"It's time African Countries utilized the WTO, Dispute Settlement Understanding more to leverage their International Trade Interests."

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I. Abstract

The paper unravels the law relating to WTO, Dispute Settlement Understanding, pointing out why African Countries have failed to harness it to leverage international trade Interests. The ability of African Countries in international trade has been saddled by many factors that characterize Less Developed Countries. The Uruguay Round (1986-94) introduced many changes such as the reduced timelines (from when disputes are initiated to when they are disposed of), admission of third parties to represent poor Countries which may be deficient in requisite capacity to deal with the complexity of the World trade disputes. The paper articulates that the marginalization of African Countries in the World trade system is partly caused by their inability to harness the Dispute Settlement Measure out whys and other inherent factors that saddle them as Less Developed Economies. We adopted a qualitative research methodology, reviewed existing literature and empirical evidence to foster the objectives for writing the paper. There is ample evidence that African Countries have been sidelined because they have not utilized the Dispute Settlement Understanding to leverage their international trade interests.

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II. Introduction

The success of the international trade system depends to a great extent on effectiveness of the mechanisms for settling emerging international trade disputes. It is precisely because of the lopsided nature of the Dispute Settlement Understanding under GATT (1947) that many Countries did not join it. Many stakeholders have been disenchanted at the WTO largely for its failure to use the Dispute Settlement Understanding mandate to prevent abuse of WTO rules and principles by member countries and consequently its concomitant failure to streamline the world trade system. The Dispute Settlement mechanisms were designed to settle emerging trade disputes between countries from time to time. Therefore, the purpose of this paper is to peer into the DSM to tease out why it has not been efficiently utilized especially by African countries to leverage their trade in goods and services. The extent African Countries have utilized the WTO in settling trade disputes is appallingly low and could explain the reason/s why they have lagged behind in economic development compared to other countries. The paper has examined the DSM procedures and implementation of rulings by the Panel and Appellant Body (AB) of the WTO adjudicated cases from time to time. It is worth noting that settling international trade disputes is a long and often arduous process that kickstarts with consultations[2], followed by implementation

[2] Recently, South Africa requested for WTO dispute consultations against the European Union concerning certain measures imposed by the European Union on the importation of South African citrus fruit. The request was circulated to WTO members on 29 July 2022 and is ongoing.

of rulings and recommendations by the Panel and Appellate Body which may drag on for years.[3]

III. The WTO Dispute Settlement Mechanism (DSM)

The Marrakesh Agreement on Dispute Settlement Understanding (DSU) creates a mechanism for settling emerging trade disputes between member countries. However, one thing that must be pointed out is that the rules and procedures for settling trade disputes are so cumbersome that more often they tend to favour developed countries than developing countries.[4] The rules and procedures are mandatory and apply to all WTO disputing Members based on the covered Agreements listed in Appendix 1 to the DSU regardless of their varying levels of development. Once a country has ratified the WTO founding treaty, it will be bound by the Single undertaking principle—virtually, whereby every item of the negotiation is part of a whole and indivisible package and nothing can be agreed separately. Ideally this means that nothing is negotiated and agreed until everything is and has negotiated agreed. Article 2 mandates the DSB to establish panels, to adopt panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations, and authorize suspension of concessions and other obligations under the covered agreements.

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

[4] Bilateral consultations between the parties are the first stage of formal dispute settlement process (Article 4 of the DSU). They give the parties the latitude to discuss the matter and to find a satisfactory solution amicably. After such mandatory consultations have failed to produce a satisfactory outcome within 60 days may the complainant request adjudication by a panel (Article 4.7 of the DSU). Parties to a dispute can decide to refuse consultations through mutual agreement under Article 25.2 of the DSU if they resort to arbitration as an alternative means of dispute settlement.

Article 3 of the DSU provides a mechanism for settling emerging trade disputes between member countries from the covered agreements in a transparent fair and impartial manner. This same mechanism is what has endeared countries to accede to the WTO, increasing its membership from 23 at the time of GATT 1947 to 125 by the time of Marrakesh Agreement (1995) to 164 members by 2016, making it one of the fastest growing international organizations today.[5] It is also worth noting that 46% of the WTO membership is comprised of LDC's, of which 25% are African countries whose export trade is mainly of mining, fuel and primary agricultural Products. Apart from participating as third parties, there is no African country which has lodged a complaint under the Dispute Settlement Body (DSB) and benefited directly from a ruling under the covered agreements even though their exports face trade barriers from their trading partners in form of (SPS, TBT and subsidies) compared to countries such as Brazil, India and Mexico which have filed cases and won some of them.[6]

IV. Formal dispute settlement procedure under the WTO

Bilateral Consultations are considered the first litigation stage under Article 4 of the DSU, it is a compulsory procedure to all WTO members whenever a dispute arises and binding to parties within sixty (60) days. The request for consultation must be done in writing highlighting specific provisions that have been violated under the covered agreements by the respondents. In cases were parties fail to amicably settle their disputes under consultation which are closed to only

[5] See the WTO Website at http://www.wto.org/accession of member Countries (accessed 15th April 2022.

