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The WTO Dispute Settlement Understanding: How can Africa make better use of the system?

Using Egypt as a case study.

Submitted in Partial Fulfilment of the Degree

LLM in International Law

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DECLARATION

I, Khaled Mohamed El-Taweel declare that the work presented in this dissertation is original. It has never been presented to any other University or Institution. Where other people's works have been used, references have been provided. It is in this regard that I declare this work as originally mine. It is hereby presented in partial fulfilment of the requirements for the award of the LL.M Degree in International Law.

Signed…….

Date: 15 June 2010

Dedication:

This dissertation is dedicated to the memory of my father Mr Mohamed El-Taweel, for all his inspiration.

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List of Abbreviations

ACP	African, Caribbean and Pacific
ACWL	Advisory Centre on World Trade Organization Law
AD	Anti-Dumping
AGOA	African Growth and Opportunity Act
AoA	Agreement on Agriculture
CDWTO	Central Department for World Trade Organization in Egypt
COMESA	Common Market for Eastern and Southern Africa
DDA	Doha Development Agenda
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EAC	East African Community
EC	European Communities
EU	European Union
FTA	Free Trade Area
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Production
IMF	International Monetary Fund
LDCs	Least Developed Countries
MTI	Ministry of Trade and Industry in Egypt
NAMA	Non-Agriculture Market Access
NEPAD	New Economic Partnership for Africa's Development
RECs	Regional Economic Communities
SADC	Southern African Development Community

SCM	Subsidies and Countervailing Measures
SPS	Sanitary and Phytosanitary Measures
TAS	Trade Agreements Sector in Egypt
TRIMs	Trade-Related Investment Measures
TRIPS	Trade-Related Aspects of Intellectual Property Rights
UNCTAD	United Nations Conference on Trade and Development
USA	United States of America
USD	United States Dollar
WB	World Bank
WTO	World Trade Organisation

Table of Contents

Executive Summary

The Dispute Settlement Understanding (DSU) established under the World Trade Organisation, is one of the most notable achievements of the multilateral trading system. African countries need to engage more in this emerging system to defend their trade and economic interests, especially in this time of increasing integration in the world trading system.

It is submitted that the weak participation of African countries in the DSU can have negative economic and trade implications on Africa, as it minimises the influence these countries could exert on the development of the DSU legal system at this stage of particular importance to the evolution of international trade law in addition to its direct economic and trade costs.

All complaints about impediments in the DSU cannot be rightly claimed to be the core reasons for weak African participation in the system, as the system still stand out as a rule-based with equal treatment to Developed and Developing countries. Additionally, the low participation of African countries cannot be justified by the degree of development basis only, as other developing counties have been very successful in this regard and some African countries managed to make use of the system in a very positive way.

Moreover, this dissertation states that the effect of other internal constraints that are reported to hinder African participation, such as lack of sufficient financial resources, limited technical expertise and political factors, could be minimised through joint African cooperation, and by developing national strategies to deal with DSU.

Egypt is a good example in this regard; despite its limited financial and technical expertise, it managed to gain accumulated experience through its various forms of engaging in the DSU, and consequently managed to defend its trade and economic interests. The establishment of a national organisational framework to deal with the DSU assisted in the preparation of national expertise that is gaining increasing experience. Egypt's incorporation of national legislations on Anti-Dumping, Investment Protection, Intellectual Property Rights and other WTO agreements definitely supports the Egyptian position in the DSU.

African countries are called to work within the African Union and on the national levels to make the best use of the system to serve their developmental goals. National strategies should

be formulated regarding WTO dispute settlement engagement. These should include sound legislations and clear rules of engagement between different departments and the private sector to enable African countries to overcome the major constraints currently limiting their participation. African countries can depend partially on the support system offered by organisations like ACWL, UNCTAD and pro bone assistance from international law firms and NGO's to overcome the financial and lack of experience constraints.

Chapter 1: Introduction

1.1 Background Information

The Dispute Settlement Understanding (DSU) under the World Trade Organization (WTO) is the backbone of the multilateral trading system.[1] It is considered to be one of the greatest achievements of the Uruguay Round of multilateral trade negotiations, as it managed to fill some major gaps in the General Agreement on Tariff and Trade (GATT) dispute settlement system.

The DSU is the result of the evolution of rules, procedures and practices developed over more than 60 years under GATT 1947. It is embodied in the understanding on rules and procedures governing the settlement of disputes. It constitutes Annex 2 of the WTO agreement, and sets out the rules that define today's trade dispute settlement system.

The central objective of the DSU is to provide security and predictability to the multilateral trading system.[2] It aims as well to provide a fast, efficient, dependable and rule-oriented system to resolve disputes that might arise between trade partners, regarding the application of the provisions of the WTO agreements. If it is proven that one of the member states has failed to comply with a WTO agreement or provision, the DSU provides for a relatively rapid resolution of the matter through an obligatory ruling that has to be implemented within a specific time frame, otherwise non-complying member will face potential trade sanctions.[3]

1.2 Problem Statement

WTO statistics show that both Developed and Developing countries are showing increasing confidence in the DSU, and are consequently participating more actively in it compared to the old GATT system.[4]

1 *Moore* (2000) Press/180 WTO.
2 Article 3.2 of the DSU Agreement.
3 World Trade Organisation (eds) (2004) 2.
4 Using data from "World Trade Law" <www.worldtradelaw.net> (accessed 15 March 2010).

Despite the African countries' relatively active participation in the Uruguay round compared to previous negotiation rounds, their participation in the DSU since its inception on 1 January 1995 has been remarkably low.[5]

It is submitted that this weak participation of African countries in the DSU has significant economic and trade implications on Africa. Additionally, it minimises the African countries' influence on the development of the DSU legal system in this stage which is of particular importance to the evolution of international trade law.

1.3 Research Objectives

This dissertation seeks to determine the main reasons for African countries' low participation in the DSU and to identify proposals – on both regional and national levels – to advance their participation, in order to safeguard African trade and economic interests and support their long-term developmental objectives. This will depend on achieving the following objectives:

1. To analyse the DSU text in order to highlight the main constraints toward a greater level of African countries participation in the WTO dispute settlement, and to what extent these constraints are correlated to their current low level of participation. Additionally, major African proposals to clarify and improve the DSU will be analysed to evaluate their possible impact on African countries' participation.
2. To review the difference in the levels of participation in the DSU between African countries and other major Developed and Developing countries, with the objective of analysing the reasons why Africa lags behind other economic blocks in terms of their use of the DSU.
3. To identify internal constraints that might act as barriers for African countries' participation, and possible recommendations on how to deal with such constraints.
4. To discuss in detail some of the cases where African countries managed to make use of the DSU system, with the objective of analysing how these countries managed to overcome their internal constraints.
5. To discuss in detail the Egyptian participation in the DSU and look at the national structure dealing with it, in order to come with possible conclusions about how Egypt managed to increase its engagement in the DSU.

5 See the discussion about the difference between GATT dispute settlement usage and DSU usage in chapter 4 item 4.2, Using data from "World Trade Law" <www.worldtradelaw.net>.

1.4 Thesis Statement

Despite certain unfavourable provisions within the DSU as well as recognised national constraints, there is space for greater African countries participation in the WTO dispute settlement system, which would enable these countries to defend their economic and trade interests.

1.5 Limitations of the Study

1. The study will cover the period since the initiation of the DSU on 1 January 1995 up until 31 December 2009, and will not discuss African participation under the GATT dispute settlement system.
2. As the research methodology depends partially on interviews with experts from the WTO Secretariat, DSU experts and government officials from Egypt and South Africa, the availability of the interviewees may prove to be a limitation. Additionally, due to limited time and resources, the research will not include interviews with experts from other African countries.
3. The limited resources available about the latest state of negotiation on the DSU clarification and improvement might present another limitation.

1.6 Significance of the Study

1. It is of particular importance to African countries to identify and overcome the main constraints that prevent larger participation in the DSU, in order to benefit from the DSU rule-based system. This would assist these countries in achieving their trade and economic objectives, and they would consequently not be shut off from influencing the system at this vital stage of evolution.
2. As the WTO is a consensus-based decision making institute, encouraging the involvement of African countries in the DSU is essential to give the system more legitimacy and to make its operation more effective.
3. In terms of previous research, most of the academic work done on the DSU focused more on why the system was not used by African countries, rather than how African countries could use the system in a more effective way. In addition, previous analysis focused on analysing the case law, rather than interviewing real practitioners working in the field. In

this regard, conducting interviews with experts working firsthand with DSU issues presents a useful means of tackling the problem and acquiring information about its real and profound causes, and of suggesting ways to deal with it.

1.7 Research Methodology

This research will combine analytical and comparative approaches, and will make use of in-depth interviews to answer the research questions.

An analytical approach will be used to analyse the DSU legal text and major proposals to improve it, as well as African participation in the system. This will be done in order to highlight the major weak points within the DSU that hinder effective African participation and to come up with some recommendations in this regard.

A comparative approach will be used to discuss African countries' participation in the DSU case law in terms of number of cases, mode of participation and the nature of disputes. This will be done to highlight the different levels of participation between African countries, and Developed and Developing countries.

In-depth interviews will be held with government officials, experts and other stakeholders from Egypt and South Africa (major African participants in the DSU) to highlight the major causes of African countries' weak participation, and to look at potential recommendations.

Some parts of the research – especially the chapter on Egypt's participation in the DSU – will depend partially on the author's own experience, as he worked in the WTO department in the Egyptian Ministry of Foreign Affairs and personally dealt with DSU issues.

1.8 Research Structure:

This body of work will be divided into six chapters. Following this introduction, and the second chapter on background and literature review, the third chapter will deal with the analysis of the DSU agreement, and current negotiations to clarify and improve the DSU text, the fourth chapter will explore world trends in using the DSU, with special analysis of African participation and the internal constraints that inhibit active engagement in the DSU, the fifth chapter will deal in more detail with Egypt's participation in the DSU, and involvement in the current negotiation to improve and clarify the DSU, and the national

structure that handle DSU issues, and the last chapter will highlight the major conclusions and recommendations on possible strategies for improving Africa's participation.

Chapter 2: Background and Literature Review

2.1 Introduction

The world trading system consists of a set of national laws, bilateral agreements and internationally negotiated plurilateral and multilateral arrangements that together govern the conduct of cross-border exchange of goods and services. This system provides an international legal framework, in the context of which countries voluntarily and multilaterally limit the restrictions to such exchanges.[6]

The Uruguay Round Agreement of the WTO has been described as the most important event in recent economic history.[7] With the completion of the Round, a new trading system was established together with a new institution, the WTO, to manage it. Nations are more and more engaged in the detailed processes of the WTO, especially its dispute settlement procedure.[8]

The emergence of the WTO as the preeminent organisation on trade and trade-related aspects of global policymaking makes it of critical importance for Africa as the region embarks on dramatic change in its development strategy, and enters a phase of closer integration into the world economy.[9]

2.2 Overview of the WTO Structure, Membership and Decision-Making process

According to the words of Pascal Lamy, the Director General of the WTO *"The WTO provides a forum for negotiating agreements aimed at reducing obstacles to international trade and ensuring a level playing field for all, thus contributing to economic growth and development"*.[10]

6 *Oyejide & Lyakurwa* (eds) (2005)1.
7 *Bierman et al* (1996) *UPJIEL* 821 at 845.
8 *Jackson* (2000) 168.
9 *Oyejide & Lyakurwa* (eds) (2005)1.
9 *Bierman et al* (1996) *UPJIEL* 821 at 845.
10 "About the WTO" <http://www.wto.org/english/thewto_e/whatis_e/wto_dg_stat_e.htm> (accessed 1 April 2010).

The WTO also provides a legal and institutional framework for the implementation and monitoring of these agreements, as well as for settling disputes arising from their interpretation and application. The current body of trade agreements comprising the WTO consists of 16 different multilateral agreements (to which all WTO members are parties)[11] and two different plurilateral agreements (to which only some WTO members are parties).[12]

Over the past 60 years the WTO and its predecessor, the GATT, have helped to create a strong and prosperous international trading system, thereby contributing to unprecedented global economic growth.[13] The WTO currently has 153 members, of which 117 are Developing countries.[14]

Decisions in the WTO are generally taken by consensus of the entire membership.[15] The highest institutional body is the Ministerial Conference, which meets roughly every two years.[16] A General Council conducts the organisation's business in the intervals between Ministerial Conferences.[17] Both of these bodies comprise all members. Specialised subsidiary bodies (Councils, Committees, Sub-committees), also comprising all members, administer and monitor the implementation by members of the various WTO agreements.[18]

One important entity for this research is the Dispute Settlement Body (DSB). It is made up of all member governments and usually represented by Ambassadors or their equivalent. [19]

2.3 WTO's Main Objectives and Principles

The WTO seeks to achieve many objectives, including negotiating the reduction or elimination of obstacles to trade, administering and monitoring the application of the WTO's agreed rules for trade in goods, trade in services and trade-related intellectual property rights, monitoring and reviewing the trade policies of WTO members, as well as ensuring

11 Article II.2 of the Agreement establishing the WTO.
12 Ibid Article II.3.
13 "About the WTO" < http://www.wto.org/english/thewto_e/whatis_e/wto_dg_stat_e.htm> (accessed 1 April 2010).
14 Ibid.
15 Article IX of the Agreement establishing the WTO.
16 Ibid Article IV.1.
17 Ibid Article IV.2.
18 Ibid Article IV.
19 " Dispute Settlement" <http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm#dsb> (accessed 1 April 2010).

transparency of regional and bilateral trade agreements, and settling disputes among members regarding the interpretation and application of the agreements.[20]

The WTO's founding and guiding principles remain the pursuit of open borders, the guarantee of the Most Favoured Nation (MFN) principle and non-discriminatory treatment by and among members, and a commitment to transparency in the conduct of its activities.[21]

2.4 The Evolution of the Dispute Settlement Understanding

The Uruguay Round transformed the world trading system, through a series of far-reaching measures that included the creation of the WTO and the strengthening of its monitoring and dispute settlement procedures.[22]

The dispute settlement mechanism is a major pillar of the international trading system that went through two main stages of development, under the GATT and the WTO, as will be explained in the following sections.

2.4.1 The GATT Dispute Settlement System:

The dispute settlement System of the GATT was based on Articles XXII and XXIII of GATT 1947. It instructed GATT member states to use consultation to settle their disputes.[23] If this was unsuccessful, it empowered the whole membership as an organ to consult with the disputing parties in order to end the dispute. [24]

GATT 1947 specified what constitutes a dispute and how such matters should be raised.[25] It went on to instruct the whole membership to respond to a dispute by investigating and making appropriate recommendations to the disputing parties, or by giving a ruling on the matter.[26]

20 "About the WTO" < http://www.wto.org/english/thewto_e/whatis_e/wto_dg_stat_e.htm> (accessed 1 April 2010).
21 Ibid.
22 *Yeo* (1998) *Mimeo AERC* 11.
23 Article XXII of the General Agreement on Tariffs and Trade (GATT 1947).
24 *Alavi* (2007) *DPR* 25 at 26.
25 Article XXIII of GATT 1947.
26 Ibid.

GATT Article XXIII was the cornerstone of dispute settlement.[27] It provided for consultations as a prerequisite to invoke the multilateral GATT processes. Three features of these processes can be stressed: [28]

- They could usually be invoked on grounds of nullification or impairment of benefits expected under the agreement and they did not depend on actual breach of legal obligation.
- They established the power of the contracting parties not, only to investigate and recommend action, but also to give a ruling on the matter.
- They gave the contracting parties the power in appropriately serious cases to authorise a contracting party or parties to suspend GATT obligations to other contracting parties.

