of overcoming challenges of international trade in EAC members in relation of WTO Dispute Settlement System. While the chapter five is focusing on the legal framework which applies on the disputes against WTO the EAC states members Lastly, this work is closed with a conclusion and recommendations on my thesis.

Within all above chapters the findings focus on the three main chapters which are chapter three; chapter four and chapter five then there are conclusion and recommendations

6.2. Answers to the research questions

The roles of world trade organization under international trade law such that The WTO's overriding objective is to help trade flow smoothly, freely and predictably. It does this by: administering trade agreements. acting as a forum for trade negotiations.[282]

So that with come up on the legal aspects relating to my thesis which found within the above three chapters, one is related to chapter three of the legal analysis of International trade in EAC states members and WTO Dispute Settlement System. the answer is WTO, helps to prevent the detrimental effects of unresolved international trade conflicts and to mitigate the imbalances between stronger and weaker players by having their disputes settled on the basis of rules rather than having power determine the outcome.

On the chapter four as another legal aspect is relating to the mechanisms of overcoming challenges of international trade in EAC members in relation of WTO Dispute Settlement

[282] S., Gregory, 'Developing Country Use of the WTO Dispute Settlement System: Why it matters, the barriers posed and its impact on bargaining ', Paper prepared for the WTO AT 10 :A look at the Appellate Body IN Sao Paulo , Brazil , May 16-17, 2005 https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm Dispute by Member accessed on 25 th march 2023.

System. The mechanisms available for dispute resolution can include mediation, arbitration and use of formal court proceedings. Each has its place and offers particular benefits.

There are three main stages to the WTO dispute settlement process: (i) consultations between the parties; (ii) adjudication by panels and, if applicable, by the Appellate Body; and (iii) the implementation of the ruling, which includes the possibility of countermeasures in the event of failure by the losing party to do so.

The last legal aspect, is in chapter five which focusing on the legal framework which applies on the disputes against WTO the EAC states members. Some of the legal framework is that, The EAC institutional framework is responsible for investment promotion and creating a conducive investment environment for current and future investors.

The EAC has put in place sufficient legal framework that has created a conducive legal environment for investments to thrive. This legal framework is enabling EAC Partner States to cooperate in the areas of Investment and Industrial Development to harness the investment potential to promote economic growth and development in the region.

The legal framework is also enabling harmonization and rationalization of investment incentives with a view to promoting the EAC as a single investment area. It is also enabling efficiency in production. This EAC legal framework is provided for in: the EAC Treaty Articles, 79-80 and 127-129; The EAC Customs Union Protocol, Article 3 (c) and (d); The EAC Customs Management Act Article 25; The EAC Competition Act; the EAC Common Market Protocol Articles 23 and 29; and The EAC Model Investment Code 2006..[283]

By conclusion all includes within my thesis is relevant and necessary for future law students for further legal research, then my recommendation as a lawyer to have an international trade law which is strong, it's better for the EAC member states to create one trade policy of law as a EAC Trade law which can prevent any disputes or conflicts can arise or occur within member states accordingly for helping the weaker states to access on market or trade environment.

6.3.Scope for further research

The scope for further research relating to the topic of this thesis which is The role of world trade organization (WTO) in sustainable development of Africa under international trade law.

[283] *ibid*

Case study EAC member states. The future researchers can work on this by focusing on development its self; security and on the protocols of EAC common market, etc

6.4. General conclusion

By conclusion, the Concept of international trade is directly influences the economic growth because there are many other factors that also directly affect the rate of growth of a given country. For instance, the level of security of a country matters a lot. If the country is constantly infested by terrorism or it has an ongoing civil war, it is highly unlikely to experience any form of economic growth even when it attempts to engage in international trade. This and many other factors that affect the economic growth alongside international trade have been discussed in this paper in order to provide a clear insight to the reader about the real effects of international growth and its relationship to the growth of the economies. Many other analyses and discussions have been included, including the US-China trade war and the Brexit, which has been a leading hot topic for about 3 consecutive years since the passage of the referendum in 2016. Drawing from the descriptions, discussions and analysis included in this thesis, the following policy recommendations are brought forth as suggestions so that there is an achievement of internationally, regionally and nationally agreed goals of development.