[6] Brazil won a case against Indonesia that was filed with the World Trade Organization (WTO) regarding an "undue delay" by Indonesia in recognizing Brazil's health certification process for exports of chicken meat to the Asian country. See, https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm#complainant to discern how African Countries are conspicuously missing in action unlike other developing Countries.

parties to the dispute, they are mandated to request for the establishment of a panel (composed of three panelists) who have to first be approved by the members under Article 4.8 of the DSU before presenting their submissions unless by consensus the DSB agrees not for the panel establishment.[7] The panel is thereafter mandated to give its findings, recommendations and conclusion on the given case at hand in a final report in less than six months' subject to adoption by all WTO members in the DSU. "Unless there is negative consensus amongst the DSB not to adopt the report" as per Article 16.4 of the DSU or there is a notification for appeal from either party to the dispute, the adoption of the panel report by the DSB should be done in less than sixty days from the date of its circulation to the members. The Appellate Body is mandated by Article 17.6 of the DSU to handle all appeals from the DSB under the WTO jurisdiction.[8] The proceedings are confidential and are preceded by seven independent panel members asked to interpret issues of law covered in the panel report. The final stage deals with the ruling phase dealing with the implementation and recommendations of the available remedies.

V. Possible reasons for African Countries failure to harness the WTO, DSM

African WTO members have raised concerns on the jurisprudence and development of the Panel and AB in the traditional rules of treaty interpretation as per Article 3.2 of the DSU. The panel and the AB allow limited time to fully address implementations, recommendations and ruling from disposed disputes.

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[7] Panagariya A, 'EU Preferential Trade Policies and Developing Countries' (2002) 25(10) *World Economy* <https://www.repec.org> accessed 19 July 2020.

[8] Brenton P, 'Integrating the Least Developed Countries into the World Trading System: The Current Impact of EU Preferences under Everything but Arms' (2003) WPS3018 *Policy Research Working Paper* <https://www.elibrary.worldank.org> accessed 12 July 2018.

Pursuant to authorized consultation amongst disputant parties, the panelists are mandated under Article 4.3 of the DSU to determine whether there is a violation of the defendant rights based on the covered agreements.[9] The plaintiff is also mandated to "identify and provide a brief summary of the legal basis and provisions violated "by the defendant. This requirement is often very cumbersome and costly for many African countries that lack the technical capacity on WTO laws and jurisprudence. The unfortunate part of it also is that law does not provide a comprehensive and clear reference of cases to be considered by panelists in disposition of cases in the covered agreements. This lacuna in the law, is challenging for both the panel and the parties in making an objective assessment of the facts and applicability of the matter brought before it as a way of assisting the DSB in providing rulings and recommendations in conformity with the WTO it is deterred from applying and examining provisions outside what was cited by the complainant.[10]

Article 3.12 of the DSU allows countries (developing) acting as complainants to invoke article 4, 5 and 6 of the DSU in cases initiated against developed countries. Developing countries are further entitled to use the good office of the Director General (DG) of the WTO in Geneva as a form of diplomacy to their benefit. However, the litigation process under the DSU is lengthy, taking over two (2) to four (4) years on average from consultation to the implementation of rulings.[11] In cases where there is failure to amicably settle the dispute through consultations

[9] Panagariya, *note* 7 above.

[10] Ibid, note 8

[11] If a request for consultations is made pursuant to a covered agreement, the Member to which the request 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, with a view to reaching a mutually satisfactory solution. If the Member does not respond within 10 days after the date of receipt of the request, or does not enter into consultations within a period of no more than 30 days, or a

within two months, Article 12.10 of the DSU allows the chairmanship of the DSB after consulting with the relevant parties to give a further extension. However, this doesn't deter other countries involved in consultation to slow down the process until the stipulated time expires as provided by the provisions on tie lapse. The defect in this provision is that it doesn't guarantee and give raise to a developing country to raise S&DT provision as part of its pleading submissions and also does not clearly state the obligations to be undertaken by a developed country in arguments or pleading in line with S&DT provisions brought forth by a developing country making it ambiguous.

With the good office provision offer of the Director General, the majority of African countries have no permanent representation in Geneva since they cannot afford the logistics for their technical team during the consultation process which take approximately two to nine months. Apparently, lack of the adequate financial resources is what translates of African Countries to harness the complicated DSM of the WTO[12].

VI. Third party involvement

Article 10.2 DSU requires the first meetings to be confidential and closed off only to parties and third parties that are required to demonstrate "substantial trade interest" in the matter before the

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period otherwise mutually agreed, after the date of receipt of the request, then the Member that requested the holding of consultations may proceed directly to request the establishment of a panel.