Even though some authors argued that the GATT dispute settlement was merely a facilitation of negotiations designed to reach a settlement, the original intention was for the GATT to be placed in the institutional setting of the International Trade Organization (ITO), and the draft ITO charter called for a rigorous dispute settlement procedure which contemplated effective use of arbitration.[29]

At the beginning of the GATT's history, disputes were generally taken up by diplomatic procedures; they were dealt with at semi-annual meetings of the contracting parties.[30] Later they would be brought to an intercessional committee of the contracting parties, and even later were delegated to a working party set up to examine either all disputes, or only particular disputes brought to GATT.[31] However, around 1955 a major shift in the procedures occurred and it was decided that, rather than using a "working party" composed of nations, a dispute would be referred to a Panel of experts. The three or five experts would be specifically named and were to act in their own capacities and not as representatives of any government.[32] This development, it can be argued, represented a shift from primarily a negotiating atmosphere of multilateral diplomacy, to a more arbitrational or judicial

27 *Janowa et al* (2008)138.
28 Ibid.
29 *Jackson* (2000) 170.
30 Ibid 172.
31 Ibid.
32 Ibid.

procedure designed to arrive impartially at the truth of the facts and the correct interpretation of the law.[33]

Major weaknesses in the GATT system

Because of its emphasis on diplomacy, positive consensus and negotiation, the GATT's dispute settlement system had some systematic shortcomings. Any party to a dispute could at any stage block the process.[34] There were no deadlines for the settlement process to determine for example, how long consultations should last.[35] The binding nature of the rulings could be disputed, and their quality was often considered inadequate. Finally, eight of the GATT's nine "Codes" had their own system of dispute settlement.[36]

However, it is fair to say that despite its flaws, the GATT dispute settlement mechanism was quite successful. Its procedures worked better than expected and arguably better than those of most other international dispute procedures at this time. [37]

2.4.2 The WTO Dispute Settlement Understanding

Gradually, and in response to these problems under the GATT dispute settlement system, a more complex and legalised system emerged. Its emergence built on GATT's relatively successful overall record of dispute settlement, despite its shortcomings.[38]

The DSU has been described as the most important and powerful of any international law tribunals, although some observers reserve that primary place to the International Court of Justice.[39] It is a quasi-judicial system because political factors usually affect the dispute, and because disputes are channelled exclusively through member governments and not the private sector.

Some scholars rightly claim that the DSU is unique in international law and institutions; it embraces mandatory exclusive jurisdiction and virtually automatic adoption of dispute settlement reports. This is extraordinary for an institution with such broad-ranging

33 Ibid.
34 *Alavi* (2007) *DPR* 25 at 26.
35 Ibid.
36 Ibid.
37 *Jackson* (1997) 112.
38 *Alavi* (2007) *DPR* 25 at 26.
39 *Jackson* (2006) 135.

competence and responsibilities as the WTO.[40] Virtually every aspect of economic regulation and policy is touched upon at least potentially, if not actually, and is already imposing obligations on 153 nations comprising 93% of world trade.[41]

By reinforcing the rule of law, the DSU makes the trading system more secure and predictable. Where non-compliance with the WTO agreement has been alleged by a WTO member, the DSU provides for a relatively rapid resolution of the matter through an independent ruling that must be implemented promptly, falling which the non-implementing member may face possible trade sanctions.[42]

Major Improvements in the DSU

The DSU represents a breakthrough in commercial dispute settlement tools, when compared to the GATT dispute settlement system, the current system shows a significant improvement and effective measures, which include greater clarity of rules, binding decisions, a standing Appellate Body (AB) and better guarantees for members who wish to defend their rights.[43]

Don Moon rightly claims that the WTO DSU has introduced a highly legalised Dispute Settlement mechanism whose key function is compulsory adjudication.[44] The litigation process becomes expeditious and automatic without allowing interference or blockage from disputing states.[45] Independent legal bodies are supposed to make the final decisions on disputes and determine the amount of remedies for violations.[46] The member states are expected to comply with the strict regulations and obligations that the new DSU mandates.[47]

Although the DSU did not solve all the problems of the GATT dispute settlement system, it marks significant improvement, the most obvious being the following:

- The enforcement mechanism through the DSU is much stronger than that of the previous system. The GATT enforcement procedures were easily delayed or blocked by parties to the dispute; whether at the stage where a Panel was established, or when the Panel issued its report; as a consensus was needed to establish a Panel or accept its report; Now a

40 *Jackosn* (2006) 135.
41 Ibid.
42 World Trade Organisation (eds) (2004) 2.
43 *Mosoti* (2006) *JIE*L 427 at 428.
44 *Moon* (2010) *CIS Inha University* 136 at 137.
45 Ibid.
46 Ibid.
47 Ibid.

consensus is needed in order to stop the proceedings from advancing at any stage of the dispute settlement procedures. This is theoretically impossible, as it is always in the winning party's interest to have the Panel report adopted. This results in a quasi-automatic adoption of Panel reports.[48]

- The DSU enforcement mechanism is also stricter. While the GATT dispute settlement system previously stated that the contracting parties may authorise suspension of concessions if the circumstances are serious enough and as they determine to be appropriate, the DSB "shall grant authorization to suspend concessions or other obligation" and the level of such suspension is to be equivalent to the level of the nullification and impairment.[49]
- It established a unified dispute settlement system for all parts of the WTO, including services and intellectual property rights.[50]
- It established stricter time limits on the operation of dispute Panels.[51]

2.5 African Countries and the DSU

While the DSU agreement was being drafted, Developing countries supported the system because it was rule-based and not power-based as had been the case with the GATT.[52] It is submitted that their support was based on the understanding that the strengthening of the dispute resolution system would allow for equal opportunities, compared with Developed trading partners, and that it would protect them from the arbitrary use of power.

However, some scholars argue that stronger states take advantage of weaker states under the legalised DSU of the WTO. Insufficient legal resources are most frequently identified as an inherent disadvantage for weaker or poorer countries.[53] The bigger WTO members still yield a lot of power with a consequent perception of inferiority on the side of smaller members. Appointment of high-class law firms and an intimidating collection of "experts" as part of delegations will often discourage, smaller less-experienced members from participating.[54]

48 *Zimmermann* (2006) 139.
49 Article 22.4 of the DSU.
50 Article 1 of the DSU.
51 *Yeo* (1998) *Mimeo AERC* 38.
52 *Croome* (1999) 124.
53 *Moon* (2010) *CIS Inha University* 136 at 137.
54 Interview with Mr Thinus Jacobsz 21 May 2010.

In general, African countries have traditionally not been active participants in the various multilateral trade negotiations that have defined the rules and procedures of the global trading system. This suggests that Africa has not paid adequate attention to the external developments that affect its trade and trade prospects. Regardless of its motivating factors, this passive posture could be counterproductive in light of recent strategic changes and ongoing policy reorientation in the region.[55]

Despite the improvements in the dispute settlement system, African countries have largely been absent as players at the DSU in its first decade. Why Africa is not fully utilising the opportunities presented by this mechanism to advance its trade agenda is intuitively understandable, but practically mystifying.[56]

In recent literature, this has been attributed to a number of factors, including the low volume of trade with an export base often characterised by single unprocessed commodities; a complicated and expensive dispute settlement system; inadequate legal expertise and a less litigious approach to possible disputes particularly when major trading and donor partners are involved.[57]

Bown and Hoekman claim is submitted correctly that the probability of encountering disputable trade measures is proportional to the diversity of a country's exports over products and partners, which means that larger and more diversified exporters would be expected to bring more complaints than smaller and less diversified exporters.[58]

African and other Developing countries stand to benefit substantially from the systematic reform of the world trading system because it strengthen the rule-based nature and offer more protection for small and poor countries that can exercise little economic or political power.[59]

There is general agreement that Developing countries should be more actively and constructively involved in the WTO.[60] These nations cannot prosper in isolation.[61] Many commentators will go further and call for WTO reforms so that development needs can be

55 *Oyejide & Lyakurwa* (eds) (2005) 2.
56 *Zunckel* (2005) *JWT* 1071 at 1071.
57 *Mosoti* (2006) *JIEL* 427 at 427.
58 *Bown & Hoekman* (2005) 140, Interview with Mr Hilton Zunkel 21 May 2010.
59 *Yeo* (1998) Mimeo AERC 11.
60 *Gerhard Erasmus* "Accommodating Developing Countries in the WTO: From Mega-Debates to Economic Partnership Agreements" < http://www.idrc.ca/en/ev-151641-201-1-DO_TOPIC.html> (accessed 20 May 2010).
61 Ibid.

better accommodated.[62] Others point to larger systemic benefits for developing countries (for example, more clout in trade negotiations) and the fact that the system will become more legitimate with increased participation by developing countries.[63]

Finally, John Jackson has observed − while commenting on the WTO dispute settlement system – that the participation of Developing countries in this system is, in the opinion of many, vital to the long-term durability and effectiveness of the WTO dispute settlement system, and therefore, probably the WTO itself.[64]

2.6 Conclusion

The dispute settlement system under the GATT and the WTO went through a gradual evolution and development toward a more predictable system and it has levelled the playing field for African countries. However, it is evident that these countries are not benefiting from such development for factors that go beyond the DSU text.

62 Ibid.
63 Ibid.
64 *Jackson*, (2002) *(WTRL)* 101 at 111.

Chapter 3: Analysis of the Dispute Settlement Understanding and Main Proposals to Improve and Clarify it

3.1 Introduction

The Understanding on Rules and Procedures governing the Settlement of Disputes is an international agreement comprising 27 articles with three appendices. It has been enforced for 15 years now. The agreement is currently under negotiations to clarify and improve its provisions, as per Paragraph 30 of the 2001 Doha Ministerial declaration, which reads:

"*We agree to negotiations on improvements and clarifications of the Dispute Settlement Understanding (DSU). The negotiations should be based on work done thus far as well as any additional proposals by members, and aim to agree on improvements and clarifications not later than May 2003,*[65] *at which time we will take steps to ensure that the results enter into force as soon as possible thereafter".*[66]

In the coming sections, the main stages of the Understanding will be analysed to determine the major provisions that might be hindering the effective participation of African countries in the DSU. This analysis will also cover major African proposals to improve and clarify the DSU.

3.2 The Consultation Phase

Consultation is the mandatory first stage in any dispute,[67] Article 4 of the Understanding explains in details the steps and time frame the complainant has to pursue before he can request to establish a Panel. The member to whom the request of consultation is made shall, unless otherwise mutually agreed, reply to the request within 10 days after the date of its receipt and shall enter into consultations in good faith within a period of no more than 30 days after the date of receipt of the request.[68] This time frame can be decreased if the dispute is about perishable goods.[69]

65 This time limit was postponed over and over and the negotiation process is still going although it is not part of the single undertaking.
66 Doha Declaration paragraph 30.
67Article 4.2 of the DSU.
68 Article 4.3 of the DSU.
69 Article 4.8 of the DSU.

There are two legal bases for launching a dispute with a request for consultations, that is, either articles XXII:1 or XXIII:1 of GATT 1994.[70] The main difference between these two legal bases relates to the ability of other WTO members to participate. If the complainant invokes article XXII:1, the admission of interested third parties depends on the respondent. By choosing article XXIII: 1, the complainant is able to prevent involvement of third parties in the consultations. This option may be attractive for a complainant who intends to work towards a mutually agreed solution with the respondent without interference from other members.[71]

3.2.1 Consultations Time Frame

Some African countries have opposed the EU proposal[72] seeking to limit the time available for consultation from 60 to 30 days.[73] It is assumed that this opposition is based on a perception that African countries' technical capacities wouldn't be sufficient to handle the consultation in less than 60 days.

Such a proposal- if adopted- could have some benefits for African economies with small economies who suffer from breach of trade obligations by other WTO members, as it limits the period from the introduction of the inconsistent measure to the establishment of the Panel and the withdrawal of the measure. This is especially relevant in cases where the other party displays no real interest to participate in the consultation process and only aims to extend the negotiation process for as long as possible as part of its litigation tactics.

Some larger WTO members seem to merely follow a systemic approach when faced with matters deemed to be of less economic importance to them. It is only when matters are considered to be serious enough that these members engage in serious negotiations.[74] This may render the consultation process meaningless for smaller members and cause a smaller member to doubt the bona fides of the other party.

70 World Trade Organisation (eds) (2004) 45.
71 Ibid 46.
72 Report by the chairman to the DSB WTO Doc. Job (08) 81, Interview with Mr Waleed El Nozhy 15 May 2010.
73 Report by the chairman to the DSB, WTO Doc. Job (08)/81.
74 Interview with Mr Thinus Jacobsz 21 May 2010.

3.2.2 Location of Consultation

Very often informal discussions on matters between capital-based officials, or between the Geneva delegations of the members involved, precede the formal WTO consultations.[75]

The fact that the consultation usually takes place at the WTO headquarters in Geneva presents another hurdle to African countries as many of them have limited or no permanent representation there. The Least Developed Countries group (LDCs) which include many of the African countries has proposed that the consultations be held in the LDC member country involved in the dispute, in order to overcome the financial obstacles LDCs countries usually encounter when they have to travel to Geneva.[76]

Although this proposal can ameliorate the disadvantages experienced by some developing countries and LDC's,[77] it is not likely to be accepted by all Developed and some Developing countries, because of the logistical constraints associated with having consultation in an LDC capital. It could be suggested that these consultations are continued to be held in Geneva to preserve the neutrality notion, and to finance LDCs representatives through a WTO fund to be established for this reason, or to hold these meetings in major regional cities like Cairo, Johannesburg and Abuja where the logistical facilities are relatively better.

3.2.3 Preferential Treatment to Developing Countries

Although Article 4.10 specifically states that, during consultations, members should give special attention to the particular problems and interests of Developing country members, the agreement does not clarify if this is about substantive or procedural matters, and how this will be achieved with regards to LDCs from African member states.

These provisions are more of soft law nature and are not usually enforced in practice.[78] The current negotiations should come with clear-cut determination on how Developing countries' and LDCs interests are to be taken into consideration.

75 World Trade Organisation (eds) (2004) 45.
76 *Jobodwana* (2009) *IJPL* 206 at 210.
77 Ibid.
78 See Bed Linen case (DS141) explained in detail in chapter 5 section 5.4.2.1 as an example of the soft law of the developmental provisions in the DSU, Interview with Mr Lambert Botha on 4 May 2010.

3.2.4 Compensation

The DSU does not provide for any compensation for the loss incurred by the complainant in the period between the introduction of the inconsistent measure, and its withdrawal during the consultation stage. In the case of African countries, the inconsistent measure could cause major damage to their vulnerable small economies even if applied for a short period of time. African countries have suggested retroactive compensation, as the mere withdrawal of the measure may not be enough.[79] It is submitted that the underlying reason for this proposal is that African and other Developing countries should not suffer any damage as a result of inconsistent measures adopted by a Developed member, which are later withdrawn either before the commencement or during consultations between the parties.[80]

3.3 Third Party Rights

Since statistics indicate that most African countries' participation has been as third parties,[81] it is important to shed some light on the legal framework of this type of participation.

WTO members with a substantial interest in the matter before the Panel have an opportunity to be heard by Panels and to make written submissions as third parties, even if they have not participated in the consultations. Third parties receive the parties' first written submissions to the Panel and present their views orally to the Panel during the first substantive meeting.[82] They can make a written submission to the Panel and AB. However, they have no rights beyond these although a Panel can, and often does, extend the rights of participation of third parties in individual cases.[83] Third parties have no appeal rights[84] but are informed to a large degree by the direction taken by the principal plaintiff and defendant. In many cases it is of great benefit to the principal plaintiff to have third parties align themselves with the argument that is being advanced.[85]

79 *Kessie and Addo* "African Countries and the WTO Negotiations on the Dispute Settlement Understanding" <http://ictsd.org/i/publications/10437/ >(accessed 20 May 2010).
80 Ibid.
81 See Chapter 4 on World Trends in using the DSU, item 4.2 .
82 Article 10.3 of the DSU.
83 World Trade Organisation (eds) (2004) 50.
84 Article 16.4 of the DSU.
85See for example the Sugar Case (DS 266) and Upland Cotton Case (DS 267), explained in details in chapter 4 items 4.4.1 and 4.4.2.

