

IT'S TIME AFRICAN COUNTRIES UTILIZED THE WTO, DISPUTE SETTLEMENT UNDERSTANDING MORE TO LEVERAGE THEIR INTERNATIONAL TRADE INTERESTS

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ABSTRACT

The paper deconstructs the law relating to WTO, Dispute Settlement Mechanisms (DSMs) to establish why African Countries have failed to harness it to leverage their international trade Interests. There is compelling evidence to affirm that many African Countries are marginalized in international trade because many odds including failure to harness the WTO Dispute Settlement are stacked against them. 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

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be deficient in requisite capacity to handle the complexity of the World trade disputes mechanisms. This paper posits that the marginalization of African Countries in the World trade system is partly caused by inherent factors that saddle them as Less Developed Economies. We adopted hybrid doctrinal and qualitative methodological approaches by way of reviewing WTO relevant Agreements, existing literature and evaluating evidence in the context of objectives for writing the paper. The findings corroborate that African Countries have been sidelined in international trade system because they have not utilized the Dispute Settlement Understanding Agreement to leverage their international trade interest well.

I. Introduction

The success of any international trade system depends to a great extent on the effectiveness of its ability to settle emerging international trade disputes. It was precisely because of the skewed Dispute Settlement Understanding under GATT, 1947 and failure to solve trade disputes that made some Countries to shun it. The GATTs had a small membership of twenty-three countries which grew to one hundred twenty three (123) by the time of the Uruguay trade round in 1986.⁸ Today, many stakeholders have expressed their displeasure over WTO's failure to use its Dispute Settlement Understanding mandate to prevent the abuse of WTO rules, principles and procedures by member countries.

The Dispute Settlement mechanisms (DSMs) were designed to settle emerging trade disputes between countries from time to time. Therefore, the purpose of this paper is to evaluate how particularly African Countries have utilized the WTO Dispute Settlement Mechanisms to leverage their trade in goods and services across member Countries.

⁸ Today, the World Trade Organisation is made up of one hundred, sixty four member countries.

This study has found out that the extent African Countries have utilized the WTO in settling emerging trade disputes has been appallingly low, presumably explaining why they have lagged behind other countries in economic development. The paper has examined the DSM procedures and implementation of rulings by the Panel and Appellant Body (AB) of the WTO adjudicated cases to establish the extent African Countries have harnessed the DSM Mechanisms. We noted that the process of settling international trade disputes starts with consultations, followed by implementation of rulings and recommendations by the Panel and Appellate Body which may drag on for years.⁹ In all these stages, African Countries are disadvantaged either by the nature and intricacies of the system or inherent disadvantages are developing countries.

II. Methodology

We adopted a hybrid methodology, involving elements of doctrinal and a qualitative research methodologies. In terms of doctrinal methodology, the Marrakesh Agreement on Dispute Settlement Understanding (DSU) creates a mechanism for settling emerging trade disputes between member countries. However, it was evident that the rules and procedures for settling international trade disputes are complicated and naturally tend to favour developed countries more than it does for developing countries.¹⁰ The rules and

⁹ 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.

¹⁰ Bilateral consultations between the parties are the first stage of formal dispute settlement process (Article 4 of the DSU). They give parties the latitude to discuss the matter and find a satisfactory solution amicably. After such mandatory consultations have failed to produce a satisfactory outcome

procedures of WTO are mandatory and apply to all 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 Dispute Settlement Body (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.

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 123 by the time of Marrakesh Agreement (1995) to 164 members by 2016, making it one of the fastest growing international organizations today.¹¹ It is also worth noting that 46% of the WTO membership is comprised of Least Developed Countries (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

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.

¹¹ See the WTO Website at <http://www.wto.org/accession> of member Countries (accessed 15th April 2022).

the covered agreements even though their exports face trade barriers from their trading partners compared to countries such as Brazil, India and Mexico which have filed cases and won some of them.¹²

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 where parties fail to amicably settle their disputes under consultation which are closed to only 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.¹³ 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 among 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

¹² 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.

¹³ Panagariya A, 'EU Preferential Trade Policies and Developing Countries' (2002) 25(10) *World Economy* <<https://www.repec.org>> accessed 19 July 2020.

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.¹⁴ 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.

A review of the literature on African Countries propensity to harness the WTO Dispute Settlement Understanding has corroborated that they have been disadvantaged with the jurisprudence of the Panel and Appellate Body (AB) in dispensing rules of treaty interpretation under Article 3.2 of the DSU. The panel and the AB allow limited time for Least Developed Countries to be able to address required recommendations and rulings.