[12] Adank J, *WTO Dispute Settlement: One-Page Case Summaries 1995-2016* (2017 edn) <https://www.wto.org/disputes> accessed 4 June 2018.

panel and informed its concerns to the DSB.[13] However, the challenges arise on the definition and interpretation of the term "Substantive trade interest," which the DSU never defined or gave a definite meaning. This has left a number of countries request to participate in consultations as third parties rejected due to failure to demonstrate a "substantial trade interest" in their cases. Further, the preliminary assessment requirement in regards to a legitimate and sufficient interest in the disputes in issue calls for governments to gathering and scrutinizing trade data observing reports and checking internal regulations in connection with the affected industry that are challenging to most African countries due to limited resources to enable them demonstrate substantive trade interest in the disputes.[14]

VII. The Special and Differential Treatment (S & DT).

The S & DT provisions are not effectively addressing problems faced by limited human and financial constraints, limited trade remedies and ineffective mechanisms to the rulings and recommendations of the panelist and development issues in the DSM process.[15] Article 4:10 DSU provides that, "members should give special attention to particular problems and interests of developing countries during consultations" although this provision aims to assist poor

[13] In the event that consultations have failed to settle the dispute, the complaining party may request the establishment of a panel to adjudicate the dispute. The complainant may do so any time 60 days after the date of receipt by the respondent of the request for consultations, but also earlier if the respondent either did not respect the deadlines for responding to the request for consultations or if the consulting parties jointly consider that consultations have failed to settle the dispute (Article 4.7 of the DSU).

[14] Ibid, note 8.

[15] The WTO agreements contain special provisions which give developing countries special rights and allow other members to treat them more favourably. These are "special and differential treatment provisions" (abbreviated as S&D or SDT).

countries by taking notice of their challenges faced during the pre-panel stage of the DSU, it doesn't clearly specify the extent to how" special attention" and the level of compliance to be extended to developing countries during the consultation phrase. Therefore, developed countries are not mandated to mention their submissions to the panel on the nature of special attention rendered to the developing country and thus the panel cannot determine if the challenges facing developing countries have been taken into consideration by the developed country basing on their submissions or not. The obligations provided in article 4.10 are not mandatory as indicated by the wording of the drafter whereby using "should" instead of: shall" was suggested, causing avoidance in implementation.

VIII. The timeframe for implementation of rulings of the Panel and AB

Limited timeframes have acted as a challenge to African countries especially when a respondent has to revise the conforming measures (usually its domestic laws) so as to bring them into conformity with the breached agreement as demonstrated in EC- Banana case 111.25. This therefore makes more developed countries to take advantage and drag cases at the expense of less developed countries to an extent that by the time there is confirmation by the panel on a specific violation, the former countries will have already benefited from the reforms of the particular measure without any consequences. Judith Bello noted that, "The WTO has no jail house, no bondsmen, no blue helmets and no tear gas...the WTO initially relies upon voluntary compliance of states." This has created difficulties with regard to enforceability of the WTO

agreements since there is no outside body to monitor and enforce the rulings and recommendations in cases where there is deviation.[16]

Compensation is nevertheless voluntary and temporary measure to the complainant which is not a variable option to WIG members. It has only been awarded twice by Japan to Canada, in Japan-Alcoholic Beverages II case and by the United States to the European communities in the EC -US Copyright case.

After the panel has made a ruling, Article 19 of the DSU mandates the AB to recommend the DSB to invite all respondents and direct them to bring the measure in dispute into conformity under the covered agreement.[17] 1-fowever, the awarding of "may suggest" in regard to the way in which the respondent could implement the AB or panel's recommendations and the ruling gives an option for non-compliance or retaliation within the broad creation of such endorsement leaves the interpretation at the hands of any country as some may wish to propose a very high threshold of over 10% in accordance with the GATT market shares leaving African countries at a disadvantage since they make up less 3.5% of world trade and two thirds is comprised of mineral fuel (crude), precious stones (platinum and diamond), iron and steel. It further necessitates and calls for African countries to carefully scrutinize and gather more trade data and regulations in accordance with the affected industries in dispute which is financially expensive and costly.[18]

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[16] Ibid, note 15.

[17] Ikiara M M and Ndirangu K L, 'Prospects of Kenya's Clothing Exports under AGOA (2003) 24 *Kenya Institute for Public Policy Research and Analysis* <https://www.researchgate.net> accessed 18 July 2018.

[18] Fergusson F I, 'World Trade Organization Negotiations: The Doha Development Agenda' 2008 *Library of Congress Washington DC Congressional Research Services* <https://www.dtic.mil/dtic/tr/fulltext/u2/a486294.PDF> accessed 12 June 2018.