Costa Rica and the EU have proposed to increase third-party rights and remove some of the restrictions on their participation in the DSU process.[86] This proposal is supported by some African countries, who believe this would eventually encourage more African countries to participate in the system. On the other hand, other African members are concerned that this proposal might increase the influence of third parties from Developed countries which might present extra burden on developing countries.[87]

African countries oppose any larger rules for Non-Governmental Organisations under Amicus Curiae[88] category as they argue that the DSU is of an inter-governmental character, and because this would increase the burden on developing countries.[89]

The LDCs group has proposed that Developing countries and LDCs be allowed to participate in any dispute without having to prove that they have substantial trade interest.[90] It is submitted that such proposal this will increase their legal experience, and would enable them to defend long-term developmental interests.

3.4 The Panel Stage

The complainant may request the establishment of a Panel if the respondent did not respect the time limits stipulated in Article 4.3 of the DSU, if the consultation stage did not reach a mutually agreed solution within a period of 60 days, or if parties agreed before the expiry date that consultations have failed to settle the dispute.[91]

The Panel is expected to issue the final report to the parties within six months from the composition date, and three months in the case of an emergency.[92] The period from the establishment of the Panel to the circulation of the reports to members should not exceed nine months.[93] In practice, Panels generally follow the working procedures of Appendix 3 of the DSU, but often adopt additional rules where specific disputes so requires.[94]

86 WTO Doc. TN/DS/W/5 and WTO Doc. TN/DS/W/6.
87 See for the example the Egyptian position toward this proposal explained in detail in chapter 5 under item 5.5.1.
88 A legal term that finds its origins in Latin which means “Friends of the court”.
89 *Jobodwana* (2009) *IJPL* 206 at 215.
90 WTO Doc. TN/DS/W/5.
91 Article 4.3 and 4.7 of the DSU.
92 Article 12.8 of the DSU.
93 Article 12.9 of the DSU
94 World Trade Organisation (eds) (2004) 53.

The Panel should reach a conclusion either to uphold or reject the complainant's claim. Its decision should be based on discussion of the applicable law in light of the facts established by the Panel on the basis of the evidence before it, and in light of the arguments submitted by the parties. The Panel members can express a separate opinion in the Panel report, on the condition that this is done anonymously.[95]

If the Panel concludes that the measure is inconsistent with a covered agreement, it also recommends that the violating member brings the challenged measure into conformity with the WTO.[96] However, the Panel findings are not binding until they are adopted by the DSB in a time frame of 20-60 days after the date of circulation of the report,[97] and on condition that no party to the dispute notifies the DSB of its decision to appeal, or if the DSB decides by consensus not to adopt the report which is not likely.

3.4.1 Establishment of the Panel

The request for the establishment of a Panel must be made in writing and addressed to the chairman of the DSB, it should indicate if consultations were held, identify the specific measure at issue, and provide a brief summary of the legal basis of the complaint.[98]

Similar to the dispute settlement under the GATT 1947, the respondent member can block the establishment of the panel in the first DSB meeting in which the request for Panel establishment is made. However, at the second meeting, the Panel will be automatically established, unless all the members of the DSB decide not to establish the Panel.[99] The second meeting usually takes place around one month later, but the complainant can request a special meeting of the DSB to be held within 15 days of the request, provided that at least 10 days' advance notice of the meeting is given.[100]

In current negotiations to clarify the DSU, there seems to be consensus to allow for the establishment of a Panel at the first meeting at which the request appears on the agenda of the

95 Article 14.3 of the DSU.
96 Article 19.1 of the DSU.
97 Article 11 of the DSU.
98 Article 6.2 of the DSU.
99 Article 6.1 of the DSU.
100 Footnote 5 to Article 6.1 of the DSU.

DSB.[101] This amendment is logical and will speed up procedures that can be of benefit to Developing and African countries.

3.4.2 Composition of the Panel

The DSB does not have a permanent Panel; instead Panels are established on ad hoc basis from an indicative list that is usually prepared by the Secretariat, with the selection of three or five members, pursuant to procedures stipulated in Article 8 of the DSB. Panellists should meet certain requirements in terms of expertise and independence. The EU has proposed the establishing of a permanent Panel, which would be composed of a selected number of experts, who have substantial expertise in the DSU, and could be selected swiftly for the cases and who would always be available for subsequent or related procedures.[102]

Although this proposal is not supported by some African countries,[103] it could help to overcome some of the difficulties that currently characterise the Panellists' selection process, as the reluctance of many countries to accept specific Panellists, and the increased demands on Panellists in terms of time and detailed knowledge of the subject under investigation, as well as the increasing number of cases. However, having a permanent Panel might place extra financial pressure on the finances of the WTO.[104]

When evaluating the preferential treatment offered to Developing countries in this regard, the DSU provides that when a dispute occurs between a Developed and Developing country, the Panel must – upon the request of the Developing country – include at least one Panellist from a Developing country.[105] Although this provision secures the minimum level of preferential treatment to Developing countries, proposals have been made from the LDC group to provide for the mandatory inclusion of a Panellist from LDC where a dispute involves LDC member, and for the inclusion of an additional Panellist from an LDC if the disputant LDC so requests.[106] LDCs also suggested that Panellists should give individual opinions and the decision be taken on a majority.

101 Report by the chairman to the DSB, WTO Doc.Job (08)/81,Interviw with Mr Waleed El Nozhy 15 May 2010.
102 WTO Doc. TN/DS/W/37.
103 See Egypt position in this regard Chapter 5, item 5.4.
104 Interview with Mr Jan Heukelman 4 April 2010.
105 Article 8.10 of the DSU.
106 *Jobodwane* (2009) 2 *IJPL* 206 at 211.

The result of this proposal may not always be in favour of Developing countries; in particular because of the refined and legalistic way in which legal questions at issue are formulated by Panels and the AB, which might not allow latitude to base a decision on broad arguments such as development.[107] In addition, insisting on Developing-country nationals might actually exclude some other WTO experts who are perhaps better suited to bringing development concerns to the fore of the dispute settlement system.[108]

3.4.3 The Panel Terms of Reference and Preferential Treatment to Developing Countries

The Panel's terms of reference is to examine, in the light of the relevant provisions in the Agreement(s) cited by the parties to the dispute, the matter referred to the DSB by the complainant member.[109] Consequently, the request for the establishment of a Panel determines the limits of the jurisdiction of the Panel.

The African and LDCs groups have suggested making it obligatory for Panels to consider developmental implications in their rulings, and to specifically consider any adverse impact that findings may have on the special and economic welfare of the Developing or LDC parties.[110] If adopted, such suggestion would assist - to some extent - to ensure that the Panel findings do not harm the developmental priorities of African countries.

The DSU allows Developing countries, in cases initiated against a Developing country, to invoke the 5 April 1966 decision,[111] which permits Developing countries to make use of the good offices of the Director General of the WTO and to shorten time limits in Panel proceedings. If invoked, these provisions can lead to positive results for African countries. Given its limitations, however, it has never been invoked in the DSU to date. [112]

African countries have also proposed that experienced lawyers be available within the WTO Secretariat to support them in the preparation and conduct of cases before the DSU.[113] This proposal is meant to deal with insufficient technical resources in African countries, as well as the limited assistance that is currently received from the Secretariat. It should, however, be

107 *Mosoti* (2006) *JIEL* 427 at 443.
108 Ibid.
109 Article 7.1 of the DSU.
110 WTO Doc. TN/DS/W/15, Para 7.
111 Article 3.12 of the DSU.
112 Jobodwane (2009) 2 IJPL 206 at 216.
113 *Mosoti* (2006) *JIEL* 427 at 443.

considered with caution, as it can dramatically increase the operational cost of the WTO, will prevent African countries from accumulating practical experience, and also has political costs.[114] Additionally, the fact that the WTO Secretariat currently provides some support to Panellists in their work can create some conflict of interests. It is proposed in this regard to create an independent section in the WTO secretariat which would be dedicated to supporting Developing countries.

3.5 The Appellate Review stage

If the Panel report is appealed by a party to the dispute before the Panel findings are adopted, the dispute is referred to the AB.

This permanent seven-member organ is set up by the DSB, and broadly represents the range of WTO membership.[115] Members of the AB have four-year terms, which may be extended for a second term. They have to be individuals with recognised standing in the field of law and international trade, and may not be affiliated with any government.[116]The AB has adopted its own working procedures on the basis of the mandate and procedures stipulated in Article 17.9 of the DSU.

If the AB concludes that the measure is not consistent with a covered agreement, it recommends that the violating party bring its measure into conformity. Similar to the Panel decisions, this ruling will be adopted quasi-automatically in the DSB.

When evaluating the rules governing the AB stage in relation to African countries, it could be argued that the establishment of the AB made the system more judicial and authoritative, which definitely counts in favour of small African countries which have better circumstances under rule-based systems.

The current composition of the AB includes four members from Developing countries (South Africa, the Philippines, China and Mexico) and three members from Developed countries (USA, Belgium and Japan) but up till now there has never been any member from an LDC,[117]

114 Interview with Mr. Muhamed De Gamma on 13 May 2010.
115 Currently the only African member and chairman of the AB body is Professor David Unterhalter from South Africa.
116 "Dispute Settlement Appellate Body" < http://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm#members> (accessed on the 15th of May 2010).
117 Ibid.

and the only other African country that had been represented in the AB is Egypt which was represented by two of its nationals in previous terms.

Some African countries suggested the mandatory inclusion of at least four members from Developing members and LDCs to ensure that AB decisions will consider the developmental aspects of Developing countries. However this suggestion is not guaranteed to work in this direction because of the legal nature of the decisions as it was explained in the Panel stage. [118]

The LDC group has proposed that the AB members each deliver a full-reasoned, separate written opinion about the AB decisions, and that provision should be made in the DSU for dissenting opinions.[119] The moral of this suggestion is that opinions may bring to the fore usually unheard concerns, which may in the long run shape the evolution of the system and can be of benefit to small countries.

3.6 Compliance with DSB Decisions

If the parties disagree on whether or not the infringing member has implemented the recommendations and rulings of the DSB, either of them can request a Panel under Article 21.5 of the DSU. The original Panel, where possible, shall decide on that matter in an expedited fashion, within 90 days. The practise has shown that appeals against compliance Panel reports are possible and quite frequent.[120]

The AB clarified that the Panel's task is not limited to examining whether the implementing measure fully complies with the DSB recommendations; rather it must consider the new measure in its totality, including its consistency with a covered agreement.[121]

3.6.1 Non-Implementation

If the losing member fails to bring its measure into conformity with its WTO obligations within a reasonable period of time, the wining member can resort to temporary measures,

118 See the discussion under the Panel stage item 3.4.3 as it applies as well to the AB.
119 WTO doc.TN/DS/15.
120 World Trade Organisation (eds) (2004) 79.
121 AB report, Canada-Aircraft (Article 21.5- Brazil), Para 40-41; AB report US-Shrimp (Article 21.5-Malaysia), Para 85-87.

which can either be compensation or the suspension of WTO obligations. Neither of these measures is preferred over the full implementation of DSB recommendations.[122]

3.6.2 Compensation

The DSU requires that the implementing party which doesn't achieve full compliance by the end of the reasonable period of time enter into negotiations with the complaining party, with a view to agreeing a mutually acceptable compensation.[123] This compensation does not mean monetary payment; rather, the respondent is supposed to offer a benefit, for example a tariff reduction, which is equivalent to the benefit which the respondent has nullified or impaired by applying its measure.[124]

Offering compensation has its limitations, as Article 22.1 requires that the compensation must be consistent with the covered agreements. This later requirement is probably one of the reasons why WTO members have hardly ever been able to work out compensation, because it implies consistency with the MFN obligation, which means that other WTO members will benefit in terms of tariff reduction. This makes compensation less attractive for both the respondent, for whom it raises the price, as well as the complainant, who does not get an exclusive benefit.[125]

It is also important to apply LDCs proposal that compensation to LDCs affected by offending measures under Article 22.2 should be made mandatory by the elimination of the phrase "if so requested".[126]

3.6.3 Suspension of Concessions

If the parties have not agreed on satisfactory compensation within 20 days after the expiry of the reasonable time, the complainant may ask the DSB for permission to impose trade sanctions against the respondent.[127] Technically this is called "suspension of concessions or other obligations under the covered agreements".

122 Article 22.1 of the DSU.
123 Article 22.2 of the DSU.
124 World Trade Organisation (eds) (2004) 80.
125 Ibid.
126 WTO doc.TN/DS/W/37.
127 Article 22.2 of the DSU.

The purpose of this authorisation is to induce compliance, but statistics show that authorisation for WTO sanctions do not occur often.[128]

Although the DSU came up with strict deadlines for its procedure, it still takes a considerable amount of time, during which the complainant may suffer major damage to its trade interests. By the time the AB report is released, the inconsistent measure would have been in place for at least 15 months. The DSB might be allowing a cost-free opportunity to delay compliance for several months. While strong economies like the USA and EU can sustain such damage, Developing countries could incur a major loss, especially if the measure challenged affects their major export commodities.

Additionally, the losing party can even request that the reasonable time for implementation be determined by arbitration.[129] In the EC Measures concerning meat and meat Products the Panel set the period of implementation as 15 months from the date of the adoption of the reports.[130] It can be delayed even further by requesting arbitration for the amount of retaliation.[131]

This kind of intentional delay should be restricted by decreasing the time frames, and closing these gaps in the system in order to encourage swift compliance with the DSB decisions. Additionally, any compensation should cover the damages incurred since the introduction of the inconsistent measure until the implementation of the Panel decisions, including legal expenses, which are one major constraint for African countries' participation.

Additionally, it is very doubtful that many African countries will be in a position to practically suspend concessions to their Developing trading partner, as it may cause greater harm to their small economies, and in particular to their fragile private sector than it may potentially harm the trading party. This was manifested very clearly in the USA gambling case.[132] It is suggested in this regard that Developing countries might be given the option to receive financial compensation equal to the damage they incurred because of the inconsistent

128 *Kennedy & Southwick* (eds) (2002) 603.
129 Article 21.3 (C) of the DSU.
130 Panel Report, EC Measures Concerning Meat and Meat Products (Hormones), Complaint by the United States, WT/DS26/R/USA, adopted 13 February 1998, modified by Appellate Body Report, WT/DS26/AB/R, WT/DS48/AB/R, DSR 1998:III, 699.
131 Article 22.6 of the DSU.
132 "Measures Affecting the Cross-Border Supply of Gambling and Betting Services .<http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds285_e.htm> (accessed on 20 May 2010).

measure.[133] Although this idea is more attractive to small African economies, it has its own difficulties. For example, how can this compensation be channelled to the private sector, and whether it would it be considered as a subsidy? And what would happen if an African country was required to pay compensation to a Developing country? [134]

One of the suggested options is to make use of cross retaliation.[135] This means that African countries can seek authorisation from the DSB to apply retaliatory measures under WTO agreements different from the ones being violated by the other member. In 2005, alleging that the US had missed the 21 September deadline to comply with a March WTO ruling on its cotton subsidy programme, Brazil formally requested the right to retaliate against US patents, copyrights, and services providers.[136]Although such moves may be critical to Developed countries, especially if vital areas like intellectual property rights are targeted, the effect of such a move when it comes from small African countries with limited market capacity is doubtful.

