THE EFFICACY OF THE WORLD TRADE ORGANISATION DISPUTE SETTLEMENT MECHANISM IN ADDRESSING TRADE DISPUTES BETWEEN AFRICAN COUNTRIES AND OTHER MEMBER STATES IN THE MULTILATERAL TRADE SYSTEM

By

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DECLARATION

I, **TACEY KERUBO MAKORI,** do hereby declare that this is my original work and has not been submitted for a degree in any other University.

SIGNED……. DATE…….

TACEY KERUBO MAKORI

This research project has been submitted for examination with my approval as the University Supervisor.

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DEDICATION

To my daughter, Unathi Msibi, for being my greatest motivation and source of aspiration and strength.

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LIST OF ABBREVIATIONS

DS	Dispute Settlement
DSS	Dispute Settlement System
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
GATT	General Agreement of Trade and Tariffs
GDP	Gross Domestic Product
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
WTO	World Trade Organization

ABSTRACT

The WTO is a trade forum for states to grow their market share while protecting state rights provided for in the various Agreements annexed to the Agreement establishing the World Trade Organization. The record of states that frequently utilize the global trading system as per the World Trade Organization World Trade Statistical Review 2018 does not include any African country. The reason behind this could be that African countries are developing and their trade volumes are low. The World Bank opines that over the last three decades, Africa has become marginalized from world trade and as a result, African economies have remained stagnant due to lack of export expansion and diversification. However, there is a wide array of developing countries using the system to advance their trade visions, such as China, India, Brazil and Mexico, and this therefore begs the question whether indeed the dismal participation in the Dispute Settlement System by African states is as a result of the "developing" classification. A vast majority of African countries are part of the World Trade Organization, withall of them participating in domestic and foreign trade.

African countries, as a group, boast a majority of membership in the World Trade Organization, however they are the least participants in the DS of the World Trade Organization. African member states, collectively, are one of the largest exporters of raw materials however, their share of the world market is at a menial 1%. The African Member States of the WTO have been members since the GATT era however their contribution to the jurisprudence of the DS of the WTO is quite minimal. Only two African member states have been participants in the DSS of the World Trade Organization.

This paper delves into the reasons behind the poor performance by African Member States to the WTO. The paper will discuss at length and make findings on the external and internal factors contributing to the dismal use of the WTO Dispute Settlement system by African member states. It then concludes with an overview of the information and offers new and innovative ways to combat the problem at hand.

CHAPTER ONE: INTRODUCTION

1.1 Background of the Study

Settlement of disputes is an integral aspect of organizations, especially one where the members are states and the business at hand is trade with bilateral and multilateral aspects to it. There exists a misconception that dispute settlement was a sole and unique product of theWTO. In reality, thesystem of dispute settlement under the WTO largely owes its characteristics to the General Agreement on Trade and Tariffs, 1947. The General Agreement on Trade and Tariffs, 1947 provided for a mechanism for dispute settlement established under Articles XXII and XXIII of the aforementioned Treaty.[1]

The WTO was formed in 1995 and successfully replaced the GATT. Currently, the WTO system has made improvements, based on Articles XXII and XXIII of the General Agreement on Trade and Tariffs, 1947which are now provided for under the DSU.[2] One of the key roles of the WTO is to conduct litigation according to its own dispute settlement provisions.[3] Compliance in this system is achieved vide binding dispute settlement provisions.[4] In as much as trade volumes and economic growth has increased for some member countries, the system needs to be sustained by focusing on the institution's flaws and how to cure them.[5]

Another of the improvements of the WTO system from that of the GATT is that under the previous regime it was more power-oriented whereas now, under the WTO, it is rule based giving less room for manipulation of the system.[6] Furthermore, specific provisions have been inserted to deal with the power imbalance that is perceived to be present amongst the member states which disfavoursdeveloping countries. The WTO dispute settlement model, through the

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[1]<https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s1p1_e.htm> Accessed on 5th November 2018.

[2] Dispute Settlement Understanding, article 3.1.

[3] Dispute Settlement Understanding, article 1.1.

[4] Bartosz Ziemblicki, 'The Controversies of the World Trade Organization Settlement System'<http://www.bibliotekacyfrowa.pl/Content/32203/0014.pdf> Accessed on 5th November 2018.

[5]Christina Davis, 'The Effectiveness of the World Trade Organization Dispute Settlement: An Evaluation of Negotiation Versus Adjudication Strategies,'2008, <https://pdfs.semanticscholar.org/5f2a/f57cbbe98c0f868f1c1aacd07e5a92da1f15.pdf> Accessed on 5th November 2018.

[6] Fabien Besson and Mehdi Racem, 'Is WTO Dispute Settlement System Biased against Developing Countries? An Empirical Analysis'<https://ecomod.net/sites/default/files/document-conference/ecomod2004/199.pdf> Accessed on 5th November 2018.

secretariat, has established legal provisions to aid developing countries, which include African Countries. However, the help is only on general issues hence the risk of their inability to successfully litigate a matter subsists.[7]

As it would appear, most African countries are still bystanders in the DSS with only two African states actively participating in the system as Respondents, that is South Africa and Egypt. [8]The WTO is lauded as being a rule based system which has seen an increase in trade and the settlement of disputes arising out of these increasing transactions, but for whom? According to the statistics, it is clear to see that African states are least participants in the DSB despite a general rise in the referral of trade disputes by other member countries.

Quite notably, African states' participation in the world trade is negligible.16% of Africa's world exports are exports within Africaand generally, their share of global exports is 2.4 %.[9]African states seem to be great dependents on imports which is not amply balanced by corresponding exports.[10]African countries are individually and collectively net importers of goods and services under the multilateral system, yet all disputes appear to be activated by the exporter states.

African States have repeatedly committed themselves to active participation in the elaboration and continuity of the framework and rules of international trade.[11] That notwithstanding, the Dispute Settlement Mechanism's achievement ought to be measured by the ease of all member states to resolve disputes with other member states and not by an increase of cases instituted before it.[12]

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[7] Ibid.
[8] Ibid.
[9]"Intra-Africa trade profile – 2017", <https://wolffwww.tralac.org/resources/infographic/13964-intra-africa-trade-profile-2017.html> Accessed on 13th August 2019.