The absence of clarity and consistence between Article 21.5 of the DSU and Article 22.6 of the DSU has been termed as a sequencing problem between compliance and retaliation.[19] This was clearly demonstrated in the European Communities EC- Bananas dispute Ill, normally known as the "sequencing problem" the European Communities (EC) In 1997, lost a dispute in which USA, Ecuador, Mexico and Guatemala challenged the EC's closure of market access to bananas from the South American region. In 1998, the EC and Ecuador disjointedly requested for formation of compliance panels under Article 21.5 of the DSU to determine whether measures implemented by the EC were consistent with DSB recommendations. Known that there was (and still is) no condition for a multilateral determination of noncompliance under Article 21.5 of the DSU before the panels allows retaliation under Article 22.6 of the DSU. Before the DSB had determined what was to be complied to, USA requested the panel to authorize them to suspend their concessions using article 22.6 DSU. Therefore, the foregoing case clearly indicates that Compensation and suspension of concessions shall only be applied until full implementation is performed.

When a measure is found to be inconsistent with the covered agreements under the WTO, "the violating party is requested and recommended by the AB to bring the said measure into conformity within a reasonable period of time."32 Failure of the defendant to conform to the AB decision provided under Article 21 DSU, the plaintiff with authorization from the DSB is allowed to impose temporary trade retaliatory measures such as suspension of concessions which comes as the last resort.

[19] In the event that parties disagree on the complainant's the proposed form of retaliation, arbitration may be requested (Articles 22.6 and 22.7 of the DSU). This disagreement can relate either to the question of whether the level of retaliation is equivalent to the level of nullification or impairment or to the question of whether the principles governing the form of permitted suspension are respected.

The shortcomings of the DSM procedure notwithstanding, the ability of African Countries to take advantage of the WTO DSM has also been caused by insufficient human resource capacity which makes them over reliant on hiring foreign experts and as result weak measures put in place that cannot ensure compliance and implementation of DSU rulings. [20] There is a need for African Countries to grow their internal capacity to ensure sustainability but also independence. It is mind boggling for a person or a country for that matter to seek assistance from another with who they are competitors.

IX. Insufficient Human Resource Capacity

To understand the extent African Countries have utilized the DSM of the WTO, it is important to do so in the context of how other low-income developing countries (classified by the World Bank such as India) have utilised the WTO for the economic development. They all together initiated 23 cases as a complainant 25 as respondent and 129 as a third parties since 2019. Africa's lower- middle income countries such as South Africa and Egypt that have used less of the DSU. Thailand which is also at the same level of Development as Egypt as 'filed 13 cases as complainant 4 cases as respondent and 73 as third party while Egypt has been involved in 4 cases as respondent and 11 cases as third party. Even though African countries have showed an increase in their participation in the DSU as third parties, the number is still low compared to other developing countries.

[20] Martin Khor argues that the WTO does not manage the global economy impartially, but in its operation has a systematic bias toward rich countries and multinational corporations, harming smaller countries that have less negotiation power. Martin Khor was the executive director of the South Centre, an intergovernmental organisation of developing countries based in Geneva, from 1 March 2009 to 2018.

On many occasions, poor people are denied justice apparently because they lack resources and capacity to effectively pursue their cases. This is exacerbated by the fact that poor countries, which are already faced with resources constraints may need to litigate in foreign countries, which is very costly. To effectively identify disputes, countries must have the resources and expertise to regularly conduct research, monitor and scrutinize activities of trade partners. The challenge is that most African countries do not have the financial, human and technical resources to harness the advantages of international trade. Most African Countries disputes are in relation to barriers such as Sanitary and Phyto-Sanitary measures (SPS), Technical Barriers to Trade (TE3T) cases which regularly involve hiring of technical expert provided under Article 4.5 agreement on Subsidies and Countervailing Measures (SCM) since they highly involve scientific evidence under article 11.2 of SPS Agreement are limited to most African countries in terms of research and proof to support their cases which cover hundreds of pages.

The stages and procedures to initiate a complaint at the WTO DSM require thorough background research and information to yield positive results. However, countries with limited resources are made sometimes to let go because they are not able to mobilize the required resources to pursue a case that may drag on for over three years. The legal costs at the WTO are astronomical for African countries to foot and eviscerate their capacity to initiate cases. In the Japan-Photographic Film case, their lawyers claimed over $ 10 million for their services rendered in the case of which few African countries can afford compared to the trade interest at stake. This is compounded by the fact that most African Countries export low quality goods (raw materials) to the World Market compared to what they buy from Developed Countries are thus marginalized.