The African group and LDCs have suggested adopting a principle of collective retaliation.[137] Under this principle, all WTO members collectively would have the right and responsibility to enforce the recommendations of the DSB. In a case where a Developing or LDC member is a successful complainant, collective retaliation should be available automatically. Although such a proposal would have positive effect on the degree of compliance of member states, it is submitted that it is unlikely that major Developing countries - who are interconnected to each other with huge economic and trade interests - would accept such a proposal.

Another important suggestion is to prevent a non-compliant country from exercising its voting power and to announce that it does not respect its trade obligations, which would have a negative impact on the reputation of the country and can be major incentive for implementation.[138]

133 WTO Doc. TN/DS/42.
134 Interview with Mr. Lambert Botha 4 of May 2010.
135 Ibid.
136 " ICTSD (2005) "Brazil Asks For Cross-Retaliation Under TRIPS, GATS In Cotton Dispute With US", *Bridges Weekly Trade News Digest*, October, Volume 9, number 34<http://ictsd.org/i/news/bridgesweekly/7349/> (accessed 1 May 2010).
137 WTO Doc.TN/DS/17.
138 Interview with Mr. Lambert Botha 4 of May 2010.

3.7 Conclusion

1. The DSU is far from a perfect agreement. However, despite having major flaws, the DSU still stands out when compared to other international conflict-resolution mechanisms. The proposals from African countries' touched on many important impediments in the system, but many of these are not realistic, and deals with issues that are theoretically obstructive, but which cannot be claimed to be the core constraints, as African countries have barely used the system.
2. Although the DSU negotiation is not part of the single undertaking under the Doha negotiations, there was little improvement in recent years, and it is not expected to advance significantly unless negotiations result in agreed understandings on agriculture and Non-Agriculture Market Access (NAMA), which currently seems unlikely. The last chairman text was presented on 18 July 2008 and is still under negotiations.[139]
3. African countries should continue to work hard with likeminded countries to bring the DSU reform more strongly onto the negotiating table, in order to accommodate the developmental dimension of the Doha round and ensure the improvement of the text to their interests. This should, however, go hand in hand with the mending of national constraints, which should receive the highest attention.

[139] Report by the chairman to the DSB, WTO Doc.Job (08)/81.

Chapter 4: World Trends in using the DSU

4.1 Introduction

The WTO is one of the fastest expanding international organisations in terms of members and mandate. Its members have increased very significantly since the inception of the GATT. Currently there are 153 members, [140] compared to 23 original members under the GATT, out of the current members there are 41 African countries.[141]

Statistics show that African countries lag behind in using the DSU when compared to Developed and Developing countries in general. In the coming sections this will be illustrated in some detail.

4.2 General Overview of DSU Statistics

A quick overview of some statistics helps in understanding the role of the DSU during its 15 years of operation. Up to 10 April 2010, there have been 405 dispute complaints under the DSU.[142] Only 288 cases reached the Panel stage, and in 96 cases there have been adopted Appellate Body reports.[143]

These statistics imply that consultations and the threat of establishing a Panel are very important incentives for violating parties to adjust their trade policies to the WTO rules, as they show that many cases are solved before the Panel stage.

In 47 years of operation under GATT dispute settlement system, only 432 disputes were initiated, out of which 188 panels were established, and 150 panel rulings were issued.[144] This means that there is a remarkable increase in the number of cases brought under the DSU, compared to cases brought under the GATT which reflects a growing degree of confidence in the system. However, many scholars claim that this increase is a reflection of testing of the new system, or may be the result of ambiguity in the texts of the Uruguay Round.[145]

140 WTO members and Observers <http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm> (accessed 8 April 2010).
141 Using data from "World Trade Organization" <http:// www.wto.org > (accessed 10 April 2010).
142 Using data from "World Trade Law" <http:// www.worldtradelaw.net> (accessed 15 April 2010).
143 Ibid.
144 *Bush & Reinhardt* (2003) *TPR* 153.
145 *Jackson* (2000) 179.

The covered agreements most invoked by complainants have so far been the GATT 1994 in 326 cases; Subsidies and Countervailing Measures in 83 cases; Anti-Dumping in 82 cases; Agriculture in 66 cases; Technical Barriers to Trade in 40 cases; Sanitary and Phytosanitary in 36 cases; Safeguard in 36 cases; Licensing in 35 cases; Trade Related Intellectual Property Rights in 26 cases and Trade Related Investment Measures in 25 cases. The least-invoked agreements are the Agreement on Textile and Clothing in 16 cases; the Customs Valuation in 15 cases and Rules of Origin in 7 cases.[146]

In the first years of operation, almost every Panel decision was appealed by the losing party.[147] This trend has decreased in recent years,[148] which shows increasing confidence in the system and its rulings.

4.3 Analysis of Developed and Developing Countries' Trends in Using the DSU

Currently, Developed countries are the most frequent users of the system. On top of the list is the USA which has participated in 276 cases, out of which 94 cases as complainant, 109 cases as respondent and 76 cases as third party.[149] Following the USA is the EU with 235 cases, including 81 as complainant, 67 as respondent and 88 as third party.[150]

Other major Developing countries have also used the system in a moderate way: Canada: (33 as complainant, 15 as respondent and 77 as third party),[151] Also Japan: (13 cases as complainant, 15 as respondent and 95 as third party),[152] and Australia: (7 cases as complainant, 10 as respondent and 50 cases as third party).[153]

146 Ibid.
147 Using data from "World Trade Organization" <http:// www.wto.org > (accessed 10 April 2010).
148 Ibid.
149 "USA and the WTO"< http://www.wto.org/english/thewto_e/countries_e/usa_e.htm> (accessed 28 April 2010).
150 "EU and the WTO"< http://www.wto.org/english/thewto-_e/countries_e/european_communities_e.htm> (accessed 28 April 2010).
151 "Canada and the WTO" <http://www.wto.org/english/thewto_e/countries_e/canada_e.htm> (accessed 28 April 2010).
152 "Japan and the WTO" <http://www.wto.org/english/thewto_e/countries_e/japan_e.htm> (accessed 28 April 2010).
153 "Australia and the WTO" <http://www.wto.org/english/thewto_e/countries_e/australia_e.htm> (accessed28 April 2010).

When Developing countries are taken as a group, it shows a relatively high level of involvement in the system, especially since the launch of the Doha Development Agenda in 2001. This trend is significantly affected by major Developing countries like India, Brazil, Mexico, Argentina and China, who managed to use the system to achieve and defend their trade interests in the last years. It is submitted that this implies a growing understanding of the system and flexibility in dealing with the new trade.

India, for example, has participated in 18 cases as complainant, 20 cases as respondent, and in 55 cases as third party.[154] Brazil has participated as complainant in 24 cases, as respondent in 14 cases and as third party in 54 cases.[155] Mexico has participated as complainant in 21 cases, as respondent in 14 cases, and as third party in 46 cases.[156] Argentina has participated as complainant in 15 cases, as respondent in 16 cases, and as third party in 24 cases.[157] China a relatively new member [158] has participated in seven cases as complainant, as respondent in 17 cases, and as third party in 65 cases.[159]

It is encouraging that the participation of major Developing countries parties is so diversified and covers most of the agreements of the WTO. Brazil, for example, has initiated cases against major Developed trading partners like the USA, The EU and Canada in different areas that included Anti-Dumping (AD) duties on poultry; export subsidies, safeguard measures on woven fabric, countervailing duties on steel, customs classification and USA patent code. It is noted as well that Brazil has participated in many cases as third party in disputes initiated against China which is a fellow Developing country and partner within the group of BRICs (Brazil, Russia, India and China).

China has in turn; initiated cases that dealt with safeguard measures on steel products and AD measures on footwear, and has also responded to cases that cover areas like financial services, Value Added Tax and intellectual property rights.[160]

It could be noted as well that Developing countries have a higher ratio of participation as third parties. This can be attributed to the advantages associated with this kind of

154 "India and the WTO" <http://www.wto.org/english/thewto_e/countries_e/india_e.htm> (accessed 28 April 2010).
155 "Brazil and the WTO" <http://www.wto.org/english/thewto_e/countries_e/brazil_e.htm> (accessed 28 of April 2010).
156 "Mexico and the WTO" <http://www.wto.org/english/thewto_e/countries_e/mexico_e.htm> (accessed on 28 April 2010).
157 "Argentina and the WTO" < http://www.wto.org/english/thewto_e/countries_e/argentina_e.htm> (accessed on 28 of April 2010).
158 Only joined the WTO in 2001.
159 "China and the WTO" <http://www.wto.org/english/thewto_e/countries_e/china_e.htm> (accessed on 28 of April 2010).
160 Ibid.

participation, such as lower costs, the chance to gain experience, and a lower degree of confrontation with trading partners.

Developing countries represent more than two thirds of the WTO members.[161] Although their participation in the DSU is more than their share of the international trade (around 30%), their participation is still less than their membership share in the WTO.[162]

A comparison between the total GATT period (1947–1994) and the WTO period (1995–2009) reveals that the appearance of Developing countries, both as complainants and defendants, has increased significantly during the WTO period (from 30.5% to almost 44% as complainants, and from 11.5% to almost 39% as defendants).[163] This clearly implies that Developing countries have participated more actively and aggressively in the DSU in order to resolve disputes with other states.[164]

This increase in participation can be attributed to many factors, including the increase of their share in international trade, the admission of new members to the WTO as well as the increasing confidence and understanding of the new judicial-based system.

Additionally, the appearance of Developing countries as complainants has increased significantly since 2000, whereas their appearance as defendants has decreased.[165] In terms of the complainant status, Developed countries had occupied a distinctively larger portion during 1995–2000, but this portion has decreased and even reversed since 2001. As for the status of defendants, there is a clear tendency that the appearance of Developed countries has decreased and the appearance of Developing countries has increased continuously since 2001.[166]This pattern reveals that Developing countries began to overcome their passive attitude toward the legal dispute settlement mechanism, started using the system more actively for securing their trade interests by raising disputes against Developing countries.[167]

161 "About the WTO" < http://www.wto.org/english/thewto_e/whatis_e/wto_dg_stat_e.htm> (accessed 1 April 2010)
162 *Moon* (2010) *CIS Inha University* 136 at 146.
163 Ibid.
164 Ibid.
165 Using data from "World Trade Organization" <http:// www.wto.org > (accessed 18 April 2010).
166 *Moon* (2010) *CIS Inha University* 136 at 146.
167 Ibid.
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4.4 African Countries and the DSU

African countries form the smallest group in terms using of the DSU; no African country has been a complainant in any case so far, although Egypt and South Africa might currently be considering some perceived violations from trading partners which might lead to individual litigation under the DSU.[168]

The only two African countries which were party to WTO dispute settlement cases are Egypt and South Africa; Egypt was party to four cases as respondent and four cases as third party.[169] South Africa has participated as a respondent in three cases that were brought by India, Turkey and Indonesia, to which the process ended before the Panel stage.[170]

Other African countries' participation is limited to the third party category. No African country has ever participated as a main party in a case in the AB.[171]

In addition to Egypt and South Africa, 14 other African countries have made use of the system on a third-party basis. The largest African country participant in this category is Mauritius in five cases, followed by Madagascar and Nigeria with four cases each; Kenya, Tanzania, Swaziland and Malawi with three cases each; Senegal with two cases, and lastly Chad, Cameroon, Morocco, Zimbabwe, Benin and Ghana with one case each.[172] Often, the involvement of African countries in such cases is experimental and with no real added value, but in some cases, African countries made substantial contributions. These include African countries inputs in both the Upland Cotton and the Sugar Cases, Nigeria's contribution in the Shrimp case,[173] and Egypt in the Bed Linen Case.[174]

No other African member state (Angola, Botswana, Burkina Faso, Burundi, Cape Verde, Central African Republic, Congo, Congo DRC, Djibouti, Gabon, Gambia, Guinea, Guinea

168 Interview with Mr Muhamed De Gama 13 May 2010 and Mr. Waleed E Nozhy 15 May 2010.
169 "Egypt and the WTO" <http://www.wto.org/english/thewto_e/countries_e/egypt_e.htm> (accessed 20 April 2010).
170 South African and the WTO <http://www.wto.org/english/thewto_e/countries_e/south_africa_e.htm> (accessed 20 April 2010)
171 Using data of from "World Trade Law" < http://www.worldtradelaw.net> (accessed 10 April 2010).
172 Using data from "World Trade Law" < http://www.worldtradelaw.net> (accessed 10 April 2010).
173 Panel Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/R and Corr.1, adopted 6 November 1998, modified by Appellate Body Report, WT/DS58/AB/R, DSR 1998:VII, 2821.
174 Panel Report, European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India, WT/DS141/R, adopted 12 March 2001, modified by AB Report, WT/DS141/AB/R, DSR 2001:VI, 2077.

Bissau, Lesotho, Mali, Mauritania, Mozambique, Namibia, Niger, Rwanda, Sierra Leon, Togo, Tunisia, Uganda and Zambia) has participated in any way in the system up to now.[175]

In the next sections two major cases in which African countries had major input in the DSU will be analysed (the Upland Cotton Case, and the Sugar Case).A separate chapter will be devoted to the Egyptian participation in the DSU.

4.4.1The Upland cotton case (DS267)

4.4.1.1 Case background

On 27 September 2002 Brazil requested consultations with the US regarding prohibited and actionable subsidies provided to US producers, users and/or exporters of upland cotton.[176] Brazil contended that these measures were inconsistent with the obligations of the US under the following provisions: Articles 5(c), 6.3(b), (c) and (d), 3.1(a) (including item (j) of the Illustrative List of Export Subsidies in Annex I), 3.1(b), and 3.2 of the Subsidies and Countervailing Measures agreement (SCM); Articles 3.3, 7.1, 8, 9.1 and 10.1 of the Agreement on Agriculture (AoA); and Article III: 4 of GATT 1994.[177]

The Brazilian government claimed that such subsidies were adversely affecting Brazil's potential to exploit the international upland cotton market by negatively suppressing international cotton prices.

The dispute lasted for almost two and half years,[178] and Argentina, Australia, Benin, Canada, Chad, China, Chinese Taipei, EC, India, New Zealand, Pakistan, Paraguay, Venezuela, Japan and Thailand joined the case as third parties.

In March 2005, the AB essentially upheld all the critical elements of Brazil's challenge to US cotton subsidies as found by the initial Panel on 8 September 2004.[179] The AB agreed with the Panel that US export credit guarantees on cotton met the definition of export subsidies, and were prohibited since the US had not scheduled to provide them.[180] It rejected US

175 Using date from "World Trade Law" on <http://www.worldtradelaw.net> (accessed 10 April 210).
176 Panel Report, United States – Subsidies on Upland Cotton, WT/DS267/R, and Corr.1, adopted 21 March 2005, modified by AB Report, WT/DS267/AB/R, DSR 2005:II, 299.
177 Ibid.
178 On 18 and 20 October 2006, Brazil and the United States respectively requested the Director-General to compose the Article 21.5 Panel.
179 AB Report, WT/DS267/AB/R, DSR 2005:II, 299.
180 Ibid.

arguments that the AoA serves as an exception for export credits from export subsidy commitments. The AB agreed with the Panel that the US ``Step 2 program'' violated WTO rules when the US pays producers the difference between the US price and the world market price in order to ensure that US cotton can be sold in global markets at a profit.[181] The AB upheld the Panel's finding that the US had exceeded its allowable domestic support to upland cotton from 1999-2002 which prevented the US from relying on the protection of the AoA Peace Clause.[182]

It recommended that (i) as for prohibited subsidies (export credit guarantees and step 2 payments), the US withdraw them without delay and (ii) as for subsidies found to cause serious prejudice, the US should take appropriate steps to remove their adverse effects or withdraw the subsidy.[183]

4.4.1.2 African Countries' Participation

This introduction was indispensable in order to analyse the participation of Benin and Chad in this particular dispute as an example of the values that African countries can bring through a more proactive approach.