Pursuant to authorized consultation among 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 (Panagariya, 2002:16-20). 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

¹⁴ Brenton P (2003), ‘Integrating the Least Developed Countries into the World Trading System: The Current Impact of EU Preferences under Everything but Arms’ WPS3018 *Policy Research Working Paper* <<https://www.elibrary.worldbank.org>> accessed 12 July 2018.

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 (Panagariya, 2002).

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.¹⁵ In cases where there is failure to amicably settle the dispute through consultations 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.

¹⁵ 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 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.

With the good office provision offer of the Director General (currently, Ms. **Ngozi Okonjo-Iweala. Ngozi Okonjo-Iweala**), 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 adequate financial resources is what translates of African Countries to harness the complicated DSM of the WTO¹⁶.

Third party involvement under 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 panel and informed its concerns to the DSB.¹⁷ 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

¹⁶ Adank, J. (2017 edn), *WTO Dispute Settlement: One-Page Case Summaries 1995-2016* accessed on 4th June 2018 at.<<https://www.wto.org/disputes>>

¹⁷ 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](#)).

demonstrate substantive trade interest in the disputes (Brenton P, 2003).

The Special and Differential Treatment (hereinafter S & DT) provisions do not seem to take into account the challenges of Less developed Countries which inhibit their capacity to implement the rulings and recommendations of the panelist in a timely manner.¹⁸ 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 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.

III. Discussion and Findings

We reviewed data to establish why African Countries have not utilized the DSM of the WTO. We found that African Countries

¹⁸ 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).

have only initiated 23 cases as respondent and appeared in 129 cases as a third parties since 2019. Lower- middle income countries such as South Africa and Egypt have also utilized the DSU even though would have expected them to have some requisite capacity. Contrast this with Thailand which is also at the same level of Development as Egypt but has managed to ‘file 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.

It must be noted that the poor are sometimes denied justice and by the very nature of poverty and its constraining effect, poor countries lack the capacity to effectively pursue their cases. Poor countries are already faced with resources constraints, which make them lame ducks and unable to litigate in foreign countries.

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 Phytosanitary 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 was found that most cases on average at the World Trade Centre 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 (WTO (2003e: WT/L/521).

There no African country which falls in a high-income economy cohort because of the high debt burden apart from Namibia, 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 (WTO (2003e: WT/L/521).

African Countries suffer diminished capacity, coupled with reduced representation in Geneva create an environment for further marginalization of these Countries.¹⁹ 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. 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

¹⁹ Ramsay, D. (13 August 2018), “Comoros making scents”, Trade for Development News, also available at <https://trade4devnews.enhancedif.org/en/photoessay/comoros-making-scents>.

departments (for example agriculture trade, environment) over thirty lawyers that are specifically specialized in litigation with also a support of from 123 Professors 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 (Ramsay, D, 2018).

There are limited timeframes for implementation of rulings creates another hurdle for African countries especially when the respondent has to adopt desired conforming measures to address breached agreement. This therefore gives developed countries an upper hand to drag cases at the expense of less developed countries. By the time the panels pronounce themselves on the matter, the former countries will have already benefited from reforms of the particular measure without any consequences. The WTO has no jail house, no bondsmen, no blue helmets and no tear gas...the WTO initially relies upon voluntary compliance of states (Bello, J. 2016). This has created difficulties with regard to implementation of the WTO agreements since there is no outside body to monitor and enforce the rulings and recommendations in cases where there is deviation ((Ramsay, D, 2018).

Compensation is a voluntary and temporary measure to the complainant 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.²⁰ The way in which the respondent could implement the

²⁰ Ikiara M M and Ndirangu K L (2003), 'Prospects of Kenya's Clothing Exports under AGOA 24 *Kenya Institute for Public Policy Research and Analysis* <<https://www.researchgate.net>> accessed 18 July 2018.

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.²¹

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.²² 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.

²¹ Fergusson F I (2008), 'World Trade Organization Negotiations: The Doha Development Agenda' *Library of Congress Washington DC Congressional Research Services*, last accessed on 12th June 2018 at: <https://www.dtic.mil/dtic/tr/fulltext/u2/a486294.PDF>.

²² Martin Khor (2008), 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.

Some scholars have contended that the rules and procedures for settling trade disputes are designed to favour of Developed Countries against the weaker ones. In the WTO, DSM its traditional that rights always prevail over power.²³ This was brought about by the new legalized system and procedure, reducing the bargaining power among 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 (Ramsay, D, 2018: 24).

It must also be pointed out that most of African Countries' National Development Budgets are donors funded. This by its very nature constrains their independence to engage in international trade disputes against their donors.²⁴ Most of African trade falls under preferential trade 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 level. 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

²³ Ramsay, D (13 August 2018), "Comoros making scents", Trade for Development News

²⁴ Financing Global and Regional Public Goods through ODA (2004): Analysis and Evidence from the OECD Creditor Reporting System. Paris, OECD.

to the small and weak countries that lack the capacity (Ramsay, D, 2018: 30-31).