It has been argued that most cases on average at the WTC are initiated by developing countries whose median GOP is $5,864 that have high income compared to the $ 4,895 developing countries that have never filed a case."[21] No African country is considered or falls under the high-income economy cohort because of the high levels of debt except Namibia which is categorized as the only African country that is not highly indebted. Thus, African countries tend to undertake "survival" litigation which is tactical and barely yields no precedent and benefits than other developing countries that are being strategic to contribute to the jurisprudence and accrue benefits from the DSM arid trade regime.[22]

Lack of requisite capacity coupled with reduced representation in Geneva from Africa has precipitated an environment for further marginalization of African Countries.[23] The foregoing environment has degraded the capacity of some countries to train staff and boost stock of talented staff with knowledge on WTO, international trade relations. According to Meagher "one quarter of WTO member countries by 2007 didn't not have missions in Geneva."40 This leaves majority of African countries with a task of performing all the necessary ground work needed in terms of litigation and fact-finding during consultation pre-panel and panel phase. A and Simmons B.A (2002) unlike some countries like USA which have representatives that are lawyers from different departments (for example agriculture trade, environment) over thirty lawyers that are specifically specialized in litigation with also a support of from 123 Professors

[21] WTO (2003e). LDC Position Paper, WT/L/521.

[22] Ibid, note 21

[23] Ramsay, Deanna, "Comoros making scents", Trade for Development News by EIF, 13 August 2018. Available at https:// trade4devnews.enhancedif.org/en/photo essay/comoros-making-scents.

1-5 years' experience on WTO as their area of specificity" making it easier and cost effective in research and providing information on specific laws compared to the African countries that don't have the specific capacity and institutional development to take advantage and seize all aspects of WTO covered agreement.[24]

X. Dualities in the global system and their implication

Some scholars have contended that the rules and procedures for settling trade disputes are lopsided in favour of Developed Countries against the weaker ones. In the WTO, DSM its traditional that rights always prevail over power.[25] This was brought about by the new legalized system and procedure, reducing the bargaining power amongst member states in the wrong ran. Power is still a powerful instrument used as by the powerful against the weak and most African countries are still subjected to global power asymmetries partly as a result of the aid received from the developed countries. Developing Countries are constrained from filing cases against their donors for fear of losing substantial aid they depend upon to balance their budgets."[26]

It must also be pointed out that most of African Countries' National Budgets are funded from aid received from developed nations. This has compromised their ability to engage in international trade disputes against their donors as the saying goes, 'you can't slap the hand that feeds you" thereby whittling down their desire to participate in a dispute at the WTO for fear of losing Aid

[24] Ramsay, note 23.

[25] Ramsay, Deanna, "Comoros making scents", Trade for Development News by EIF, 13 August 2018.

[26] Ibid, note 23

from donor countries in the future.[27] Most of African trade falls under preferential arrangements, such as the US African Growth and Opportunity Act (AGOA) program and the EU's Everything But Arms EBA\ Economic Partnership Agreement (EPA) arrangements that are less likely to be litigated at the WTO Consequently complaints are regularly resolved bilaterally beneath the preferential schemes as a form inbuilt discrimination against developing and least developed African countries that have low market shares in international trade hence low retaliatory powers being restrained by economic implications of a WTO-dispute. Large countries are better off because of their ability to impose tariffs as a means of improving their terms of trade through increasing their welfare at the expense of the defendants compared to the small and weak countries that lack the capacity.[28] The long-term retaliation process by a small country is very low to influence the terms of trade against the defendant large country.

In April this year, the WTO gave a grim forecast based on two possible scenarios for world trade in 2020. One was an optimistic scenario in which the volume of world merchandise trade would fall by 13 per cent; and the pessimistic scenario envisaging a fall of 32 per cent.[29] As of October 2020, the WTO modified this forecast to a 9.2 per cent decline in merchandise trade for 2020, followed by an increase of 7.2 per cent in 2021. On both the foregoing accounts, African countries would be more at a disadvantage since many odds are stacked against them. African Countries suffer capacity deprivation and cost constrains that are to a greater extent are an offshoot of the absence of a credible mechanism to ensure implementation and compliance of the

[27] Financing Global and Regional Public Goods through ODA: Analysis and Evidence from the OECD Creditor Reporting System. Paris, OECD (2004).

[28] Ibid, note 27.

[29] WTO Website at http://www.wto.org (accessed 2oth July 2022).

DSU rulings amongst the member states giving developed and powerful countries more options than they do for less developed countries.[30] Therefore, the rules and procedures authorized by the DSU on retaliation favor countries that are economically stable at the expense of the weak countries that cannot retaliate even though allowed to sanction a developed country by the DSU for fear of jeopardizing economic benefits they receive from those countries. There is also the fear of trade wars that will arise between the disputant countries making it difficult for weaker countries to succeed. The higher the asymmetry between the two countries the lower the chances of success on the part of the small and weak country.[31]

XI. Remedies and recommendations awarded by the Panel and AB

To protect the complainant's trade interests and avoid further damages over inconsistent measures undertaken by a member state, the panel or AB shall direct the losing party to withdraw or remove those measure in question that are inconsistent with the covered agreements. However, the WTO rules do not provide for retrospective remedy and any right to compensation to the losing party unless bilaterally offered and "mutually agreed" upon between the parties. Thus, the absence of monetary compensation at the WTO DSM has acted as a factor hindering African countries from effectively filing cases for their economic loss which calls for attention and consideration by the WTO.[32]

[30] Ibid, note 29.