[10] Evita Schmieg, 'Africa's Position in Global Trade- Free Trade Agreements, WTO and Regional Integration' <https://www.swp-berlin.org/fileadmin/contents/products/projekt_papiere/Africas_Position_in_Global_Trade.pdf>Accessed on 23rd January 2019.
[11] Wolfgang Benedek, "The Participation of Africa in the General Agreement on Tariffs and Trade (GATT)", Verfassung und Recht in Übersee / Law and Politics in Africa, Asia and Latin America, Vol. 20, No. 1 (1. Quartal 1987), pp. 45-58.
[12]Stella Muheki, 'African countries and the World Trade Organisation Dispute Settlement Mechanism: Underlying Constraints, Concerns and Proposals for Reform' (2010) https://repository.up.ac.za/handle/2263/28410 Accessed 6th December 2018.

1.2 Statement of the Problem.

Although the World Trade Organization DSS is hinged on equality and non-discrimination of its members, nevertheless African countries seem to reap the least benefits.

The WTO, in Birkbeck's view seeks to, "To protect a stable, multilateral, rules-based approach to international trade."[13] The World Trade Organization is perceived to be more inclusive while utilizing a rule-based approach. The member countries should enjoy equal access rights to be heard.

Article 3.2 of the Dispute Settlement Understanding stipulates that, "The DSU is a central element in providing security and predictability to the multilateral trading system. It serves to preserve the rights and obligations of states under the covered agreements."[14]It would however appear that Africa continues to play a peripheral role in the dispute settlement system despite the theoretical equal access to justice that is deemed to be enjoyed by all member states as provided for under the DSU.

It as much as the DSB has, on paper, provided for equal access to justice by all member states by *inter alia* establishing strict timelines and panels with binding recommendations and a general rule based system, African countries have been left out of this process as DSB proceedings are dominated by United States and the European Community, using the World Trade Organization as an avenue to further their aspirations in international trade.[15]

Access to justice is the backbone of any dispute settlement system. Anorganization's ability to ensure that there exists no hindrances to a party's capability of accessing justice is the basis in which the said system can be said to be efficient. Access to justice is therefore a real issue for majority of African States and if not addressed forcefully, it has the potential of bringing into question the legitimacy of the system.[16]

Access to justice refers to the ability of member states of the World Trade Organization to institute a case before the dispute settlement system, either as Complainants, Respondents or as

[13]Carolyn Birkbeck and Catherine Monagle, 'Strengthening Multilateralism: A Mapping of Proposals on WTO Reform and Global Trade Governance'(2009), <https://ssrn.com/abstract=1531687> Accessed 6th December 2018.
[14] Dispute Settlement Understanding, article 3.2.
[15]Stella Muheki, 'African countries and the World Trade Organisation Dispute Settlement Mechanism: Underlying Constraints, Concerns and Proposals for Reform' (2010) https://repository.up.ac.za/handle/2263/28410 Accessed 6th December 2018.
[16] Kim Borght, "Justice for all in the Dispute Settlement System of the World Trade Organization?" <http://digitalcommons.law.uga.edu/cgi/viewcontent.cgi?article=1064&context=gjicl> Accessed on 10th November 2019.

Interested Parties, in absence of hindrances such as weak economic capacity in the international market.[17] Considering the existing status quo and the high costs attributable to being an active participant before the DSB, does the current system ensure African countries access to the WTO DSB in order to promote a fair solution and ensure access to justice?

The World Trade Organization Agreements, and in particular, the DSU makes provision for special and differential treatment for developing countries. For instance, for consultations more attention is designated to developing countries' problems and interests.[18] "If the object of the consultations is a measure taken by a developing country Member, the parties may agree to extend the regular periods of consultation. If, at the end of the consultation period, the parties cannot agree that the consultations have concluded, the DSB chairperson can extend the time-period for consultations."[19]Despite this, African countries still seem unable to take advantage of these mechanisms throughout not only to spur international trade in their favour, but also in the DSU as well.

In addition, developing member states have protection at the panel stage, "When a dispute is between a developing country Member and a developed country Member the panel must, upon request by the developing country Member, include at least one panelist from a developing country Member."[20].

As it is now, it is unclear whether the DSS as it is, is capable of ensuring access to justice to all member states. Dynamics such as high costs in litigating and lack of expertise, for instance, are an obstacle to African states taking part in the system ofdispute settlement at the Dispute Settlement Body.[21]Unequal access to justice in the DSS creates procedural discrimination between countries and as a result increases the gap between developed member states and least developedmember states and, consequently, it threatens the very legitimacy of the body.[22]

[17] Inez Lopez, "Dispute Settlement Body of the WTO: Access to Developing Countries?"https://www.academia.edu Accessed on 10th November 2019.
[18] Dispute Settlement Understanding, article 4.10.
[19] Dispute Settlement Understanding, article 12.10.
[20] Dispute Settlement Understanding, article 12.11.
[21]Inez Lopez, "Dispute Settlement Body of the WTO: Access to Developing Countries?"https://www.academia.edu Accessed on 10th November 2019.
[22] Ibid.

1.3 Objectives of the study

1.3.1 Overall objective

The overall objective of the study is to examine the efficacy of the World Trade Organization's dispute settlement mechanism in addressing trade disputes between African member states and other member states in the multilateral trading system.

1.3.2 Specific objectives of the Study

a) To critically analyze the functioning and practice of the dispute settlement mechanism of the World Trade Organization;
b) To critically analyze the participation of African countries vis-à-vis the participation of developed member states in the Dispute Settlement Body;
c) To identify the obstacles and constraints faced by African member states in their pursuit of participation in the dispute settlement system of the World Trade Organization.

1.4 Research Questions.

a) What is the functioning and practice of the dispute settlement mechanism of the World Trade Organization?
b) What is the participation of African countries vis-à-vis participation of developed member states in the Dispute Settlement Body?
c) What obstacles and constraints do African member states face in their pursuitof participation in the dispute settlement system of the World Trade Organization?