The two African countries joined the Panel as third parties on the side of Brazil, as they felt the American subsidies represented a major threat to their commodity-based economies. Their decision was not obstructed by the fact that they are the recipients of unilateral trade preferences with the USA under the African Growth and Opportunity Act (AGOA).[184] No retaliation was taken against them as a result of their participation.

The AB decision came in the interest of the African countries, as it demanded that the USA remove its prohibited subsidies. These subsidies, of almost USD 4 billion, exceeded the respective gross national income incomes of Benin and Chad, and their African neighbours, Burkina Faso, the Central African Republic, Mali and Togo.[185] The Panel found that it had undermined the subsistence cotton sectors of West and Central Africa, as the US share of world cotton exports increased from 23.5% in 1999 to 39.9% in 2002; at the same time West

181 Ibid.
182 Ibid.
183 Ibid.
184 The African Growth and Opportunity Act was signed into law on May 18, 2000 as Title 1 of The Trade and Development Act of 2000. The Act offers tangible incentives for African countries to continue their efforts to open their economies and build free markets including tariff concessions in the American market,
185 *Zunckel* (2005) *JWT* 1071 at 1076.

African cotton producers' exports decreased from 10.2% in 1998 to 8.1% in 2002. This loss of 2.1% of world market share translated into a 20% drop in exports for the West African cotton exporters.[186]

Additionally, the African cotton exporters indirectly benefited from this decision, as it supported their negotiating position on agriculture subsidies in the fifth WTO Ministerial Conference in Cancun in 2003.

It is important to highlight that, despite the vital economic importance of the case, it is highly doubtful that Benin and Chad would have been able to participate without the support they received from the Advisory Centre on WTO Law (ACWL), and the private law company, (White & Case) which provided its services free of charge;[187] especially in light of the logistical constraints that affected the two countries;[188] and because of the difficult nature of the case. The Benin delegation included a researcher from the International Food Policy Research Institute (IFPRI), who presented the results of a study showing the effects of depressed world cotton prices on poverty in Benin.[189] The written submissions of the two countries also drew heavily on the work of Oxfam to justify their case.[190]

It is submitted that the two African countries did not participate as complainants in the dispute because of the high financial costs associated with that, a lack of experience in the DSU beside the preference for a less-confrontational approach with the USA.

4.4.2 The Sugar Case (DS266)

4.4.2.1 Case Background

In 2002, Australia and Brazil challenged the EC measures relating to subsidisation of the sugar industry, [191] claiming that the EC was providing export subsidies that exceeded its reduction commitment levels and was, thereby, violating the provisions of the WTO (AoA).

186 Ibid.
187 Ibid 1085.
188 Although Benin had a limited permanent mission in Geneva, Chad did not have one, and was represented by a delegation headed by its Ambassador in Brussels.
189 *Zunckel* (2005) *JWT* 1071 at 1080.
190 Oxfam (2002) Oxfam Briefing Paper.
191 Thailand joined the dispute as complainant at the Panel stage.

In particular, it was exporting so-called C sugar through cross-subsidies linked to A and B quota sugars.[192]

The EC, on the other hand, denied that it was providing any subsidies on its exported sugar. It argued that the basis of the claim was erroneous in that not only did it involve a contrived interpretation of what constitutes a subsidy, but also included a quantity of sugar which must be excluded, as it is equivalent to the EC imports from African, Caribbean and Pacific countries (ACP) plus India under the Sugar Protocol (a total of 1,6 million tons), which was included in a footnote inserted at the bottom of its schedules submitted to the WTO.[193]

The complainants disputed that this footnote absolved the EC from taking into the calculations the total tonnage in question.[194] They claimed that the EC is illegally exempting from its export subsidy cap sugar imported from ACP countries and India under preferential arrangements. It supposedly does this on the grounds that the preferential sugar is imported and then processed for re-export. But the complainants argued that the majority of the preferential sugar is in fact consumed domestically, with EC-produced sugar benefiting from the exempted subsidies. The complainants argued that there is no provision under the AoA allowing the EC to claim such an exemption for ACP/India sugar through a unilateral footnote to its schedule of commitments.[195]

On 15 October 2004 the Panel report was circulated and it basically found that the EC violated Articles 3.3 and 8 of the AoA by exporting C sugar, because export subsidies in the form of payments on the export financed by virtue of government action within the meaning of Article 9.1(c) was provided in excess of the EC commitment level.[196] The decision was in light of the fact that EU producers were able to export sugar to the world market at low prices, because they were able to cover the associated costs from the high internal EC prices. The AB upheld the Panel judgement on 28 April 2005, including that The EC acted inconsistently with Articles 3 and 8 of AoA since the evidence indicated that The EC exports

192 Panel Report, European Communities – Export Subsidies on Sugar, Complaint by Australia, WT/DS265/R, adopted 19 May 2005, modified by Appellate Body Report, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, DSR 2005:XIII, 6499.
193 *Matsebula* (2005) Conference on WTO Dispute Settlement 2.
194 Ibid 3.
195 Ibid.
196 Panel Report, European Communities – Export Subsidies on Sugar, Complaint by Australia, WT/DS265/R, adopted 19 May 2005, modified by AB Report, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, DSR 2005:XIII, 6499.

of ACP/India equivalent sugar received export subsidies within the meaning of Article 9.1(a), and the EC had not proved otherwise.[197]

On 8 June 2006, Australia, Brazil and Thailand informed the DSB that they each had reached an understanding under Articles 21 and 22 of the DSU with the EC.

4.4.2.2 African Countries' Participation in the Sugar Case

In light of the abovementioned facts, the following remarks can be highlighted regarding the African participation in this case, some of which are in line with the Upland Cotton Case as well as others that differ from it:

- This case represents the highest level of African countries' participation in the DSU as third parties with the participation of nine African countries (Congo, Côte D'Ivoire, Kenya, Madagascar, Malawi, Mauritius, Swaziland, Tanzania and Zimbabwe). African countries sided this time with the Developed partner and donor, the EC, against Australia and Brazil and supported what is regarded as a distorted trading system, which was not the case in the Upland Cotton Case where their reasoning was morally and legally sustained.
- Similar to the Upland Cotton Case, the nine African countries proved that they had substantial interest in the dispute, and were allowed to participate as third parties. They acted only when they felt that their preferential access for sugar into the EU markets was subject to a very strong threat. This was in the light of the nature of the EU Sugar Regime and the intricate inter-relations among its various components which meant that touching one component would disturb the other components in a kind of domino effect.[198]
- The financial and technical support was as crucial, as it also was in the Upland Cotton Case. The EU financed the hiring of the law company "Gide Loyrette Nonel (GLN)" to represent ACP sugar suppliers and their fees were paid out of funds provided by the EC out of one of its assistance programmes provided under the Cotonou Agreement.[199]
- Similar to the coordination with Brazil in the Cotton Case, African countries coordinated with The EC to determine their strategy in dealing with the threat. Since the threat

197 Ibid.
198 *Matsebula* (2005) Conference on WTO Dispute Settlement 4.
199 Ibid 9.

challenge was directed at The EU, action by ACP countries was complementary rather than leading.[200]

4.5 Major Inherited Causes for African Countries low Participation in the DSU

Apart from the embedded constraints in the DSU agreement which were highlighted in Chapter 3, other major inherited causes are the following:

1. African countries represent almost 3.5% of world trade,[201] with an export base often characterised by largely non-contentious single unprocessed commodities and trade that is concentrated with few trading partners. These factors are naturally correlated with law disputes as more diversified exports and trading partners are poised to bring more trade disputes than smaller and less diversified ones.[202]
2. Many African countries have an anti-litigation culture; they prefer a diplomatic approach, as they feel that WTO litigation is an unfriendly act that might shake the relation with their trading partners.[203] It is evident that political considerations played a substantial role in encouraging some African countries not to resort to the DSU, even when they had a valid case. This was evident in cases where a perceived WTO violation by China was ignored by African governments because of Chinese political pressures on these governments.[204] The same argument holds true in cases that involved The USA or The EU, who are major donors and trade partners to many African countries.[205]
3. A lack of sufficient expertise and human resources also constraints African participation in the DSU.[206] Many African countries do not have permanent representation in the WTO headquarters in Geneva. Apart from major economies like Egypt, South Africa, Nigeria and Mauritius, the representation of other countries is limited to two to three persons, who cover a wide range of issues, from human rights to the United Nations and WTO. In case of consultations they need to dispatch officials to Geneva which is not affordable for many countries.

200 Ibid 4.
201 International Trade Statistics (2009) WTO.
202 *Bown & Hoekman* (2005) 140, Interview with Mr. Hilton Zunkel 21 May 2010.
203 Interviews with Mr. Lambert Botha 4 May 2010, and Mr. Thinus Jacobsz 21 May 2010.
204 Brink (2007) ICTSD 213.
205 Ibid 208, several interviews with unanimous African experts in DSU.
206 Brink (2007) ICTSD 212.

4. The financial cost of approaching the DSB is another important limitation; a case will cost between one and four million USD if it reaches the AB stage,[207] which in many cases is not affordable for many African countries.
5. The logistical, legal, legislative and technical requirements needed to collect data on the ground, in order to prove violation that can be litigated, is not usually available to African countries in a way that would allow them to engage on a peer level with other trading partners. Additionally, weak private-sector organisations and a lack of coordination with the government are further impediments.

4.6 Understanding the Secondary Support Structure that surrounds the DSU

It is evident that at the present, most African countries can not engage in the DSU by making use of national experts and local financial resources only.[208] The Upland Cotton and Sugar Cases highlighted what could be called a secondary structure that surrounds the DSU which African countries can make great use of. This structure includes the following:

4.6.1 WTO Secretariat

The WTO secretariat is required to provide legal expertise to any Developing member that so request.[209] This comes in the form of pre-case legal assistance and technical training courses to government officials. This assistance is usually not sufficient given the lack of adequate personal and financial resources of the WTO Secretariat. Additionally, depending on the WTO Secretariat for litigation sometimes has its drawbacks as it limits the development of national technical capacities.[210]

207 Interview with Mr. Waleed EL-Nozhy 15th of May 2010.
208 Ibid.
209 Article 27 of the DSU.
210 Interview with Mr. Muhamed de Gama 13th of May 2010.

4.6.2 The Advisory Centre on WTO Law

The ACWL is a Geneva-based intergovernmental organisation that was established in 2001 to provide legal advice on the law of the WTO, support in DSU proceedings and training in WTO law to Developing countries and LDCs.[211]

The ACWL functions like a law firm in providing legal services, albeit at substantially reduced rates, to Developing countries that seek to (i) obtain advice on legal issues relating to the WTO, and (ii) use the DSU to settle a trade dispute. ACWL has distinguished itself for the quality of its work, as it was manifested in many cases including the Upland Cotton case.

Some African countries believe that the ACWL does not provide enough assistance to Developing countries. They complain that even the low hourly rates charged by the ACWL are still rather prohibitive for many African countries, and it was proposed that a fund should be established in WTO to help defray such costs.[212]

4.6.3 United Nations Conference on Trade and Development (UNCTAD)

Under UNCTAD there is a facility whereby the limited services of a group of law firms have been secured. These firms are prepared to provide some pro bono[213] assistance for dispute settlement matters to deserving candidates including African countries.

4.6.4 Law Firms and Non-Governmental Organisations (NGOs)

African involvement in the DSU shows that many law firms, research organisations and NGOs are willing to provide pro bono or lower-cost consultations to African countries as part of their organisational vision and ethical strategies. This option should always be considered by African countries when approaching the DSU.

4.7 Conclusion

1. Major Developing countries have participated aggressively against Developed and Developing countries in the DSU based on the awareness that their participation will have

211 "Guide on how to use the services of the ACWL" http://www.acwl.ch/e/news/news-00030.html (accessed on 20 May 2010).
212 WTO Doc. Tn.DS/W/15, *Mosoti* (2006) *JIEL* 427 at 442.
213 Phrase derived from Latin which means for the Public Good.

important implications; not only on the disputed issues but also on the system development.

2. There has been a relative increase in the number of developing countries who make use of the DSU, but this should not conceal the fact that it is very fragmented within emerging developing countries, and African countries are still far from actively using the system. African countries participation has thus far been very minimal, and concentrated on raw material and the defence of trade preferences. This low participation cannot be justified by the degree of development basis only, as other developing counties have been very successful in this regard.
3. In the few incidents where African countries have adopted proactive approach as third parties, they managed to defend their economic and trade rights and provided tangible input despite their internal constraints and complaints about the DSU agreement. They proved that most of the DSU constraints could be overcome using proactive approaches.
4. Solidarity and division of work between African countries proved to be very important in cases where African Countries have common interests, such as the Cotton and Sugar cases, which was important in enhancing the effectiveness of their participation.
5. One issue of particular interest to African countries is that the DSU represents a chance to take ownership of important Doha negotiation issues like agriculture sector liberalisation in a way that can allow them to take violating states to the DSU without having to resort to the slow consensus-building process required by the Doha negotiations.
6. Finally, it is highly expected that, with the conclusion of the Doha negotiations and the increasing integration of African countries in the multilateral trading system, there will be a progressive need for countries to resort to the DSU. It is submitted that African countries need to prepare themselves for that by engaging gradually in the DSU to defend their trade interests, participate in shaping the evolving international economic law and ensure they are not shut out from the learning curve.

Chapter 5: Egyptian Participation in the Dispute Settlement Understanding

5.1 Introduction

Egypt is the second largest economy in Africa[214] with total Gross Domestic Production (GDP) of USD 188 billion in 2009.[215] Despite the effect on the international economic crisis, Its GDP is projected to grow by 5% in 2010 and 5.5% in 2011, helped by encouraging fiscal and monetary policies.[216] Its economy is well diversified where agriculture represents 13.2%, industry 37.5%, and service 49.2% of the GDP.[217]

Egypt is member of many preferential trade arrangements including partnership agreement with the EU, Free Trade Area (FTA) with the European Free Trade area group (EFTA) in addition to FTA with Turkey. It is also a member of the Common Market for Eastern and Southern Africa (COMESA), and the Pan Arab Free Trade Area (PAFTA).[218]

Egypt became a contracting party to the GATT in 1970 and has been a WTO member since 30 June 1995. It has been an active member in the WTO trade liberalisation negotiations, and is currently the coordinator of the African group in the WTO and a member of other negotiating groups including the Arabic group, the G20, the G90, and NAMA-11.[219]

Egypt has a growing private sector, which has increasing trade interests as well as a responsive public administrative system, and thus possesses some of the fundamental ingredients needed to make use of the WTO dispute settlement system.

Egypt could be rightly claimed to be the most experienced African country in the DSU so far, as it has participated in eight disputes; four of them as a respondent, and four as third party. This positions Egypt as the largest African user of the system since its establishment in 1995.

214 Only next to South Africa.
215 "World Economic Outlook April 2010< http://www.imf.org/external/pubs/ft/weo/2010/01/pdf/text.pdf> (accessed 1 May 2010).
216 Ibid.
217 "Egypt at Glance" http://devdata.worldbank.org/AAG/egy_aag.pdf (accessed 1 May 2010).
218 "Egypt Industrial and Trade Agreements"<http://www.mfti.gov.eg/english/Agreements/Pafta.htm> (accessed 1 May 2010).
219 "Egypt and the WTO < http://www.wto.org/english/thewto_e/countries_e/egypt_e.htm> (accessed 2 May 2010).

5.2 The Organisational Framework for Dispute Settlement Procedures in Egypt[220]

The Egyptian Ministry of Trade and Industry (MTI) is the governmental body responsible for coordinating and organising the government engagement with WTO. In achieving this mandate, the MTI coordinates with other Ministries and stakeholders, mainly the Ministry of Foreign Affairs; the Egyptian mission and commercial office in Geneva; other involved Ministries; the private sector and industrial and agricultural federations.