[31] WTO/OECD, Report on Trade-Related Technical Assistance and Capacity Building (2005) available at: https://www.wto.org/english/news_e/news18.

[32] *Annual Report on WTO (2018) at* <https://www.wto.org/english/news_e/news18_e/anrp_30may18_e.htm> accessed 16 June 2018.

Despite the introduced reforms during Uruguay Trade Round, the dispute procedures still take a considerable period of time that leads to delayed justice to the complainants as they wait for the opportunity to challenge violations of WTO rules. During the dispute settlement process, there is no interim relief to protect trade interests of complaints and no award or compensation is given to the complainant during that period the respondent is supposed to implement the rulings. Furthermore, there is no reimbursement for the winning party in regards to the legal expenses incurred during the proceedings. Therefore, making it impossible for Less Developed Countries to resort to suspensions of their obligations as per WTO founding Agreements.[33]

The authority of WTO DSM has been undermined by insufficient mechanisms to enforce the panel and AB rulings which forms the basis for retaliation through suspension of concessions by the losing party. This allows the shift from "the legal context and procedures to the arena of international politics which are economically aid-dependent, poor and small countries are not given the opportunity to prevent measures of continuous infringement by a strong country within the framework provided by the WTO Agreements.[34]

However, under the WTO economic strength of a country does not necessarily bring about compliance since retaliation cannot be used to enforce negotiated WTO agreements. "Powerful countries have been seen complying voluntarily with negative ruling of the panel and AB at the

[33] Ibid, note 32

[34] Ibid, note 32

expense of the economically weak countries" as clearly illustrated in the case of United States - Standard for Reformulated and Conventional Gasoline.[35]

XII. Inability to harness the WTO DSU.

African Countries ability to file cases under the WTO DSU can be inferred their performance in international trade. Although there has been a marked improvement in Africa's economic performance since 2003, there are still challenges to increasing Africa's export per capita income.[36] "African countries are still marginal participants, commanding less than 3.5% of world trade--two thirds mineral fuel (crude), precious stones (platinum and diamond), iron and steel." Some African countries such as Libya, Nigeria and Angola (with exception to Tunisia, South Africa and Mauritius who have a high level of export diversification) largely depend on oil as their major source of export earnings and trade while other African countries largely depend on exportation of unprocessed primary agricultural products such (as cocoa beans cotton and coffee) with few manufactured products thus leaving many African countries vulnerable to external shocks 52 compared to other LDC's.[37] European Union and USA are the major destinations for Africa's export products. "In 2015, sub-Saharan Africa exports to USA accounted for over 0.8%

[35] Ibid, note 32

[36] Ibid, note 32

[37] WTO, Doha Work Programme, Decision Adopted by the General Council on 1 August 2004, WT/L/579 #04-3297.

of total goods imported" according to the GSP annual product review53 Few players account for Africa's export trade especially those with minerals and oil.[38]

African countries argue that the WTO DSU system would only entice the likes of United States (So far, the only one to "buy" non-retaliation by the complainant)54 that may be able to spend millions of dollars to claim victory in the WJ0 dispute settlement process due to their strong economic power and superiority. However, this does not inevitably equate with economic victory since the implementation or compliance process is often too long, complex for African countries that rely on a few numbers of export products and markets.

It is also worth noting that although African countries are half-hearted about utilizing the DSU, other LDC's have succeeded in filing cases against major strong players and winning against the European Union and the United States of America. For that, non-participation of African countries will not protect them from the rulings and decisions adopted by the WTO upon its members. Thirdly, the cases will also show that lodging a case is not based on either a country is developed, least developed or developing but rather the potential and capacity to initiate a case and see up to the ruling.

Egypt and South Africa are the two major African countries that have been involved in the WTO dispute settlement as respondents; Egypt was party to four cases and South Africa five cases to which the process ended before the Panel stage. African countries have often been able to

[38] Ibid, note 37

participate at the minimal as third parties along other countries under the WTO DSU whose significance was seen in;

XIII. United States – Subsidies in the narrow purview of Upland Cotton, 2005

This case was concerned with government subsidies. The U.S based multinational corporations was selling key commodities in world market at below cost of production prices. Brazil chose to initiate this case challenging the prohibitive actionable subsidies provided by the US to producers and exporters of upland cotton and also the laws and regulations that made such subsidies available.[39] Brazil argued that the US measures were inconsistent with their obligation under Agreement on Agriculture and the subsidies Agreement on exports. Claiming that the subsidies increased and maintained the production of high-cost of US upland cotton that suppressed the Brazilian price on the world market thus causing serious prejudice to the interests of Brazil as US obtained equitable share of the world export trade. The US argued that its subsidies did not artificially increase supply or depress price because they were not attached to production and their famers did not get extra handouts for extra cotton but were paid according to the number of acres they planted and cotton they produced.[40]

The Panel ruled in favor of Brazil, finding that several aspects of the US the U.S. cotton program violated WTO rules and those US subsidies unfairly deflated cotton prices. It recommended that

[39] WTO | dispute settlement - the disputes - DS267

[40] Ibid, note 39.

the US take steps to remove these measures. On appeal, the AB upheld the panel's ruling that the subsidies provided by US were incompatible with the provisions of the SCM and other WTO agreements and w ere causing significant price suppression, thus adversely affecting the interests of Brazil.