1.5 Hypothesis

This study makes the hypothesis that:

a) The high cost of referring a disputeand the lack of sufficient knowledge on DSB procedures hinders African member states to participate in the dispute settlement body of the World Trade Organization.
b) African country's Gross Domestic Product has an impact on its decision to refer disputes to the DSB.

1.6 Theoretical Framework

This research relies on two main theories. These theories are: **Legal positivism** and **Utilitarian theory of law.**

1.6.1 Legal Positivism

The collection and assessment of data in this paper will be largely based on a legal positivist point of view. This is due to the fact that the World Trade Organization is now rule-based and therefore its essence is rooted in codified law. Legal positivism, which was largely developed by legal thinkers such as John Austin, is a philosophy of jurisprudence and law which posits that the law ought to be looked at as is and not as it should be. H.L.A Hart is one of the most prominent figures known to advance the legal positivism theoryand who advanced a reevaluation of the positivist doctrine and the nexus with other legal theories.[23] Legal positivism posits that a law's legality ought not to be ascertained by the mere fact that it may be inefficient, unwise of unjust.[24]

With that in mind, the reason for adopting the positivist approach lies in the fact that the dissection of the relationship between African countries in the WTO and their use of DSB, vis-à-vis developed countries, will be based on the current provisions of the WTO ensuring equity for all member states intending to utilize the dispute settlement mechanism of the WTO.

The relevance of legal positivism is self-evident in the Appellate Body of the DSB which has affirmed international law positivism publicly.[25] The Appellate Body holds itself as an avid proponent of international legal positivism.[26]It observed itself as follows in one of its earliest decisions:

> "The WTO Agreement is a treaty – the international equivalent of a contract. It is self-evident that in an exercise of their sovereignty, and in pursuit of their own respective national interests, the Members of the WTO have made a bargain. In exchange for the

[23] HLA Hart, *The concept of Law* (2nd edition, Clarendon Press 1994).
[24] Green Leslie, 'Legal positivism' in the Stanford Encyclopedia of philosophy accessed at http://plato.stanford.edu/entries/legal-positivism/ accessed on 6th December 2018.
[25] Oisin Suttle, "Rules and Values in International Adjudication: The Case Of The WTO Appellate Body", https://www.cambridge.org/core/services/aop-cambridge-core/content/view/456CD214419586E66F255080361AB72F/S0020589319000058a.pdf/rules_and_values_in_international_adjudication_the_case_of_the_wto_appellate_body.pdf Accessed on 1st September 2019.
[26] Ibid.

benefits they expect to derive as Members of the WTO, they have agreed to exercise their sovereignty according to the commitments they have made in the WTO Agreement."[27]

The DSU provides that the mandate of the DSS includes "preserving the rights and obligations of Members under the covered agreements as well as to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law."[28] The Appellate Body has construed this provision to mean that its task predominantly is focused on the positive law contained in theannexed Agreements which ought to be the focal point of its reasoning and determination of disputes.[29]This aspect is further emphasized by the practice of prioritizing the Agreements over precedents in the determination of disputes during the Panel/AB stages.[30]

Furthermore, in the matter for United States - Standards forReformulated and Conventional Gasoline, the Appellate Body reiterated the "need to achieve such clarification by reference to the fundamental rule of treaty interpretation set out in Article 31(1) of the Vienna Convention on the Law of Treaties."[31]Further, the Appellate Body stressed that this general rule of interpretation "has attained the status of a rule of customary or general international law".[32]

This research paper is premised on legislation formulated under international law. The positivist approach would be most ideal for reasons that the research is concerned with whether or not the law that has been formulated and practiced is a hindrance to the participation of African member states in the dispute settlement mechanism of the World Trade Organization.

1.6.2 Utilitarian theory of law

In addition to the above theory, this research will also be centered on aspects of the utilitarian theory of law, whose tenets are that the law should be made for the purpose of being socially useful. It posits that a course of action that is deemed to be proper is the one that maximizes

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[27] WT/DS8/AB/R Japan–Alcoholic Beverages, Appellate Body Report (4th October 1996), https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=32900&CurrentCatalogueIdIndex=0&FullTextSearch Accessed on 1st September 2019.

[28]Dispute Settlement Understanding, article 3.2.

[29] Oisin Suttle, "Rules and Values in International Adjudication: The Case Of The WTO Appellate Body", https://www.cambridge.org/core/services/aop-cambridge-core/content/view/456CD214419586E66F255080361AB72F/S0020589319000058a.pdf/rules_and_values_in_international_adjudication_the_case_of_the_wto_appellate_body.pdf Accessed on 1st September 2019.

[30] Ibid.

[31] WT/DS2/9 Adopted 20th May 1996.

[32] Ibid.

utilityby maximizing total benefit and reducing suffering. It further posits that a moral act is that which promotes the greatest good for the greatest number of persons. This theory has a moral foundation and is human centered.[33]Classical utilitarianism's two most influential contributors are John Stuart Mill and Jeremy Bentham.

The WTO framework generally seeks to protect the interests of each member state vis-à-vis the interests of all the member states cumulatively. For instance, the Doha Declaration[34]lays emphasis on "the common intention of WTO members on how to operationalize the balancing objectives and public interest principles of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). In paragraph 4, "Members agree that the TRIPS Agreement does not and should not prevent Members from taking measures to protect public health. Accordingly, while reiterating our commitment to the TRIPS Agreement, we affirm that the Agreement can and should be interpreted and implemented in a manner supportive of WTO Members' right to protect public health and, in particular, to promote access to medicines for all."[35]

Furthermore, the TRIPS provisions further demonstrate the public interest approach as provided for in the Doha Declaration.[36] The interpretive approach espoused in Article 8 of TRIPS is based on "treaty interpretation and implementation and it allows the tension between the provision's core function as a public interest principle and its TRIPS consistency test to be overcome."[37]The public interest principles go hand in hand with the utilitarian function of rights and this is clearly expressed in the TRIPS Preamble.[38]

The above serves as an indication that the WTO framework is inherently utilitarian in the sense that it seeks to promote the general public interest which is a function of the utilitarian approach.