All economies need to embrace trade openness and international trade so that they stay at par with all the current trends in trade and technologies to help them work through their challenges whether trade related or other socioeconomically issues. Trade openness is very important for any country, whether developed, developing or poor country because exposure to new markets means exposure to new ideas, new trading techniques, new technologies, innovations and new markets to sell or buy goods. In as much as it is hard to clearly identify a closed economy, so far, North Korea is on the verge of becoming a completely closed economy. This is because its political policies are completely opposite with what other countries embrace like democracy and human rights.

Based on the prevailing scenario it can be concluded that under the traditional retaliation economically powerful member nations are not affected by the withdrawal of tariff concessions or an imposition of import quotas by the less developed nations. In other words, it can be said that the traditional retaliation process is very much dependent on the size and importance of retaliating country's domestic market. This inability on the part of the less developed and least developed nations to enforce the sanctions against the economically powerful, non-compliant country raised many issues.

Therefore, it can be concluded that the world trade organizations dispute settlement mechanism should be promoted among the developing nations against the recalcitrant nations. The developing nation has paid a huge price the same during the Uruguay rounds of WTO and accessions process. Further, the EAC state members should actively engage themselves in the DSU negotiations and reviews in order to ensure proper functioning and to make the system more effective. We argued that the rule based multilateral framework is the best forum to address the concerns of the developing countries. A successful resolution of these difficulties will bring many benefits to both developing and developed countries. First is the obvious benefit of helping EAC state members achieve higher growth and prosperity through integration into the world economy. The second is the re-establishment of the "development credibility" of the WTO so that it continues to operate as the main forum for addressing trade issues and liberalization.[284]

6.5. Recommendations

By recommendation The WTO or DSU reform of the WTO Dispute settlement system is very important to the WTO members especially in EAC members state. The issue of strengthening the implementation and enforcement of DSB recommendations and rulings directly affects the

[284] World Trade Organization, understanding on Rules and Procedures Governing the Settlement of Disputes http://www.wto.org/english/docs_e/legal_e/ursum_e.htm#Understanding accessed, 26/2/2023.

level of enforcement pressures, which would be applied to governments in violation of WTO obligations. It should also be noted that whatever the legal niceties of the recommendations to be taken, the issue of reforming the DSU rests with the WTO Members who make their decisions by consensus, so the reforms should be acceptable to all members. This underpins some of the difficulties in reforming the DSU.

Basing on the findings I would like to recommend: That the panels and appellate Body should make use of suggestions as provided in Article 19 of the DSU. This would give guidance to the parties on how best they can implement the DSB recommendations and rulings. In the event of a dispute over whether the measures taken by the losing defendant have led to full compliance with DSB recommendations and rulings, it is usually the original panel which becomes the compliance panel, instead of waiting until dispute arises, it is suggested that the panelists and the Appellate Body be proactive in giving suggestions on implementation. This may as well expedite the implementation process.

Again for recommendation as a lawyer to have an international trade law which is strong, it's better for the EAC member states to create one trade policy of law as a EAC Trade law which can prevent any disputes or conflicts can arise or occur within member states accordingly for helping the weaker states to access on market or trade environment.[285]

[285] World Trade Organization, Past, Present and Future http://www.wto.org/english/thewto_whatis_e/tif_e/fact4_e.htm accessed 26/2/2023.

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25. [1] Shaffer, supra, at p. 58. He suggests that developing countries could say that they will only accept proposals for transparency (only those aspects that are not structurally biased against developing country interests) if developed countries accept improvements in remedies: at p. 57.
26. [1] Hudec: Remedies, supra, at p.10.
27. [1] See Bronckers and Broek, supra, for a good discussion on financial compensation and a summary of the key elements of a mechanism for financial compensation in the WTO. While recognizing that it might not be easy to get all Members to support the introduction of financial compensation, they urge developing countries and private business to rally around the proposal.
28. [1] T., Daniel Shed, Brandon J. Murrill, Jane M. Smith, Dispute Settlement in the Word Trade Organization (WTO): An overview , November 26,2012.p.10.
29. [1] Canada- continued suspension of obligations in the EC-Hormones Dispute, WT/DS321.
30. [1] , European communities – Measures Affecting Livestock and Meat (Hormones), WT/DS48(complaint of Canada).
31. [1] T., Daniel Shed, Brandon J. Murrill, Jane M. Smith, Dispute Settlement in the Word Trade Organization (WTO): An overview , November 26,2012.p.11
32. [1] Panel report , united states – continued suspension of obligations in the EU Dispute (March 31,2008)

33. [1] Appellate Body report, United States — Continued Suspension of Obligations in the EC — Hormones Dispute

34. [1] T., Daniel Shedd, Brandon J. Murrill, Jane M. Smith, op-cit, p.11.