Coordination with the private sector is essential in WTO dispute settlement proceedings. It is difficult for the Egyptian government to be aware of violations of WTO agreements by other WTO members unless these are reported by the private sector. With the objective of increasing awareness among business community, the MTI has published on its Internet site a guide for exporters in English and Arabic, which includes simple information about the rules that govern DSU procedures, and how the private sector can benefit from it.[221] Additionally, the Ministry has organised, over the last 10 years, many seminars for representatives of the private sector and lawyers about the DSU. Moreover, representatives from the private sector are currently represented in national WTO preparatory negotiating subcommittees. However, there is still a perception in the government that this awareness should be enhanced even more.[222]

An important element regarding Egypt's involvement in the DSU is that the Egyptian government has borne all the costs related to all WTO dispute settlement proceedings in which Egypt has participated; either as a respondent or a third party. This included the costs of all the officials involved in these proceedings, as well as the fees of external legal external counsel. There is a probability that the private sector might be requested to provide some financial assistance, in addition to legal and technical support, if Egypt has to participate as a complainant in any future cases.[223]

220 This part depends partially on the proceedings of the Egyptian national Dialogue on WTO Dispute settlement organised by the American Chamber in Cairo 15-16 April 2007, which was attended by the author, interview with Mr Waleed El Nozhy on 15 May 2010.
221 "Egypt in WTO Dispute Settlement" http://www.tas.gov.eg/English/WTO/Egypt+in+WTO/Settlement.htm (4 May 2010)
222 Interview with Mr. Waleed El Nozhy on 15 of May 2010.
223 Ibid.

Up to now, and despite important development in Egyptian expertise in this regard, the role of external legal counsel in the procedural and substantive issues, proved to be crucial, as the Egyptian government still does not have enough expertise that would enable it to engage in all DSU procedures without support from international legal firms.[224] Egypt did, however, become less dependent on foreign assistance in recent years, as the expertise developed by the Egyptian departments within the MTI was of increasing assistance in these procedures. A very clear indication of this can be seen in the Case of Turkey's measures affecting the importation of Rice in 2005, where the representation of Egypt has been made exclusively by representatives from the MTI.[225]

The MTI achieves its mandate through two main departments:

5.2.1 The Central Department of WTO Affairs (CDWTO)

The CDWTO is responsible for coordinating and integrating all issues related to Egypt's participation in the WTO. It participates in formulating Egypt's position in the Doha-mandated negotiations on clarifying and improving the DSU.[226]

The CDWTO was established in 2002. It has a body of over 50 highly trained economists, trade specialists, and lawyers. They work on issues that include: dispute settlement, intellectual property rights, agriculture and government procurement etc.[227]

Having managed to accumulate reasonable experience, the CDWTO's function now includes analysing claims raised by Egyptian producers and exporters, and providing support for the assessment of substantive issues during dispute settlement proceedings.[228]

5.2.2 The Legal Research and Analysis Department

In 2000, in the wake of the AD Measures on Steel Rebar from Turkey, the Legal Department was established within the framework of the MTI. The establishment of this department acknowledged the critical need for a legal entity to support the Ministry in its participation in WTO settlement procedures, and it was also formed to provide legal assistance to all the departments of the Trade Agreements Sector.

224 Ibid.
225 *Julien* (2007) Conference on Egypt National Dialogue on WTO dispute settlement 12.
226 "About CDWTO" http://www.tas.gov.eg/English/WTO/About%20WTO/ (accessed 15 March 2010).
227 *Julien*" (2007) Conference on Egypt National Dialogue on WTO dispute settlement 10.
228 Ibid.

The Legal Department is directly responsible for DSU procedures, but Egypt nevertheless relies additionally on external legal counsel from Belgian law firm "Van Bael & Bellis".[229] This kind of coordinated effort between the government and international legal firms assisted in providing Egyptian government employees with accumulated experience and exposure. The Egyptian government supported this notion of capacity building by providing its staff with regular legal training, both in Egypt and abroad, in cooperation with the WTO Secretariat.

The Legal Department receives feedback from other government agencies or the private sector, and monitors Egypt's partners' compliance with trade agreements. It can initiate discussions with those partners about their trade measures, and the Department also responds to requests for clarifications or consultations from trading partners.

5.3 National Mechanism of Engagement in the DSU

5.3.1 In Case of a claim against Egypt

When a dispute is initiated against Egypt, the Egyptian government has no other option but to seek, through the mandatory consultations, a mutually acceptable solution with the claimant. If consultations fail, the government - after examining the validity of its disputed measures with stakeholders, relevant ministries and the law consultant - will have to defend its trade and economic interests in the framework of the DSU.[230]

5.3.2 In case of a claimed violation against Egypt

If, on the other hand, an Egyptian commercial government entity or private establishment feels that its rights are infringed under any of the WTO agreements, this entity can seek the initiation of DSU procedures by approaching the Trade Agreements Sector (TAS).

In such cases, the CDWTO Affairs and the Legal Department will work jointly to assess the validity of the claims brought before them.[231] They will also collect evidence of the alleged violations, and try to identify possible claims that may be brought in addition to those initially raised. The duration of this initial phase will depend, to a great extent, on the cooperation of

229 Interview with Mr. Waleed El-Nozhy 15th of May 2010.
230 *Julien* (2007) Conference on Egypt National Dialogue on WTO dispute settlement 12.
231 Ibid.

the private sector and its level of preparation.[232] If the private sector has had a preliminary analysis made by competent specialists, and provides the TAS with all the necessary evidence, a recommendation to initiate a case may be presented to the Minister of Trade and Industry within a short period of time. On the other hand, if the claims are vague and if the TAS is provided with little or no assistance, this first phase may be a lengthy process and may not result in a positive outcome, as the TAS may not have sufficient elements to recommend to the Minister of Trade and Industry to engage in dispute settlement proceedings.[233] In April 2010 the Minister rejected claims by the steel business in Egypt to impose AD measures against Turkish steel, as the private sector failed to validate its claims.[234] This highlights the important role of the private sector in this regard.

In determining whether or not to engage in dispute settlement proceedings, the Ministry of Trade and Industry will perform a cost-benefit analysis, to ensure that the case is of actual economic or trade benefit to the Egyptian economy, keeping in mind the limited financial resources of the Ministry. Once the Minister has agreed to the initiation of dispute settlement proceedings, these will be handled by the Legal Department together with the CDWTO and, possibly, the legal counsel. The assistance of the concerned industry may be sought where necessary.[235]

5.4 Egyptian Participation in the DSU from 1995 -2009

In the period since the establishment of the DSU in 1995 until the end of 2009, Egypt has participated as a respondent in four cases which were brought forward by Thailand, Turkey, USA and Pakistan.[236] Egypt has participated as a third party in four other cases as will be explained in the coming sections.[237]

232 Ibid.
233 Ibid 11.
234 "Shorouk newspaper" <http://www.shorouknews.com/ContentData.aspx?id=15346> (16th March 2010).
235 *Julien* (2007) Conference on Egypt National Dialogue on WTO dispute settlement 12.
236 "Egypt and the WTO < http://www.wto.org/english/thewto_e/countries_e/egypt_e.htm> (accessed 2 May 2010).
237 Ibid.

5.4.1 Egypt as a Respondent

5.4.1.1 Egypt Import Prohibition on Canned Tuna with Soybean Oil (DS205)

This case marks Egypt's first participation in the DSU as a respondent. On 22 September 2000, Thailand requested consultations with Egypt concerning the prohibition imposed by Egypt on importation of canned tuna with soybean oil from Thailand. Thailand considered that, through the abovementioned measures, Egypt failed to carry out its obligations under the following provisions of the Marrakesh Agreement Establishing the WTO: Articles I, XI, and XIII of the GATT, and Articles 2, 3 and 5, and Annex B, paragraph 2 and paragraph 5, of the Sanitary and Phytosanitary Measures (SPS) Agreement.[238]

Fortunately, the consultations lead to a mutually agreed solution, and Thailand subsequently decided not to continue the dispute settlement proceedings. The case did, however, give Egypt some experience and confidence regarding the DSU system.

5.4.1.2 Egypt Definitive Anti-Dumping Measures on Steel Rebar from Turkey (DS211)

The importance of this case comes from the fact that it is the only case that reached the Panel stage where an African country was a member of a dispute.

On 6 November 2000, Turkey requested consultations with Egypt concerning an AD investigation carried out by the Egyptian Ministry of Trade with respect to imports of steel rebar from Turkey. As a result of the Egyptian investigation, AD duties were imposed, ranging from 22.63% - 61.00% ad valorem.[239]

In its request for consultations, Turkey claimed that Egypt made determinations of injury and dumping in the investigation without a proper establishment of the facts and based on an evaluation of the facts that was neither unbiased nor objective; during the investigation of material injury or threat thereof and the causal link, it was claimed that Egypt acted inconsistently with Articles 3.1, 3.2, 3.4, 3.5, 6.1 and 6.2 of the AD Agreement; and during the investigation of sales at less than normal value, Egypt violated Article X:3 of the GATT

238 "Egypt Import Prohibition on Canned Tuna with Soybean Oil" <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds205_e.htm>.
239 Panel Report, Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey, WT/DS211/R, adopted 1 October 2002, DSR 2002:VII, 2667.

1994, as well as Articles 2.2, 2.4, 6.1, 6.2, 6.6, 6.7 and 6.8, and Annex II, Paragraphs 1, 3, 5, 6 and 7 and Annex I, Paragraph 7 of the AD Agreement.[240]

After thorough analysis between major stakeholders from the Egyptian government and the legal consultant "Van Bael & Bellis", Egypt decided that its measures were consistent with its obligations under the AD agreement, and consequently decided to defend these measures in the DSU.[241]

After the consultations failed to reach a mutually agreed solution, Turkey requested the establishment of a Panel on 3 May 2001. Chile, the EC, Japan and the US reserved their rights to participate in the Panel proceedings as third parties.[242]

The Egyptian government believes that the Panel report was generally in favour of Egypt, [243] as it concluded that Egypt did not act inconsistently with its obligations under Articles 3.4, 3.2, 3.1, 6.1, 6.2, 3.5, 6.2 and 2.4 of the AD Agreement.[244] The Panel concluded that Article 3.2 did not require that a price-cutting analysis be conducted at any particular level of trade and that the Egyptian authorities had provided the justification for their choice of the level of trade at which prices were compared, and that Turkey had failed to establish that an objective and unbiased investigating authority could not have found price undercutting to exist on the basis of the elements before it.[245] Nevertheless, it also concluded that Egypt acted inconsistently with its obligations under Articles 3.4 and 6.8 of the agreement.[246]

The Panel report was adopted on 1 October 2002, and Egypt and Turkey later mutually agreed that the reasonable period of time to implement the Panel's conclusions should not be more than nine months.[247]

It could be rightly claimed that, by engaging in this case and achieving significant victory, Egyptian authorities acquired valuable knowledge, expertise and more importantly, confidence in the DSU. It also confirmed that the Egyptian investigating authority was

240 Ibid.
241 *Julien* (2007) Conference on Egypt National Dialogue on WTO dispute settlement 11.
242"Egypt Definitive Anti-Dumping Measures on Steel Rebar from Turkey" <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds211_e.htm>.
243 Interview with Mr. Waleed El Nozhy 15 May 2010.
244 Panel Report, Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey, WT/DS211/R, adopted 1 October 2002, DSR 2002:VII, 2667, paragraphs 1.127-132.
245 Ibid paragraphs 7.67-76.
246 Ibid paragraphs. 7.143-266.
247"Egypt Definitive Anti-Dumping Measures on Steel Rebar from Turkey" <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds211_e.htm>.

complying to a large extent with the rules set forth in the WTO Agreements when conducting AD investigations, which represented another source of confidence.

5.4.1.3 Measures Affecting Imports of Textile and Apparel Products (DS305)

The third case was initiated by the USA on 23 December 2003, when it requested consultation with Egypt over Egyptian Decree No. 469 of the year 2001 relating to measures affecting imports of textile and apparel products.

The USA claimed that these measures were inconsistent with the commitments made by Egypt during the Uruguay Round, mainly to remove the prohibition on the importation of apparel and made - up textile products by 1 January 2002 and bind the level of import duties under HS Chapters 61 (articles of apparel and clothing, knitted and crocheted) and 62 (articles of apparel and clothing, not knitted or crocheted) at an ad valorem rate of 46% in 2003, 43% in 2004 and 40% thereafter, and bound duties under HS Chapter 63 (other made up textile articles; sets; worn clothing) at an ad valorem rate of 41% in 2003, 38% in 2004, and 35% thereafter.[248] On 15 January 2004, the EC requested to join the consultations, which was accepted by Egypt. [249]

The Egyptian internal assessment reached a conclusion that these measure should be clarified to be consistent with WTO commitments.[250] Egypt and the USA held bilateral consultations, where Egypt explained that the contested measures were not applicable to imports from WTO Members and later clarified its regulations. On 20 May 2005, Egypt and the US informed the DSB that they had reached a mutually agreed solution under Article 3.6 of the DSU.[251]

5.4.1.4 Anti-Dumping Measures on Matches from Pakistan (DS327)

The last case to which Egypt has thus far been an original party dates back to 21 May 2005, when Pakistan requested consultation with Egypt over the AD measures imposed by Egypt

248 "Measures affecting imports of textile and apparel products" http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds305_e.htm.
249 Ibid.
250 Interview with Mr Waleed El Nozhy 15 May 2010.
251 "Measures affecting imports of textile and apparel products" http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds305_e.htm.

on imports of matches in boxes. According to Pakistan, these measures appeared to be inconsistent with Egypt's obligations under the GATT 1994 and the AD Agreement.[252]

Following the receipt of the request for consultations, the MTI made extensive consultations with the foreign consultant and internally assessed the claims of Pakistan.[253] The most important development in this regard was the active participation of the Legal Department - that had recently been established - in the analysis of the case.[254]

The consultations were not successful, and Pakistan requested the establishment of a Panel on 9 June 2005. The Panel was formally established on 20 July 2005.[255] Egypt and Pakistan continued their consultations on an informal level, as the Pakistani exporters had lodged a request for the initiation of an interim review investigation to review the form of the AD measures maintained on Pakistani imports.[256]

Further to the initiation and conclusion of the interim review requested by the two cooperating exporting producers, on 27 March 2006, Egypt and Pakistan informed the DSB that they had reached a mutually agreed solution. The interim review investigation was not directly influenced by the WTO dispute settlement proceedings. However, since its outcome was acceptable to the exporting producers, Pakistan and Egypt decided not to engage in the DSU further.[257]

5.4.2 Egypt as a Third Party

Egyptian participation as a third party strengthened its experience in the DSU; especially with the relatively low costs and the lower level of political confrontation associated with this kind of participation, as will be indicated below.

5.4.2.1 EC – Anti-Dumping Measures on Bed Linen from India (DS141)

This case marks the first time Egypt ever participated in the DSU. On 3 August 1998, India requested consultations with the EC in respect of the AD measures it imposed on imports of

252 "Anti- Dumping measures on matches from Pakistan" <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds327_e.htm>.
253 *Julien* (2007) Conference on Egypt National Dialogue on WTO dispute settlement 5.
254 Ibid.
255 "Anti Dumping measures on matches from Pakistan" <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds327_e.htm>.
256 Interview with Mr Waleed El Nozhy 15 May 2010.
257 Ibid.

cotton-type bed-linen from India. India contended that the determination of standing; the initiation of the AD investigation; the determination of dumping and injury as well as the explanations of the EC authorities' findings were inconsistent with the provisions of the WTO AD Agreement; that the EC establishment of the facts was not proper, and that their evaluation of facts was not unbiased and objective and that they had not taken into account the special situation of India as a Developing country.[258]

After the establishment of the Panel on 22 September 1999, Egypt joined the procedure as a third party since the AD measures were imposed on Egyptian exports.