The DSS provides an avenue for enforcement of rights by member states of the WTOas provided for under the various WTO Agreements. Essentially, the violation of a right under a WTO

[33]Eban Goodstein, *Economics and the Environment*(6th edition, Wiley 2011) p. 26.
[34] Declaration on the Trips Agreement and Public Health, Ministerial Conference Fourth Session Doha, 9 - 14 November 2001, <https://www.who.int/medicines/areas/policy/tripshealth.pdf?ua=1> Accessed on 2nd September 2019.
[35] Ibid.
[36]Agreement on Trade-Related Aspects of Intellectual Property Rights, article 8.
[37]Fabian Amtenbrink and Denise Prévost and Ramses Wessel, *Netherlands Yearbook of International Law 2017: Shifting Forms and Levels of Cooperation in International Economic Law: structural Developments in Trade, investment and Financial Regulation*(Springer 2018).
[38] Ibid.

Agreement precedes the DSB's function and therefore the provisions of a WTO Agreement precede the functioning of the DSB. This means that the DSB's mandate arises from the WTO Agreements, which seek to promote public interest. Flowing from this, the DSB, in carrying out its mandate is guided by this principle of public interest which is a utilitarian approach.

This theory is vital in assessing whether the DSU has outlived its usefulness such that the populace cannot derive a benefit out of it. In this instance, it is important in evaluating whether changes/amendments to the DSU are necessary so as to spur African countries into using the DSB to their benefit. The WTO, being an international organization, with a wide membership should be able to cater for the membership's needs as a whole and not just for a few. The study will be seeking to unearth if this aspect is only present in the spirit of its laws or if it is actually practiced.

1.7 Research Methodology

The researcher employs qualitative method to gather information. Qualitative method is the preferred methodology as it is suitable in finding answers to the research questions. It is useful for the purpose of reviewing already existing material on the subject matter. In order to critically examine the efficacy of the WTO DSS in addressing trade disputes between African countries and other member states, qualitative method is the ideal way of data collection.

The study relies heavily on published and unpublished material as it is a desk, internet and library based research. It considers both primary and secondary sources. The primary sources relied on are WTO Agreements and most importantly, the Dispute Settlement Understanding of the WTO which also forms part of the major International Instruments that shall be reviewed to establish whether the WTO DSS is adequate enough to address trade disputes between African countries and other countries. Secondary sources include online publications, journals and articles as well as other internet based sources.

1.8 Literature Review

African countries are classified as either developing or least developed according to the nomenclature by the United Nations.[39] There exists an abundance of literature discussing

[39] https://www.un.org/en/development/desa/policy/wesp/wesp_current/2014wesp_country_classification.pdf Accessed on 14th August 2019.

participation of developing and least developed member states in the dispute settlement body of the World Trade Organization.

Collier defines a dispute as "a specific disagreement relating to a question of rights or interests in which parties proceed by way of claims, counter-claims and denials."[40] A more specific definition of a trade dispute in the WTO is offered by Bartosz, where he states that, "it is a situation in which one WTO member state adopts a trade policy or measures or takes some action, which one or more concerned WTO member state considers to be a breach of the WTO Agreements or a failure to meet obligations under such agreements."[41]

This research paper will borrow from the research carried out by Bartosz to the extent that it brings perspective on what a trade dispute entails. However, there exists a gap in this literature in that it has only given an overview of instances when a trade dispute would arise, however it has failed to give an in-depth analysis of the costs attributed to instituting cases at the DSB such as monitoring costs and litigation costs which may deter a member state from instituting such cases in the DSB.

According to Ziemblick, one of the reasons for the formation of the WTO was to address issues that the GATT seemed to be facing. One of the issues was an unsuccessful dispute resolution process which had no enforcement mechanism and no strict timelines for compliance. One of the key roles therefore of the WTO is to conduct litigation according to the dispute settlement provisions of the WTO Agreements.[42]

There is an evident gap in this literature which this research paper intends to address. The above literature fails to give an in-depth analysis of the dynamics put in place to ensure that all member states have equal access to justice in light of the fact that member states have different economic capacities.

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[40] John Collier and Vaughan Lowe,*The Settlement of Disputes in International Law: Institutions and Procedures*, 2nd edition, Oxford University Press, 2000.

[41] Bartosz Ziemblicki, 'The Controversies of the World Trade Organization Settlement System' <http://www.bibliotekacyfrowa.pl/Content/32203/0014.pdf> Accessed on 5th November 2018.

[42]Bartosz Ziemblicki, 'The Controversies of the World Trade Organization Settlement System'<http://www.bibliotekacyfrowa.pl/Content/32203/0014.pdf> Accessed on 5th November 2018.

Bown and Mcculloch critically examine African countries' place in the dispute settlement system of the World Trade Organization.[43] They posit that African countries are more proactive than the developed countries in the self- enforcement of trade agreements. The paper focuses on the historical data of WTO dispute settlement with special attention to the self-enforcement activities of developing countries. In support of this, Bown and Mcculloch state that data shows that self-enforcement mechanisms undertaken by developed countries have consistently decreased over the years whereas that of developing countries is on the rise.[44]Bown and Mcculloch also opine that developing countries have shown similar interests in fulfilling their trade obligations to fellow developing countries and developed countries at the same time.[45]

There exists an identifiable gap in the above literature in that it fails to address the issue of whether African Countries' GDP is a hindrance to their active participation in the DSB in that it makes them unable to access justice from the DSB due to their lack of financial capability and lack of necessary expertise.

Besson and Mehdi submit findings that show an increase in developing countries' participation at the WTO[46]. However this increase is not an entirely positive one. They present that under the WTO a third of the complainants are developing countries, a figure that is slightly higher than that exhibited under the GATT. In the same breath, developing countries have been respondents in 45% of the disputes, a dramatic increase from that of the GATT. The overall usage of the dispute settlement mechanism shows that most developing countries and none of the least developed countries have initiated litigation at the WTO while the developed countries are overrepresented in the statistics.[47]

There exists a gap in the above literature in that it fails to look at the hindrances within the DSB that have contributed to the dismal participation by least developed countries and more so, African countries.