The complainant was Brazil, while Benin, Burkina Faso, Mali and Chad, four countries in Africa affected by cotton subsidies, chose to launch the Cotton Initiative with the hope of resolving the problem of subsidies that diminish their market share and depress world prices and seeking a level playing field in the market for cotton understated by subsides. Benin and Chad who were being affected by U.S subsidies to their cotton growers decided to join as third parties alongside Brazil. These countries' economies were being affected by the American subsidy which also caused a treat to their economies. Despite the fact that the two African countries are recipients of unilateral trade preferences from the US under the African Growth and Opportunity Act (AGOA) 61 no retaliation was taken against them after the AB commanded US to remove its prohibited subsidies provided to its cotton grower.

These subsidies, amounted to almost USD 4 billion, exceeded the respective gross national income of Benin and Chad, and their African neighbors, Burkina Faso, the Central African Republic, Mali and Togo that saw an increase in the US cotton export share and a decrease in the West African cotton produce.

African countries, Benin and Chad received outstanding support from by the Advisor Centre on WTO Law (ACWL), and the private law company, (White & Case) in terms of logistics,

technical support that made it possible for them to participate in the complex 0f the dispute. Consequently, this case established huge evidentiary burdens placed on complainants in subsidy cases and also put pressure on countries like US, India and Chain (big economies) to offer domestic subsidy ceiling reductions during negotiations to countries calling for elimination of cotton subsidies.

XIV. European Community-Export Subsidies on Sugar, 2005

The above dispute was brought against the European Community by Brazil, Australia and Thailand over export subsidies provided by the EC to its sugar industry under the Common Agricultural Policy (CAP) sugar regime established in 1968.[41] The ACP sugar producers benefitted from the "Sugar Protocols" paying (a total of 1.6 million tons) that were included in a footnote inserted at the bottom of its schedules submitted to the WTO e.g., Mauritius twice the World Market Price. The EU unsuccessfully tried to protect its ACP re-exports from the scheduled subsidy limit.[42] The regulation set out various basic rules, including the intervention prices for raw and white sugar, basic prize and minimum price for beet, import and export censes, levies, export refunds, and import arrangements. The EC sugar regime also provided export refunds to its sugar exporters for certain quantities of sugar, other than C sugar.[43] These refunds were direct export subsidies, and covered the difference between the European Communities' internal market price end the prevailing world market price for sugar. Australia, Brazil, and Thailand claimed that under the EC sugar regime the EC provided export subsidies

[41] WT/DS283 - European Communities - Export subsidies on sugar (europa.eu)

[42] Ibid, note 39

[43] Ibid, note 39

for sugar in excess of its reduction commitment levels specified in Section II, Part IV of the European Communities' Schedule, in violation of certain provisions of the SCM Agreement governing export subsidies.[44] On appeal, the appellant body confirmed the panels finding that the EC had violated its obligations under the AOA by exceeding its subsidy level. EC was requested to respect its commitments and bring into conformity its sugar regime under the covered obligations.

XV. The EC- Anti-Dumping Measures on Bed Linen from India (DS141)

This was the first case Egypt was involved in under the DSU as a third party after the establishment of the panel on 22 September 1999 because the AD measures imposed by EC affected her exports.[45] This case was initiated by India as complainant against European Communities as respondent's other countries Korea, Republic of United States and Japan joined as third parties. The product issue in contention was Cotton-type bed linen imports from India and measure at issue was Definitive anti-dumping duties imposed by the European Communities EU, and the zeroing method used in calculating the dumping margin by EU.[46]

[44] Ibid, note 39

[45] WTO | dispute settlement - the disputes - DS141.

[46] Ibid, note 39.

India requested for consultation on 3 August 1998 with the EC in regard to the AD measure imposed on imports of cotton type bed linen from India. India argued that the determination of standing, the initiation, the determination of jumping and jury together with the explanation of the EC authorities finding were inconsistent with WTO laws and further, the claimed that the EC establishment and evaluation of facts were not proper and balanced as they never considered the special situation of India as a developing country.[47]

The panel found EC not inconsistent with the Anti-Dumping Agreement, calculating number of profits in raising normal value, considering all imports from India (Egypt and Pakistan) in analyzing injuries caused by dumped imports, considering industrial support for the application. The panel also found EC to have violated its obligation under Articles; 2.4.2, 3.4, and 15 of the AD Agreement in determining the dumping margin in accordance to the zeroing practice, failed to evaluate the state and all the necessary factors affecting domestic industries and exploring possible productive remedies before applying AD measures as instructed under article 3.4 the AD agreement.[48]

On appeal, the AB upheld the panels finding in regard to the practice of zeroing in establishing existing dumping margins but reversed the panels finding on the method used to calculate administrative, selling, general costs and profits. Stating that they are only used when there is available data to be used calculating the profits of other producer or exporter excluding sales that are not made under the ordinary course of business. Egypt argued that the EC had violated

[47] Ibid, note 40.