35. [1] At the time of the May 2009 agreement, some products had been removed from the list of covered items pursuant to the USTR's January 2009 announcement.

36. [1] T., Daniel Shedd, Brandon J. Merrill, Jane M. Smith, op-cit,p.11.

37. [1] Notification under Paragraph2(a) of the decision of 30 August 2003 on the implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health , Doc. IP/N/9/RWA/1(19 July 2007).

38. [1] The implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public health , Doc, 1P/N/10/CAN/1(8Cotober 2007).

39. [1] The chairman's statement provides examples in the form of "best practices"guidelines.

40. [1] There is also a special waiver for regional trade agreements of mostly LDSC Members.

41. [1] www.asil.org/insights/volume/11/issue/28/canadian-made-drugs-rwanda-first-application-wto-waiver-patents

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43. [1] Apotex , Life Saving AIDS Drug for Africa Gets Final Clearance, Press release (21 September 2007).

44. [1] Canada Issues compulsory License for HIV/AIDS Drug Export to Rwanda in first Test of the WTO Procedure, 11 BRIDGES WEEKLY TRADE NEWS DIGEST 32(26 September 2007).

45. [1] Rwanda becomes first country to try to use WTO Procedure to import potential HIV/AIDS Drugs, 1 BRIDGES WEEKLY TRADE NEW DIGEST 27(25july 2007)

46. [1] Notification under paragraph 2(c) of the decision of 30 august 2003 on the implementation of paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health, Doc.IP/N/10/CAN/1(8October 2007).

47. [1] Apotex, Life savings AIDS Drugs for Africa Gets Final Clearance, Press release (21 September 2007).

48. [1]Presentation by Greg Perry to the European Parliament 's Mini-Hearing on TRIPS and Accessed to Medicines , 5 July 2007, Brussels.

49. mir attaran , AIDS Drugs Fiasco a Tale of Ed Tape, TORONTO STAR (9 August 2007)

50. [1] see , e.g; report of the Panel, EEC-Restrictions on the Imports of Dessert Apples, BISD 36S/93 (L/6491) adopted 22 June 1989

51. [1] William j.Davey, compliance Problems in WTO Dispute Settlement , 42 CORNELL INT'L L.J, 119,122 (2009)

52. [1] See Anderson (2002:5). The theory holds even though some third countries that import those or like products may lose from a terms of trade deterioration due to the fact that world as a whole will be better off economically, see ibid.

53. [1] B, MERCURIO, (2009). Why compensation cannot replace trade retaliation in the WTO Dispute settlement understanding . World Trade Review, p.326.

54. [1] M. Footer, Developing Country Practice in the Matter of WTO Dispute Settlement 2001 Journal of World Trade 35(1)55,at 94.

55. [1] Article 22 of the understanding on the Rules and Procedures Governing the settlement of Disputes (dsu) and rticle 4.10 and 7.9 of the Agreement on Subsidies and Countervailing Measures (CSM Agreement).

56. [1] Hunter Nottage , Evaluating the Critique that WTO Retaliation Rules undermine the utility of WTO Dispute Settlement for developing countries, ,pp.2.

57. [1] Retaliation is allowed only with prior DSB authorization. However, some members and trade experts have argued that Articles 8(2) and 8(3) of the Agreement on Safeguards provide an exception that allows the suspension of concessions immediately after the adoption of the Panel or Appellate Body report without prior authorization, see WTO HANDBOOK, Supra note 2, at 81 n.97.

58. [1] See DSU , supra note p, art.22(3)(b). in a TRIPS Dispute, this would entail th imposition of countermeasures on copyrights or trademarks in an underlying patent dispute.

59. [1] Decision by the Arbitrators , European Communities Regime for the Importation , Sale and Distribution of Bananas, WT/DS27/ARB/ECU (Mar.,24,2000).

60. [1] Suspension of concessions in such a case would likely lead to a decrease in supply or an increase in prices of the affected goods.

61. [1] Ecuador, Decision of Arbitrators, supra note 140,p.173.

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63. [1] See , e.g:, Decision by the arbitrators , United states – Subsidies on Upland Cotton, WT/DS267/ARB1, (Aug.31,2009).

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