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[43] Chad Bown and Rachel Mcculloch, 'Developing Countries, Dispute Settlement, and the Advisory Centre on WTO Law' [2009] SSRN Electronic Journal, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1541964> Accessed on 5th November 2018.
[44]Ibid.
[45] Ibid.
[46] Fabien Besson and Mehdi Racem, 'Is WTO Dispute Settlement System Biased against Developing Countries? An Empirical Analysis' <https://ecomod.net/sites/default/files/document-conference/ecomod2004/199.pdf> Accessed on 5th November 2018.
[47] Ibid.

Bown and Rachel propose that the situation is different and that from 1995-2008 the number of African states participating in the DSU has plateaued while that of developed countries has experienced a decline.[48]One of the reasons submitted by Bown and Rachel on why African states do not make much use of the process is the shortfall of information required to flag down trade violations.[49] Their observation is that the African states do not have sufficient data mining capabilities to enable them pick out the less-observable causes of loss of market access. This same situation means that African countries are less likely to explore situations where they may have foreign market interests to pursue.[50]

This literature is not conclusive in that it fails to address the internal issues within the DSB that hinder African countries participation in the DSB.

Schmieg provides a caveat on the generalization of African countries' performance in the international trade arena. She propounds that lumping African countries together and examining them as one has the negative effect of failing to account for the differences between the states in terms of their economies and reasons for their dismal participation at the DSM of the WTO whether historically or at present.[51]

The above literature also fails to look at the DSB system internally so as to ascertain what bottlenecks it contains that makes it a hindrance for African member states to participate in the DSB and access justice.

Ewelukwa brings out the aspect of choice in African States' participation at the WTO.[52] He opines that there are disadvantages when African states chose not to participate in the DSM of the WTO. The first is that by making that choice these states miss out on the opportunity to protect their trade and development interests. Another disadvantage is that they deny themselves

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[48] Chad Bown and Rachel Mcculloch, 'Developing Countries, Dispute Settlement, and the Advisory Centre on WTO Law' [2009] SSRN Electronic Journal, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1541964> Accessed on 5th November 2018.

[49]Ibid.

[50]Ibid.

[51] Evita Schmieg, 'Africa's Position in Global Trade, Free Trade Agreements, WTO and Regional Integration', Pg. 1, 2016, <https://www.swp-berlin.org/fileadmin/contents/products/projekt_papiere/Africas_Position_in_Global_Trade.pdf> Accessed on 5th November 2018.

[52]Ewelukwa U, 'African States Aggressive Multilateralism and the WTO Dispute Settlement System- Politics, Process, Outcome and Prospects', 2005, https://www.carnegiecouncil.org/publications/articles_papers_reports/5213/_res/id=Attachments/index=0/5213_fellowPaper_ewelukwa.pdf Accessed on 5th November 2018.

the chance to impact the progression of legal jurisprudence on issues directly affecting them. This means that they are continuously leaving their fate in the hands of those who do not have an interest in disrupting the status quo. He then goes on to add that their neutrality to the DSM process does not insulate them from the effects of panel decisions.[53]

This paper fails to sufficiently analyze the reasons behind lack of African countries participation in the DSB. Furthermore, it fails to look at the constraints within the system that cause a hindrance for African countries participation in the DSB.

According to Besson and Mehdi, their research shows that developing countries face stiff chances of winning disputes due to three external factors; "asymmetric legal capacity, economic aid received from bilateral assistance and international political factors."[54] Their theoretical standpoint is that world politics and a country's ranking in it may even influence the outcome of a dispute at the WTO.[55]A response to one of the factors brought out by Besson and Mehdi on asymmetric legal capacity is that some authors have opined that subsidizing legal services for developing and least developed countries is a way to deal with this problem. Bown and Rachel opine that doing so will have the opposite effect and further jeopardize African states' position at the WTO. This is due to the fact that the reduction of legal charges for litigation and information collection is less likely to attract counsel for fear that their legal firms will not recoup the resources spent in the fact finding mission.[56]

The above literature therefore fails to address the issue of costs as being an element denying access to justice to the DSB by limiting African countries participation in the system.

Ziemblick posits that the dispute settlement program under the WTO has been effective, so much so that he and other experts suggest it should be replicated among other organizations.[57] The support made for this statement is that part of the system's allure is that it is based on member

[53]Ibid.
[54]Fabien Besson and Mehdi Racem, 'Is WTO Dispute Settlement System Biased against Developing Countries? An Empirical Analysis'<https://ecomod.net/sites/default/files/document-conference/ecomod2004/199.pdf> Accessed on 5th November 2018.
[55]Ibid.
[56]Chad Bown and Rachel Mcculloch, 'Developing Countries, Dispute Settlement, and the Advisory Centre on WTO Law' [2009] SSRN Electronic Journal, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1541964> Accessed on 5th November 2018.
[57] Bartosz Ziemblicki, 'The Controversies of the World Trade Organization Settlement System' <http://www.bibliotekacyfrowa.pl/Content/32203/0014.pdf> Accessed on 5th November 2018.

participation. The fact that members actively refer cases for dispute settlement coupled with the fact that both developed and developing countries use it is testament to its efficiency.[58]

In further support, Ziemblick states that, due to the fact that the WTO has economic objectives as its backbone it tends to be a hub for discussions on economic matters that may be the sole concern of other international organizations; for example the International Telecommunications Union and stemming from this overlap Member States prefer to settle their disputes, economic in nature, at the WTO.[59] He is essentially opining that even when countries have overlapping memberships with different organizations dealing with the same subject matter the preferred choice of venue is the WTO and this is due to the proficiency of its dispute settlement mechanism.

The above literature is not conclusive in that it fails to address the angle of access to justice being the corner stone of any dispute settlement system and not just economic objectives. In doing so, it fails to address the internal issues that cause a hindrance to African countries participation in the DSB.