The Panel, concluded on 30 October 2000 that the EC did not act inconsistently with its obligations under Articles 2.2, 2.2.2, 3.1, 3.4, 3.5, 5.3, 5.4, and 12.2.2 of the AD Agreement in calculating the amount for profit in constructing normal value; in considering all imports from India (and Egypt and Pakistan) as dumped in the analysis of injury caused by dumped imports; in considering information for producers comprising the domestic industry, but not among the sampled producers in analysing the state of the industry.[259]

The Panel also concluded that the EC acted inconsistently with its obligations under Articles 2.4.2, 3.4, and 15 of the AD Agreement in determining the existence of margins of dumping on the basis of a methodology incorporating the practice of zeroing; in failing to evaluate all relevant factors having a bearing on the state of the domestic industry, and specifically all the factors set forth in Article 3.4; in considering information for producers not part of the domestic industry as defined by the investigating authority in analysing the state of the industry; and in failing to explore possibilities of constructive remedies before applying AD duties.[260]

The Panel decision was appealed by the EC on 1 December 2000. In its report circulated on 1 March 2001, the AB upheld the finding of the Panel that the practice of "zeroing" when establishing "the existence of margins of dumping" is inconsistent with the WTO AD Agreement but reversed the findings of the Panel that the method for calculating amounts for administrative, selling and general costs and profits provided may be applied where there is data on administrative, selling and general costs and profits for only one other exporter or

258 Panel Report, European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India, WT/DS141/R, adopted 12 March 2001, modified by Appellate Body Report, WT/DS141/AB/R, DSR 2001:VI, 2077.
259 Ibid.
260 Ibid.

producer; and in calculating the amount for profits a Member may exclude sales by other exporters or producers that are not made in the ordinary course of trade.[261]

Egypt participated actively in the case and argued that Article 15 of the AD Agreement obligated the EC to explore the possibilities of constructive remedies before applying AD duties, and that the European Communities failed to comply with this provision, as it did not suggest to the Egyptian exporters the possibility of, for instance, price undertakings. Egypt was of the view that Article 15 imposes a legal obligation on Developed countries any time they contemplate imposing AD duties against Developing countries, and it is therefore up to those Developing countries then to suggest to the Developed countries involved whether or not they would be interested in offering price undertakings.[262]

Egyptian exporters benefited from the Panel's ruling since the AD measures on imports of bed linen from Egypt were later terminated.

When evaluating the reasons behind Egypt's participation as a third party rather than a complainant, it could be assumed that the limited expertise that Egypt possessed at that time, and what was perceived as comparative advantages for Egyptian exporters over their Indian competitors as well as the important political relation between Egypt and the EC might be the main reasons for this decision.[263]

5.4.2.2 EC – Provisional Safeguard Measures on Imports of Certain Steel Imports (DS260)

On 30 May 2002, the US requested consultations with the EC with regard to the provisional safeguard measures imposed by the EC on imports of certain steel products, the US contended that these measures appear to be inconsistent with the EC's obligations under the provisions of GATT 1994 and of the Agreement on Safeguards, in particular, Articles 2.1, 2.2, 3, 4.1, 4.2, 6 and 12.1 and Article XIX:1(a) of GATT 1994.[264]

The case followed a similar complaint by the EC on the safeguard measures imposed by the US on imports of similar steel products.

261 Body Report, WT/DS141/AB/R, DSR 2001:VI, 2077.
262 *Mosoti* (2006) *JIE*L 427 at 437.
263 Interview with Mr. Waleed El Nozhy 15 of May 2010.
264 "Provisional Safeguard measures on Steel imports" http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds260_e.htm.

As Egypt was emerging at this time as an important steel exporter, Egypt together with Japan, Korea and Turkey requested to join, as third parties, the Panel that was established on 16 September 2002.

The dispute ended with no Panel report, after the EU and USA removed their respective measures on December 2003. It is submitted the Egyptian steel exports benefited indirectly from the outcome of this case as a result of the removal of these constraints in two major export destinations for Egyptian steel products.

5.4.2.3 Turkey – Measures Affecting the Importation of Rice (DS334)

On 2 November 2005, the US requested consultations with Turkey concerning the latter's import restrictions on rice from the United States. According to the request, Turkey requires an import license to import rice but fails to grant such licenses to import rice at Turkey's bound rate of duty, additionally, Turkey operates a tariff-rate quota for rice imports requiring that, in order to import specified quantities of rice at reduced tariff levels, importers must purchase specified quantities of domestic rice.

The request listed more than 10 measures through which Turkey had allegedly maintained the foregoing restrictions on rice imports. The US considers that the foregoing measures were inconsistent with Articles 2.1 and paragraph 1(a) of Annex 1 of the TRIMs Agreement; Articles III (including paragraphs 4, 5, and 7) and XI:1 of the GATT 1994; Article 4.2 of the AoA; and Articles 1.2, 1.3, 1.4, 1.5, 1.6, 3.2, 3.3, 3.5(a), 3.5(b), 3.5(d), 3.5(e), 3.5(f), 3.5(g), 3.5(h), 3.5(k), 5.1, 5.2, 5.3, and 5.4 of the Import Licensing Agreement.[265]

Further to the establishment of a Panel on 17 March 2006, Australia, China, the EC, Korea, Argentina, Egypt, Pakistan and Thailand reserved their third-party rights.[266]

On 21 September 2007, the Panel found that Turkey's decision to deny, or fail to grant, Certificates of Control to import rice outside of the tariff rate quota, constitutes a quantitative import restriction, as well as a practice of discretionary import licensing, within the meaning of footnote 1 to Article 4.2 of the AoA. Accordingly, it is a measure of the kind which has been required to be converted into ordinary customs duties and is therefore inconsistent with

265 Panel Report, Turkey – Measures Affecting the Importation of Rice, WT/DS334/R, adopted 22 October 2007, DSR. 2007:VI, 2151.
266 Ibid.

Article 4.2 of the Agreement on Agriculture.[267] The Panel also concluded that Turkey's requirement that importers must purchase domestic rice, in order to be allowed to import rice at reduced-tariff levels under the tariff quotas, accorded less favourable treatment to imported rice than that accorded to like domestic rice, in a manner that is inconsistent with Article III:4 of the GATT 1994.[268]

On 20 November 2007, Turkey informed the DSB that it was in the process of implementing the DSB rulings and recommendations and that it had already engaged in consultations with the US to explore what additional steps might be taken to ensure a mutually satisfactory outcome. On 9 April 2008, Turkey and the US informed the DSB that they had agreed that the reasonable period of time for Turkey to comply with the recommendations and rulings of the DSB shall be six months expiring on 22 April 2008.[269]

Egypt's decision to join the dispute as a third party was based on the fact that it is a major rice exporter, and the Turkish market is very important to Egypt because of its proximity. It is not clear why Egypt did not decide to join the case as a complainant despite the demands from Egyptian rice exporters.

One important indication of the development of Egyptian national expertise was that in this case, the Ministry of Trade and Industry prepared its submissions and attended the hearing sessions without any foreign assistance, additionally it cooperated independently with the Egyptian producers and exporters of rice to gather information.[270]

5.4.2.4United States Continued Existence and Application of Zeroing Methodology (DS350)

This represents the most recent case of engagement for Egypt so far. On 2 October 2006, the EC requested consultations with the USA concerning its continued application of the "zeroing" methodology. The EC claimed that the US Department of Commerce continued to apply the "zeroing" methodology in the determinations of the margin of dumping in the final

267 Ibid.
268 Ibid.
269 Ibid.
270 *Julien* (2007) Conference on Egypt National Dialogue on WTO dispute settlement 8.

results of the AD administrative reviews concerning various EC goods, and any assessment instructions issued pursuant to those final results.[271]

The EC considered that the relevant US regulations, zeroing methodology, practice, administrative procedures and measures for determining the dumping margin in reviews are inconsistent with Articles 1, 2.1, 2.4, 2.4.2, 9.1, 9.3, 9.5, 11, including Articles 11.2 and 11.3, and 18.4 of the AD Agreement; articles VI:1 and VI:2 of the GATT 1994; and Article XVI:4 of the WTO Agreement.[272]

At its meeting on 4 June 2007, the DSB established a Panel. Chinese Taipei, India, Japan, Brazil, China, Egypt, Korea, Norway and Thailand reserved their third-party rights. [273]

On 1 October 2008, the Panel found that the US acted inconsistently with the obligation set out under Article 2.4.2 by using model zeroing in the four investigations at issue in this dispute; the US acted inconsistently with its obligations under Article VI:2 of the GATT 1994 and Article 9.3 of the AD Agreement by applying simple zeroing in the 29 periodic reviews at issue in this dispute; the US acted inconsistently with its obligations under Article 11.3 of the Agreement by using, in the eight sunset reviews at issue in this dispute, dumping margins obtained through model zeroing in prior investigations. The Panel recommended that the DSB request the US to bring its measures into conformity with its obligations under the WTO Agreement.[274]

Both the EC and the USA appealed the Panel decision. On 4 February 2009, the AB affirmed the Panel's finding that the use of zeroing in 29 administrative reviews was inconsistent with the AD Agreement and the GATT 1994. The AB disagreed with the Panel that the interpretation of the AD Agreement advanced by the US was a permissible one. Moreover, the AB affirmed the Panel's finding that the eight sunset reviews at issue were WTO-inconsistent. It recommended that the DSB request the US to bring its measures, found to be inconsistent with the GATT 1994 and the AD Agreement, into conformity with its obligations.[275]

271 «US continued existence and application of zeroing methodology"
http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds350_e.htm (accessed 13 May 2010).
272 Ibid.
273 Ibid.
274 Ibid.
275 Ibid.

On 2 June 2009, the US and the EC informed the DSB that they had agreed that the reasonable period of time for the USA to implement the DSB recommendations and rulings shall be 10 months.[276]

Egypt participated in this case to gain knowledge and expertise about the interpretation of the AD zeroing methodology, especially with the importance of this case to its AD regulations.[277] This reflects a proactive approach that should be followed by African countries as way of gaining experience about the DSU and interpretation of different WTO agreements.

5.5 Egyptian Participation in the Negotiations to Clarify and Improve the DSU[278]

Egypt's position toward the ongoing negotiations to clarify and improve the DSU is very consistent with the African position. Together with African Group and Likeminded countries (India, Cuba, Dominican Republic, Honduras, Jamaica, and Malaysia), Egypt has submitted two official documents (TN/DS/W/42, 47) in this regard.

The focus of the Egyptian proposals is on the implementation of the special and differential treatment provisions, in order to encourage the participation of Developing countries in the DSU and to overcome the obstacles they face in using the system.

The main Egyptian proposals include calling for extended periods for consultation and submitting arguments and the longer time frames for implementing DSB recommendations for developing countries. Egypt also proposed that compensation to winning Developing countries should include the litigation costs, and asked for the adoption of guidelines to apply the principle of collective trade retaliation against a non-complying member.

Furthermore, Egypt calls for more flexibility on African countries' participation as third parties by relaxing the meaning of "substantial interest" to include the objective of gaining experience. Egyptian proposals also call for an increase in technical assistance from the WTO Secretariat to developing countries.

276 Ibid.
277 Interview with Mr Waleed El Nozhy 15 May 2010.
278 WTO Doc. TN/DS/W/42, 47.

5.5.1 Egyptian Position toward Major Proposals within the DSU Negotiations

Egypt opposed the proposals from the EU and Costa Rica to increase the third party rights[279] as it perceived that it will only lead to increasing the dominance of Developed countries which are the main users of the system and might represent extra burden for Developing countries. For similar reasons, Egypt does not support the EU and the US proposals to allow Amicus Curiae to present their submissions in cases before the Panel or the AB. This is based on the argument that the WTO is a governmental organisation, in addition to the non-trade interest of some Amicus Curiae , as well as the extra extended delay in proceeding that would correlate with any Amicus Curiae participation, and also because such participation would be in the interest of Developed and not Developing countries.[280]

Egypt is not in support of the fast-track approach that shortens the time frame for the dispute settlement procedures, as it perceives that this is not in the interest of Developing countries with limited technical and financial capacities.

Egypt opposes the EU proposal regarding establishing rosters of permanent Panellists, as it constraints the area of selection of Panellists and might be against the developing countries interests.[281]

Egypt agrees with the proposed amendment to insert the word "arbitrator" to the bodies that are listed in article 18/1 of the DSU (Panel and AB), whom are not allowed to communicate with parties.[282]

5.6 Egyptian Participation in the Formulation or Improvement of Working Procedures of the Appellate Review

During the discussion of the Working Procedures for Appellate Review in 1996, the only African country that made its views known was Egypt.[283] Egypt's views were rather telling, indicating that it was uncomfortable that members had not been consulted when the

279 WTO Doc. TN/DS/W/5 and WTO DOC. TN/DS/W/6.
280 Interview with Mr. Waleed El Nozhy 15 May 2010.
281 Ibid.
282 Ibid.
283 *Mosoti* (2006) *JIEL* 427 at 43.

procedures were being drawn up. Egypt welcomed the fact that the AB finalised its Working Procedures but indicated that it would have been better if Egypt had been consulted further in the process of the preparation of the Working Procedures. [284]

An issue had been raised regarding the nationality of the AB members. Some Developing countries were concerned about the geographical representation of the members. In response, Egypt indicated that all precautions had already been taken prior to their selection.[285]

5.7 Egyptian Nationals' participation in the AB and as Panellists

Egypt was represented by two of its nationals (Professor Georges Abi-Saab and Professor Saied El-Naggar) in the AB. Two Egyptian Panellists (Magda Shahin and Maamoun Abdel Fatah) have worked in several WTO disputes.[286]

Egypt benefited indirectly from those experts who came back to Egypt and brought valuable experience and knowledge to this field. To the author's knowledge one of these experts is working now as trade legal consultant, and another is assisting the private sector in its engagement with WTO.

5.8 Conclusions

1. Egypt is a good example for African countries' participation in the DSU; it participated both under the respondent and third-party categories and is currently considering the feasibility of participating as complainant. Egypt's relatively diversified economy was reflected in the array of disputes that it was involved in, which ranged from agriculture to textiles, to industrial goods and AD measures, but never touched upon issues like intellectual property rights or services.
2. Despite its limited financial and national technical expertise, Egypt managed to gain accumulated experience through its various engagements in the DSU. The establishment of the national organisational framework to deal with the DSU within the MTI assisted in the preparation of national expertise that is gaining increasing experience, and will eventually lead to more dependence on national cadres as opposed to international

284 WTO Doc. WT/DSB/M/11 (19 March 1996).
285 Ibid.
286 Using data from "World Trade Organization" <http:// www.wto.org > (accessed on the 1 May 2010).

consultants. Egypt also incorporated national legislation on AD, investment protection, intellectual property rights and other WTO agreements, which definitely supports the Egyptian position in the DSU in addition to its positive effects on foreign investment and business functioning.

3. Egypt's active participation in the current negotiations to improve the DSU ensures that the Egyptian and African stands toward international trade issues are taken into consideration. In October 2009, Egypt hosted an Informal African WTO Trade Ministerial meeting to consolidate the development dimension in the Doha negotiations, and to coordinate the African position before the 7th Ministerial Conference of the WTO.

Chapter 6: Conclusions and Recommendations

6.1 Conclusions

All constraints reported to be currently holding back African countries' participation, such as unfavourable provisions in the DSU, high costs, lack of political will, fear of retaliation and weak technical expertise could be overcome through various means, as was explained in the Egyptian case and as it was further proven in the limited cases where African countries have participated in the DSU.