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.²⁵ 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 are 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 DSU rulings among member states giving developed and powerful countries more options than they do for less developed countries (WTO: July 2022).

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.²⁶

To avoid alienating international trade interests of complainant states and avoid further damages over inconsistent measures undertaken by a member state, the panel or Appellant Body (AB)

²⁵ WTO Website at <http://www.wto.org> (accessed 20th July 2022).

²⁶ WTO/OECD (2005), Report on Trade-Related Technical Assistance and Capacity Building, available at: https://www.wto.org/english/news_e/news18.

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.²⁷

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 (Ramsay, D, 2018:30-31). 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 ((Ramsay, D, 2018).

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

²⁷ *Annual Report on WTO (2018)*, accessed 16 June 2018, at <https://www.wto.org/english/news_e/news18_e/anrp_30may18_e.htm>

have been seen complying voluntarily with negative ruling of the panel and AB at the expense of the economically weak countries” as clearly illustrated in the case of United States - Standard for Reformulated and Conventional Gasoline ((Ramsay, D, 2018). 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 (Adank, J, 2017). “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 (Adank, J, 2017). 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% 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 (Adank, J, 2017)

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 WJO 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 must be noted that the poor are sometimes denied justice and by the very nature of poverty and its constraining effect, poor countries lack the capacity to effectively pursue their cases before the WTO Dispute Settlement Mechanism ((Adank, J, 2017). Poor countries are already faced with resources constraints, which make them lame ducks and unable to litigate in foreign countries. 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 phytosanitary 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 complaints 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

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African Countries lack requisite capacity, coupled with reduced representation in Geneva create an environment for further marginalization of these Countries ((Adank, J, 2017) 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 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 (Ramsay, D, 2018).

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²⁸ Ikiara M M and Ndirangu K L (2003), 'Prospects of Kenya's Clothing Exports under AGOA, 24 *Kenya Institute for Public Policy Research and Analysis*, accessed 18th July 2018.at <https://www.researchgate.net>.

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³⁰ Ramsay, D (2018), "Comoros making scents", Trade for Development News.

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 (Ramsay, D: 2018).

It must also be pointed out that most of African Countries' National Budgets are funded from development aid by donors. This by its very nature compromises their ability to engage in international trade disputes against their donors.³¹ Most of African trade falls under preferential trade 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 level.

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 (WTO, July 2022). 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

³¹ Financing Global and Regional Public Goods through ODA (2004): Analysis and Evidence from the OECD Creditor Reporting System. Paris, OECD.

fall by 13 per cent; and the pessimistic scenario envisaging a fall of 32 per cent.³² 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 DSU rulings among member states giving developed and powerful countries more options than they do for less developed countries (Ramsay, D: 2018).

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.³³

To protect the complainant's trade interests and mitigate further damages over inconsistent measures, 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

³² WTO Website at <http://www.wto.org> (accessed 20th July 2022).

³³ WTO/OECD (2005), Report on Trade-Related Technical Assistance and Capacity Building, available at: https://www.wto.org/english/news_e/news18.

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 (Adank, J, 2017)

During the dispute settlement process, there is no interim relief to protect trade interests of complainants 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 (Adank, J, 2017)

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 (Ramsay, D: 2018).

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 expense of the economically weak countries” as clearly illustrated in the case of United States - Standard for Reformulated and Conventional Gasoline (Ramsay, D: 2018).

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. “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.³⁴

European Union and USA are the major destinations for Africa’s export products. It is bad to noted that in 2015, sub-Saharan Africa countries only managed to exports to USA 0.8% of total goods. According to the GSP Annual Product Review⁵³, few players account for Africa’s export trade especially those with minerals and oil (WTO, Doha Work Programme, 2004).

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 WJO 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 (Ibid).

It is also worth noting that although African countries have not been keen on utilizing the WTO Dispute Settlement Understanding, they need to take a leaf from other developing Countries which have successfully won cases against developed countries, winning against strong actors like the European Union and the United States

³⁴ WTO, Doha Work Programme, Decision Adopted by the General Council on 1 August 2004, WT/L/579 #04- 3297.

of America. For that matter, non-participation of African countries will not enhance their international trade prospects but will continue to get sidelined by 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 being developed, least developed or developing but rather the potential and willingness to initiate a case and wait for 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. It must also be noted that consensus decision-making procedure in the WTO is a collective decision on specific jurisprudence 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 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. The Appellate Body's tendency to pronounce themselves 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.

IV. Conclusion and Recommendations

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 at many levels.

Financial and technical assistance is needed from donor agencies to leverage African Countries ability, in terms of market access, increased productivity, quality, volume and value of their export trade to benefit from international 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!