Christina Davis holds a slightly different opinion. The author's writing addresses the reasons as to why Member States in the WTO would prefer to settle their disputes in other fora or within the WTO. [60]The overarching argument is that a country's choice of forum, in the instance of overlapping jurisdictions created by parallel processes borne out of; regional associations, multilateral trade systems and bilateral agreements, demonstrate its commitment to resolving a particular dispute.[61]

The authors who have recognized the problem have offered solutions to this problem; the most suggested being WTO reform and export diversification from African countries. However, it is evident that the above authors have failed to address the internal constraints of the DSB that deny African countries access to justice and therefore hinder their participation in the system. Therefore, the gap that is evident in the above literature is the lack of providing an in-depth analysis as to how internal constraints in the DSB are in essence denial of access to justice for African member states in their participation in the DSB.

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[58] Ibid.
[59] Ibid.
[60] Christina Davis, 'The Effectiveness of the World Trade Organization Dispute Settlement: An Evaluation of Negotiation Versus Adjudication Strategies,' Chicago Journal of International Law Vol. 2, No.2, 2001.
[61] Ibid.

1.9 Justification of the study

Trade related disputes are inevitable. The Dispute Settlement Understanding stipulates that "it is a central element in providing security and predictability to the multilateral trading system and that it serves to preserve the rights and obligations of states under the covered agreements."[62]This study presents a unique opportunity to interrogate reasons why African member states have continued to play a peripheral role in the dispute settlement system despite the equal opportunity availed to all WTO member states under the DSU.

In doing so, the research will offer African member states an opportunity to examine the structure of the DSU and the possible reasons behind their dismal participation. Trade relations between African member states and developed member states has increased drastically andas such, it is imperative that African countries' participation in the dispute settlement procedures of the WTO is encouraged so as to avoid a situation where the developed trading partners exploit African countries owing to their lack of active participation in the WTO dispute settlement mechanism.

This study will be of importance to the African countries who are members of the WTO as it seeks to enlarge the benefits and bargaining power of the aforementioned countries.Furthermore, the study seeks to identify the loopholes in the system, thereby identifying the reasons for low participation in the dispute settlement process by the said members.

Once the study is done and understood then it will be easy to provide recommendations that would pave way for an increase in African countries' participation in the WTO dispute settlement process and in doing so, the trade and development interest of African countries shall be secured.

[62] Dispute Settlement Understanding, article 3.2.

1.9 Limitation of the study

One major limitation is with regard to time and resource constraints. It is impracticable to travel across the African region to conduct interviews with the relevant personnel in specific countries so as to get a country's individualistic views regarding the stumbling blocs when it comes to WTO dispute settlement mechanism. This is therefore not possible due to time and resource constraints.

Furthermore, the dispute settlement system has been in existence for over 20 years and as such there is a lot of literature regarding this topic. Time constraints make it difficult to analyze all the literature pertaining to the dispute settlement mechanism since inception to date.

1.10 Chapter Breakdown

Chapter one deals with the history of the WTO and the inception of the Dispute Settlement System as well as its current position. In addition, the history will touch on the successes and failures of the previous system under GATT. Furthermore, the system under WTO and the Dispute settlement system will be analyzed and this will assist the reader gain context of the main problem that will form the subject matter of this paper. This chapter will also contain the hypothesis, research objectives, research questions, research methodology, significance of the study, conceptual framework, theoretical framework, literature review and justification of the study.

Chapter two deals with the WTO Dispute Settlement Mechanism and more specifically the DSB. It contains an in-depth analysis of the procedure for settling disputes. Specifically, the chapter will lay down a concise summary of the history of DSU procedures. Furthermore, the chapter will also contain a detailed analysis of the current practices, parties involved, procedural requirements and timelines at all DSU stages which include; the consultation stage, panel proceedings, appellate body, panel and appellate body recommendations, dispute settlement adoption of reports and the implementation and enforcement of recommendations of panel and appellate bodies.

Chapter three deals with the participation of African Countries vis-à-vis participation of other developed countries in the DSB. It will give a comparative analysis of the participation of African countries vis-à-vis participation of other developed countries in the DSB. It will also

give an analysis of the number of cases handled in the DSB by the level of development of the parties.

Chapter four deals with the challenges (both institutional and procedural) prevailing in the settlement of disputes in the WTO as well as the challenges facing African countries in filing of cases and implementation of decisions participation of African countries in the WTO Dispute settlement mechanism. In a nutshell, this chapter will analyze the internal constraints that inhibit the participation of African countries in the DSB.

Chapter five combines findings under the preceding chapters to come up with appropriate reforms in the DSB. This chapter also provides a conclusion of the study.

CHAPTER TWO: THE DISPUTE SETTLEMENT MECHANISM OF THE WORLD TRADE ORGANIZATION

2.1 Introduction

The Dispute Settlement Mechanism (DSM) finds its legal backing in the Understanding of Rules and Procedures Governing the Settlement of Disputes, commonly known as Dispute Settlement Understanding (DSU), of the WTO. The disputes settled under this process have parameters which are that; the disputes must be between member states, the nature is the violation of rights and obligations, the said violations are in contravention of duties covered in the WTO Agreements.[63]

The first major importance of the DSU is that it provides an avenue for the enforcement of the WTO Rules and secondly is that it contributes to the WTO system in that it offers effectiveness and predictability.[64]

[63]Dispute Settlement Understanding, article 1(1).
[64]<http://wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm> accessed on 12th February 2019.

The essence of this chapter will be to lay down a concise summary of the history of DSU procedures, current practices, parties involved, procedural requirements and timelines. In doing so, the research will ascertain whether African countries have been accorded equal access to justice so as to enable them participate actively in the DSB stages as shall be discussed in this chapter.