[48] Ibid, note 40.

Article 15 of the AD agreement by not exploring all the possibilities provided under constructive remedies before applying the AD duties or providing other possibilities to the affected parties in regards to price undertaking. it further asserted that article 15 AD agreement levies legal responsibilities on developed countries to fist explore all the available possibilities of constructive remedies i.e. (decision on to impose AD at all) before applying anti-dumping duties that would affect developing Countries interest.

However, Egypt's participated as a third party rather than a complainant because of its relatively low-income cost, limited expertise since it was its first case as a third party but managed to secure its comparative advantage and protect its economic interest and benefit over the India's competitors after the panel's ruling that saw the cessation of EC AD measures on imports from bed linen from Egypt.

XVI. What more can the WTO do to ensure the trade system works for all?

Through the trade policy Review mandate of the WTO, it know that the system is lopsided but what has it done to ameliorate this challenge? The DSP interprets existing Articles of the WTO agreements to give guidance on how engendered rules can be applied in the interest of all countries. It must be noted that the work of Panels and the Appellate Body is to settle

international trade disputes by way of interpreting the WTO Agreements.[49] Going forward, the WTO will need to address the outstanding grievances of developing countries such as affording more market access, the main issue that cause the Doha Trade Round (2001-2015) to stall. It cannot be right that outstanding concerns in developing countries are shoved under the carpet, the system must be seen to be more transparent as it claims since it fronts it as one of its fundamental objectives.

The Doha Trade Round was focused on achieving enhanced market access for agriculture and non-agriculture products, trade in services in particular trade related intellectual rights and rules of origin. There has been failure of collective governance of the dispute settlement mechanism and resolution of outstanding issues can help to revitalize the WTO systems. Many members of the WTO consider the Appellate Body to be an independent world court charged with the responsibility to provide broad interpretations of trade rules to reflect the changing economic realities today.

It must also be noted that consensus decision-making in the WTO makes collective decisions on specific jurisprudence unlikely and erodes the degree of circumspection the Appellate Body wisely demonstrated in its early years. The judicial independence of the Appellate Body doesn't exist in a vacuum but depends upon the dynamic interaction between equally effective rule making and adjudicative bodies. The relatively weaker rule making function of the WTO magnifies the power of the adjudicators, along with the implications of their rulings. Arguably,

[49] . This is "a three-stage process" in settlement of trade disputes: (I) consultations between the parties; (ii) adjudication by panels and, if applicable, by the Appellate Body; and (iii) the implementation of the ruling, which includes the possibility of countermeasures in the event of failure by the losing party to implement the ruling.

the Appellate Body's tendency to pronounce on every rule brought before it, even when not necessary to resolve a dispute, has contributed to the difficulty in agreeing to new rules in the WTO.

XVII. Conclusion

Bearing in mind the importance of multilateral trade system in economic development of Countries, African Countries cannot afford to slack, they will need to utilize the World trade system more like China has done to leverage its development interests. They cannot afford to continue dropping their guards and literally get punched in the face. They will need to regularly need to harness requisite research in areas where they have been at a disadvantage in trade and policy to leverage their capacity to harness and benefit from international trade. The blame game must stop for some Countries to make progress because some Countries such as China have utilized the Dispute Settlement Understanding Mechanisms better, won cases and progressed. We urge African Countries to continue their positive efforts in the fight against corruption because it has sidelined their development efforts including misallocation of resources.

More financial and technical assistance is needed from donor agencies to leverage African Countries gain more market access, increase productivity, quality, volume and value of their export trade. Specifically, more resources are needed such as Aid for Trade, to enable African countries overcome some impediments to trade. Regional approaches for infrastructure development such as transport, energy, standards and quality management would be more cost effective and beneficial both to intra- and extra-regional trade in Africa.

In many African Countries, a lot still needs to be done to overcome their artificial impediments to economic development such as tackling widespread corruption and its offshoot challenges. The best researchers and consultants (who would carry out requisite research for countries to leverage their capacity on trade and development policy issues) in some Countries cannot be hired to leverage economies capacity shortfall because they are not connected to people in high Government offices. Meanwhile, those who are hired because they are connected lack requisite capacity--skills and knowledge to perform at the expected level of they are hired to do. This becomes the conundrum most African Countries are caught in!