Even with its acknowledged flaws, it could be safely stated that the establishment of the rule-based DSU favours African countries, as it allows them to engage on peer levels with major blocks like the USA and EU, which was unthinkable before. The DSU has no significant bias that is unfavourable to Developing countries; on the contrary, its procedures are governed by the rule of law and are therefore equal for all countries. It gives a high degree of transparency, predictability and grants reasonable rights for all parties with substantial interests in the outcome. African countries should make use of that to defend their economic and trade interests.

6.2 Recommendations

6.2.1 On the Regional Level

1. Trade should be a top priority for African countries as it is the vehicle for economic growth and poverty alleviation.
2. African countries need to pool their resources to overcome their individual constraints. African Union (AU) institutions, and especially the New Economic Partnership for Africa's Development (NEPAD),[287] can play an important role in this regard. It is proposed to establish a legal unit within NEPAD that can be responsible for assisting African countries in their engagements in the DSU with certain trigger criteria. This unit can work in coordination with the African Group in Geneva and would have the task of exploring the possibilities of participating as third parties in disputes, and in bringing joint

287 As part of the African Union transformation into African Authority, the NEPAD would be integrated in the new authority structure; NEPAD was renamed as the NEPAD Planning and Coordinating Agency (NPCA) according to the AU Assembly Decision No. AU/14 (XIV) of 1 February 2010.

disputes in cases where a joint African interest is at stake. This unit should be supported by an African fund, and can complement the work of the ACWL on the African level. Additionally, it can have the secondary function of assisting African countries in their multilateral negotiations with trading partners.

3. The focus of the current African participation in the negotiations to improve the DSU should aim at ensuring the execution of the special and differential treatment in the DSU as they are the most important feasible provisions for African countries especially in light of the developmental dimension of the Doha Development Agenda (DDA).
4. Concurrently, while the Doha Round is not progressing because of lack of consensus among WTO countries on agriculture and NAMA,[288] African countries should work to consolidate their economic integration. African Regional Economic Communities (RECs) can work on enhancing regional dispute settlement mechanisms that can serve to solve regional trade disputes and improve experience in dispute settlement procedures. The current negotiations to establish a Free Trade Area[289] that includes COMESA, the East African Community (EAC) and the Southern African Development Community (SADC) can represent a very good long-term structure in this regard, as it includes 26 African countries and provides for regional dispute settlement mechanism while depending on sub-regional tribunals within the three RECs.
5. African non-WTO members should be encouraged and supported to accede to the WTO, as this will improve predictability in their trade relations and will constitute a framework for the discussing of any trade problems with their partners on an equal basis. Additionally, this will enhance the negotiating power of African countries as a block in the WTO.

6.2.2 On the National Country levels

It is proposed that African countries should develop their own clear national strategies on WTO DSU. These strategies should include rules about the engagement between different departments when dealing with the DSU, and ought to encompass national legislations on AD, intellectual property rights and other WTO agreements of particular importance in this regard. These strategies should work on resolving all individual constraints currently restricting their participation:

288 African Economic Outlook (2010) 50.
289 As per the Kampala summit on 22 October 2008.

Lack of expertise:

1. This factor should not stop African countries from using the system, as Egypt and South Africa managed to accumulate reasonable local expertise through their limited participation in the DSU. Other African countries like Benin and Chad also attained success in using the DSU through dependence on foreign expertise. African countries are advised to adopt a proactive approach under the DSU. Once a violation to their rights has been identified, they should consider on a cost-benefit analysis whether to go to dispute settlement or not.
2. African countries are strongly encouraged to participate actively under the third-party category in cases where they have substantial trade interests. This participation is a valuable training experience and provides an effective way of getting involved in the DSU without having to take sides and bearing the full responsibility and cost of a lead party. It also ensures that the position of African countries toward important negotiation issues is taken into consideration.
3. Although African countries will have to continue depending on foreign law firms in the short term, they need to invest gradually on building national capacities and knowledge of the WTO rules. In particular there is a need to invest in cadres with both law and economics expertise. They can depend partially on WTO technical assistance courses as well internships for lawyers and government officials in missions in Geneva and international trade law firms, which can provide them with practical knowledge about the DSU procedures.
4. African universities are encouraged to incorporate special academic programmes on WTO law, including Dispute Settlement, that are in line with government policies.[290] These academic centres can work closely with relevant Ministries to carry out technical studies, collect data about disputes and assist in trade-policy formulation.

Limited financial resources

1. In general, the financial constraint should not bar African countries from initiating cases under the DSU, as in many cases the loss incurred in terms of export earnings because of

290 Some steps were taken to incorporate special academic programme for DSU in the American University in Cairo, additionally, the Trade Law Centre of Southern Africa (TRALAC) is set up in Stellenbosch specifically with the aim of building international trade law capacity within SADC.

the inconsistent measure was many times the cost of litigation, as was proved in the Upland Cotton Case.

2. African countries should maximise benefits from the secondary support structure that surrounds the DSU, which was explained in detail in Chapter 4, item 4.6. This kind of support could effectively provide some valuable encouragement for African countries' participation in the DSU, as well as an opportunity to develop technical capacities to pursue its trade interests in the future.

Lack of knowledge of the DSU at the Private sector Level:

1. Collaboration and coordination with the private sector is a vital factor in African countries' success at the DSU. It is recommended that national teams handling cases under the DSU should have adequate representation from the private sector as the direct beneficiaries of the multilateral trade system.
2. Governments should work to enhance the private sector's understanding of the multilateral trade system. A mechanism can be established to allow the private sector to channel their demands to the governments in this regard; this includes legislations and a memorandum of understanding between different stakeholders.
3. The legal practitioners' and private-sector knowledge should not be limited to DSU rules but ought to be extended to basic knowledge about other agreements that represent specific interest to their exports, for example the WTO Anti-Dumping Agreement, the Agreement on Subsidies and the Agreement on Agriculture.
4. African governments should encourage the establishment of federations for its agriculture and industrial sectors, which will allow the private sector to formulate policies and defend its trade interests, and to deal with the governments in a more efficient way.

Political factors and fear of retaliation:

1. The threat of retaliation and political factors should not be over-emphasised, as Developed and other Developing countries are engaging very proactively with each other with little harm to their political relations. The African anti-litigation culture should come to an end.
2. In some cases, African countries can always consider less intrusive alternatives such as the good offices of the WTO Director General, to settle trade disputes in a less contentious way. These mechanisms can be fast and less costly, and can allow African

countries to engage in dispute settlement without losing the political or diplomatic space the government may wish to maintain.

Bibliography

Books

- Advisory Centre on WTO Law (no date) *How to Use The Services of The ACWL: a guide to Developing countries and LDCs* <http://www.acwl.ch/e/documents/Version.pdf > (accessed 1 May 2010).

- Brink G "International Trade Dispute Resolution: Case Study on the possibility of South Africa Utilising the WTO Dispute Settlement System" (2007) In: Prasad, P Satyanarayana (ed) *Anti-Dumping Laws Country Perspectives* Hyderabad: ICFAI University Press.

- Croome J (1999) *Reshaping the World Trading System: A History of the Uruguay Round*, 2nd Edition Geneva: World Trade Organization.

- Jackson JH (1997) *The world Trading system: law and policy of international Economic Relations*, 2nd d Edition Cambridge: MIT Press.

- Jackson JH (2000) *The Jurisprudence of GATT and the WTO: Insights on Treaty Law and Economic Relations* Cambridge: Cambridge University Press.

- Jackson JH (2006) *Sovereignty, the WTO, and Changing Fundamentals of International Law* Cambridge: Cambridge University Press.

- Janow ME & Donaldson V, Yanocich A (2008) *The WTO: Governance, Dispute Settlement & Developing Countries* New York: Juris Publishing, Inc: Huntington.

- Kennedy DLM & Southwick JD (eds) (2002) *The Political Economy of International Trade law: Essays in Honor of Robert E. Hudec* Cambridge: University of Cambridge.

- Macrory FJ & Appleton AE & Plummer MG (eds) (2005) *The World Trade Organization: legal, economic and political analysis*, Volume 2: New York: Springer.

- Oyejide A & Lyakurwa W (eds) (2005) *Africa and the World Trading System volume 1, country case studies* Trenton, N.J: Africa World Press.

- World Trade Organization (2004) *A Handbook on the WTO Dispute Settlement System: prepared for publication by the legal Affairs Division and the Appellate Body* Cambridge: Cambridge University Press.

- World Trade Organization (2009) *WTO Dispute Settlement: One-Page Case Summaries, 1995-2009* Geneva: World Trade Organization.

- Zimmermann TA (2006) *Negotiating the review of the WTO dispute settlement understanding* London: Cameron May.

Articles, Papers, Press Releases and Conferences:

- African Economic Outlook Special Theme (2010) "Public Resource Mobilisation and Aid African Development Bank.

- Alavi A "African Countries and the WTO's Dispute Settlement Mechanism" (2007) *Development Policy Review* 25.

- Bierman L *et al* "The General Agreement on Tariffs and Trade from a Market Perspective" (1996) *University of Pennsylvania Journal of International Economic Law (UPJIEL)* 821.

- Busch ML & Reinhardt E "The Evolution of GATT/WTO Dispute Settlement" *Trade Policy Research (TPR)* 143.

- Bown CP & Hoekman BM (2005) "WTO Dispute Settlement and the Missing Developing Country Cases: Engaging the Private Sector" 8 *Journal of International Economic Law*, vol. 8(4) 861.

- Erasmus G (2010) "Accommodating Developing Countries in the WTO: from Mega-Debates to Economic Partnership Agreements" <http://www.idrc.ca/en/ev-151641-201-1-DO_TOPIC.html> (accessed 20 May 2010)

- International centre for Trade and Sustainable Development (ICTSD) (2005) "Brazil Asks For Cross-Retaliation Under TRIPS, GATS In Cotton Dispute With US", Bridges Weekly Trade News Digest, October, Volume 9, number 34<http://ictsd.org/i/news/bridgesweekly/7349/>.

- International Centre for Trade and Sustainable Development (ICTSD*): Egypt National Dialogue on WTO Dispute settlement: Exploring Strategies to enhance Egypt's participation in the WTO Dispute Settlement 15-16 April 2010*, Proceedings, Cairo, American Chamber.

- Jackson JH (2002) "Perceptions about the WTO Trade Institutions" 1 *World Trade Law Review* 101.

- Jobodwane ZN (2009) "participation of African member states in the World Trade organization dispute settlement mechanism" *2 International Journal of Private Law* 206.

- Julien C (2007) "Successful case studies from Egypt" *Proceedings of Egypt National Dialogue on WTO Dispute Settlement: Exploring Strategies to enhance Egypt's Participation in WTO Dispute Settlement*, Cairo, 15-16 April 2007.

- Kessie E & Addo K "African Countries and the WTO Negotiations on the Dispute Settlement Understanding" <http://ictsd.org/i/publications/10437/> (accessed 20 May 2010).

- Matsebula M (2005) "European Communities subsidies on Sugar: Observations on African Participation as a third party in the challenge at the WTO". *Conference on WTO Dispute Settlement – An African View,* 31 March 2005, The Trade Law Centre for Southern Africa (tralac), Cape Town.

- Moon D (2010) "The Changing Status of Developing Countries under the World Trade

Organization Dispute Settlement Mechanism" Vol. XXV, No. 1 *Centre for International Studies (CIS), Inha University* 136.

- Moore M (2000) *"WTO's Unique System of Settling Disputes Nears 200 cases in 2000."* PRESS/180. Geneva: World Trade Organization.

- Oxfam (2002) "Cultivating Poverty: The Impact of US Cotton Subsidies on Africa", *Oxfam Briefing Paper*, No 30.

- Yeo S (1998) "Trade Policy in sub-Saharan Africa: Lessons from the Uruguay Round Experience: paper prepared for the AERC collaboration project and the World Trade Centre " *African Economic Research Consortium*: Nairobi (mimeo). <http://www.aercafrica.org/documents/AWTS/lessons.doc> (Accessed on 10 June 2010)

- Zunkel HE "The African Awakening in United States Upland Cotton" (2005) 39 (6) *Journal of World Trade (JWT)* 1071.

Internet sites, Reports and Data bases

- Advisory Centre on WTO Law <http://www.acwl.ord>.

- International Centre for Trade and Sustainable Development<http:// www.ictsd.org>.

- International Monetary Fund <http://www.imf.org>.

- International Trade Statistics 2009 issued by the WTO. <http://www.wto.org/english/res_e/statis_e/its2009_e/its09_toc_e.htm WTO publications>.

- Ministry of Trade and Industry Egypt http://www.mfti.gov.eg>.

- Trade Agreements Sector in the Egyptian Ministry of Trade and Industry <http://www.tas.gov.eg.>.

- World Bank <http://www.worldbank.org>.
- World Trade Law <http://www.worldtradelaw.net>.
- World Trade Organization <http://www.wto.org>.

Interviews

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• Mr Muhammad De Gama	Acting Director ITED: Legal Trade Negotiation and Policy. Department of Trade and Industry South Africa.	MdeGama@thedti.gov.za +2712 394 3323	13 May 2010
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291 Telephonic interview.
292 Ibid.

WTO Case law[293]

- Panel Report, EC Measures Concerning Meat and Meat Products (Hormones), Complaint by the United States, WT/DS26/R/USA, adopted 13 February 1998, modified by Appellate Body Report, WT/DS26/AB/R, WT/DS48/AB/R, DSR 1998:III, 699.

- Panel Report, United States – Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/R and Corr.1, adopted 6 November 1998, modified by Appellate Body Report, WT/DS58/AB/R, DSR 1998:VII, 2821.

- Panel Report, European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India, WT/DS141/R, adopted 12 March 2001, modified by Appellate Body Report, WT/ DS141/AB/R, DSR 2001:VI, 207.

- Egypt - Import Prohibition on Canned Tune with Soybean oil, WT/DS205, (No Panel Report)

- Panel Report, Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey, WT/DS211/R, adopted 1 October 2002, DSR 2002:VII, 2667.

- European Communities – Provisional Safeguard Measures on Imports of Certain Steel Products, WT/DS260, (No Panel Report).

- Panel Report, European Communities – Export Subsidies on Sugar, Complaint by Thailand, WT/DS283/R, adopted 19 May 2005, modified by Appellate Body Report, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, DSR 2005:XIV, 7071.

- Panel Report, European Communities – Export Subsidies on Sugar, Complaint by Brazil, WT/DS266/R, adopted 19 May 2005, modified by Appellate Body Report, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, DSR 2005:XIV, 6793.

293 Sorted chronologically.

- Panel Report, European Communities – Export Subsidies on Sugar, Complaint by Australia, WT/DS265/R, adopted 19 May 2005, modified by Appellate Body Report, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R, DSR 2005:XIII, 6499.
- Panel Report, United States – Subsidies on Upland Cotton, WT/DS267/R, and Corr.1, adopted 21 March 2005, modified by Appellate Body Report, WT/DS267/AB/R, DSR 2005:II, 299.

- Panel Report, United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/R, adopted 20 April 2005, modified by Appellate Body Report, WT/DS285/AB/R, DSR 2005:XII, 5797.

- Egypt - Measures affecting Imports of Textiles and Apparel Products, WT/DS305, (No Panel Report).

- Egypt- Anti Dumping Duties on Matches from Pakistan, WT/DS327, (No Panel Report)

- Panel Report, Turkey – Measures Affecting the Importation of Rice, WT/DS334/R, adopted 22 October 2007, DSR 2007:VI, 2151.

- United States - Continued Existence and Application of Zeroing Methodology, WT/DS350.

International Instruments

- Agreement on Agriculture.
- Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994.
- Agreement on the Application of Sanitary and Phytosanitary Measures SPS.
- Agreement on Subsidies and Countervailing Measures.
- General Agreement on Tariffs and Trade (GATT 1947).

- General Agreement on Tariffs and Trade (GATT 1994).
- The Marrakesh Agreement Establishing the World Trade Organisation.
- The Understanding on Rules and Procedures Governing the Settlement of Disputes.