2.2 History of the DSU

The DSU was negotiated during the Uruguay Round as part of the WTO Agreement. However, these rules have their backing in the GATT 1947, and as currently constituted, are an evolution of the aforementioned legal document.[65] The basis for the current DSU was rooted in Articles XXII and XXIII of the GATT 1947.[66]

The genesis of these procedures was a complaint by the Netherlands against Cuba on the application of Article 1, most favoured nation principle, on consular taxes which was referred to the Chairman in 1948. A decision was reached that indeed consular taxes were not an exception to the article.[67] Afterwards, such complaints were referred to what was known then as working parties which were made up of the complainant member state, the member state complained against and any other member state with an interest in the subject matter of the complaint.[68]

Disputes were initially decided upon by rulings of the Chairman of the GATT Council after which, they were referred to working parties which consisted of representatives from all interested contracting parties.[69] The working party was set up for the first time to report on a dispute between USA and Cuba regarding the latter's textile regulations.[70] In this case, three days of meetings resulted in a compromise that was satisfactory to both of the disputing parties.[71]

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[65] <wto.english/tratop-e/dispu-e/disp-settlement/cbt-e/c1s2p1-e.htm> accessed on 12th February 2019.
[66] David Palmeter and Petros Mavroidis, *Dispute Settlement in the World Trade Organization*, (2nd edition, Cambridge University Press, 2004), pg 63.
[67] Thomas Zimmermann, "Negotiating The Review Of The Wto Dispute Settlement Understanding", <http://www.worldtradelaw.net/articles/zimmermanndsureview.pdf.download> Accessed on 4th February 2019.
[68] Ibid.
[69] "A Handbook on the WTO Dispute Settlement System", Cambridge University Press 2004, Pg 12 – 13, https://www.hse.ru/data/2014/04/29/1322753805/Handbook%20DS_E.pdf Accessed on 15th February 2019.
[70] M. J. Trebilcock and Robert Howse and Antonia Eliason, *The Regulation of International Trade,* Routledge 2013.
[71] Ibid.

In contrast to the rulings given by the Chairman, the working parties were predominantly a forum for encouraging negotiations.[72]

As time and experience shaped the process, these working parties were replaced by panels made up of three or five independent experts who were unassociated to the parties of the dispute. These panels wrote independent reports accompanied with recommendations and rulings for resolving the dispute which were referred to the GATT Council. These reports became legally binding on the parties to the dispute once they were approved by the GATT Council.[73] The aspect of rules was silent in the GATT framework, merely finding expression under Articles XXII and XXIII of the legal text, whose provisions dealt with consultations and nullification impairments respectively. The reason for this is that the ITO Charter, which contained a substantial amount of detailed dispute settlement procedures, had been expected to come into force but later on failed as American Congress voted against it. The two aforementioned GATT Articles, by themselves, had no legally binding force.

The Uruguay Round was largely lauded as successful as it tied up the loose legal ends left during the Tokyo Round. The latter received praise for solving the problems with non-tariff barriers, however, member states were not required to ratify some of the Codes such as dumping and subsidies and thus the Tokyo Rounds were given the name "GATT a la carte."[74]

The WTO DSU, which was deemed to be an effective system of dealing with international trade disputes, was created as a result of the GATT Uruguay Round negotiations which entered into force on 1st January 1995. The GATT system for dispute settlement was deemed to be ineffective due to its inability to resolve major trade conflicts between member states and as such it was succeeded by the DSU.[75]

When it came into existence in 1995, it was first a diplomatic process, with less rules and procedures, which later on developed into a rule-based adjudication process.[76] This gradual

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[72] Ibid.

[73]Samuel Magezi, "The WTO Dispute Settlement System and African Countries: *A Prolonged slumber?"*<https://core.ac.uk/download/pdf/58912787.pdf> Accessed on 15th February 2019.

[74]<https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c2s1p1_e.htm> Accessed on 15th February 2019.

[75]Samuel Ochieng, "African Countries And The World Trade Organization Dispute Settlement Mechanism; The Challenges, Constraints And The Need For Reforms", http://erepository.uonbi.ac.ke/handle/11295/94418 Accessed on 15th February 2019.

[76]David Palmeter and Petros Mavroidis, *Dispute Settlement in the World Trade Organization*, (2nd edition, Cambridge University Press, 2004), pg 63.

progression had the effect of streamlining the dispute resolution process making it more authoritative and legally binding in nature.[77]

With the establishment of WTO in January 1995, vide the Marrakesh Agreement, came Annex 1 which covers Multilateral Agreements on Trade in Goods, General Agreement on Trade in Services and Agreement on Trade-Related Aspects of Intellectual Property Rights; Annex 2 which covers the Understanding on Rules and Procedures Governing the Settlement of Disputes; Annex 3 which covers Trade Policy Review Mechanism and Annex 4 which covers Plurilateral Trade Agreements. It should be noted that the Dispute Settlement Understanding's application to the Plurilateral agreements annexed to the WTO agreement is subject to adoption by consensus of the disputing parties who set out the terms for the application to the individual agreement.[78]

2.3 The Dispute Settlement Understanding (DSU) Process

In ascertaining whether African countries have been accorded equal access to justice in the DSB, it is paramount to analyze the various stages that constitute the Dispute Settlement System. An analysis of the DSB process shall reveal whether there contains bottlenecks in the system that hinder African countries participation in the system thus denying them access to justice. The WTO Dispute Settlement Process has five main stages and one that feeds into the process. These are:

a) Consultations;
b) Panel proceedings;
c) Appellate body;
d) Panel and appellate Body recommendations;
e) Dispute Settlement Body adoption of reports;
f) Implementation and enforcement of recommendations of panel and appellate bodies.

2.3.1 The Consultation Stage

This is the first stage in the dispute resolution process. The preferred objective of the DSU is for the members concerned to settle the disputes between themselves in a manner that is in

[77] Ibid.
[78] Appellate Body Annual Report, circulated as WT/AB/13, 2009.

accordance with the WTO Agreement.[79] Accordingly, bilateral consultations between the parties is the first stage of formal dispute settlement as it gives the parties an opportunity to discuss the matter and to find a satisfactory solution without resorting to litigation.[80]

The aggrieved member state initiates the process by putting out a written request for consultation.[81] The requesting member must then notify the Dispute Settlement Body (DSB) and any relevant Councils and Committees of that request.[82] The complained against member state must then reply within 10 days after its receipt. A maximum of 20 days later, the disputing parties must enter into consultations in good faith. If any of the above processes does not occur within the timeliness of 10 and 30 days respectively or a period mutually agreed on by the parties, the requesting member state has the right to move directly to request that a panel be constituted. Alternatively, if a dispute goes under consultation but parties fail to reach an understanding within 60 days, the complaining member state has the right to request for the formation of a panel.[83]

The Article has specific provisions relating to perishable goods' procedures and for those disputes in which a developing country is a member. If the subject matter involves perishable goods then the period of consultations is provided for as 20 days from the receipt of the request to enter into consultations, failure to which the requesting party may seek for a panel formation.[84] For those disputes involving one or more developing countries, the DSU states that members should take into consideration the special attention to their problems and interests.[85]

The first paragraph of the GATT Articles, XXII and XXIII places emphasis on the need to have formal consultations take place before submission of panel requests.

2.3.2 The Panel Stage

In this stage, parties request the formation of a panel with the aim of litigating their case. Article 6 dictates that it is a right of every member state to request for a panel to be constituted. The

[79] Chapter 6-dispute settlement system training module available at<http://www.wto.org>Accessed on 2nd March 2019.
[80] Ibid.
[81]Dispute Settlement Understanding, article 4(4).
[82] Ibid.
[83]Ibid,article 4(7).
[84]Dispute Settlement Understanding, article 4(8).
[85]Ibid,article 4(10).

constitution of this panel must at the latest take place at the DSB meeting in which the dispute waslisted as an agenda.[86]

The request must be in writing and must contain the particulars of the results of consultations, the impugned measure andthe legal basis for the complaint.[87]

Within 10 days after the establishment of the panel, three individuals with expertise in international trade law and policy are proposed to the two countries by the secretariat from its indicative list.[88]The selection of panelists is a process that takes anywhere between 20 days and one month. After the selection process is over, the members should then promptly be informed of the composition of the panel.[89]However, a member state involved in a dispute cannot submit a panelist for consideration.[90]Again, special attention is given to developing countries, as Article 8 stipulates that if one of the parties is a developing country, that upon request, a panelist from a developing country be brought on board.[91]

The Appellate Body in ***Australia - Measures affecting Importation of Salmon*** stated that**,** **"**Once the panel has been established, its jurisdiction and terms of reference are determined by the contents for the request of the establishment of the panel, originally addressed to the DSB, as well as the covered agreement cited in the same."***92***

After the establishment of a panel, the complaining member state files submissions to the Secretariat for onwards transmission to the responding state.[93]

In the event that there is more than one requesting member state on the same subject matter, a single panel shall be formed. Where this is not possible, more than one panel may be formed constituting the same panelists.[94]

Article 12 covers the procedures panels should follow when adjudicating disputes. The Working Procedures in Appendix 3 are the guidelines for panel conduction, unless there has been consultation with the parties and they have agreed differently.[95]

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[86] Ibid, article 6(1).
[87]Ibid,article 6(2).
[88]Ibid, article 8.
[89] Ibid, article 8(5).
[90]Ibid,article 8(3).
[91]Ibid,article 8(5).
[92] WT/DS18/AB/R of 20/10/98.
[93]"A Handbook on the WTO Dispute Settlement System", Cambridge University Press 2004, Pg 53, https://www.hse.ru/data/2014/04/29/1322753805/Handbook%20DS_E.pdf Accessed on 15th February 2019.
[94]Dispute Settlement Understanding, article 9.

The panel, not more than one week after composition, must come up with a schedule for the panel process.[96]The parties communicate their case to the panel through written submissions and shall be offered adequate time to submit.[97] There, however must be strict adherence to timelines for submission.[98]

The complainant party has the right to first submit unless otherwise agreed upon between parties, that all parties will submit simultaneously.[99] After this period, if the parties have not come to a mutual understanding, the panel produces a final report in which it summarizes the case and makes a determination on whether there were any WTO Agreement violations. These submissions are then tabled before the WTO for review and possible adoption. Timelines set out for these reports stand at not more than 6 months for ordinary cases and not more than 3 months for emergency cases.[100]

However, allowance is given for disputes involving one or more parties which are developing countries, the time period of 6 months for regular cases and that of 3 months for emergency cases could be extended if necessary.[101] If parties do not make comments during this time, the interim report under ***Article 12.8*** becomes final and is circulated to members.[102]The DSU stipulates that "within 60 days after the report is circulated to the members, the report shall be adopted at a DSB meeting unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report.[103]

2.3.3 Appellate Body Stage

Panel reports are not final and can be appealed against. Appellate proceedings are conducted in accordance with the procedures established under the DSU and the Working Procedures for Appellate Review drawn up by the AB in consultation with the Chairman of the DSB and the

[95] Ibid, article 12(1).
[96] Ibid, article 12(3).
[97] Ibid, article 12(4).
[98] Ibid, article 12(5).
[99] Ibid, article 12(6).
[100] Ibid, article 12(8).
[101] Ibid, article 12(10).
[102]Ibid,article 15(2).
[103] Ibid, article 17(1).

Director-General of the WTO.[104] Article 17 introduces the Appellate Body.[105] It now has its own working procedures published as ***Working Procedures for Appellate Review***.[106]

The right to appeal is availed to both countries who may appeal a panel's report to a three-person Appellate Body which jurisdiction is limited to matters of law and legal interpretation by the panelas provided in ***Article 16(4) DSU***.[107]

The Appellate Body is a standing Body with a tenure of four years, after which they may seek re-election once.[108]It is made up of seven members, three of whom sit at any given time. Their sitting schedule is determined by their Working Procedures.[109]

As a general rule only parties to the dispute may appeal. However, third parties may communicate their substantial interest in the matter vide submissions to the Appellate Body to seek an audience.[110]

After considering the case set forth before it, the Appellate Body shall, within 60 days, produce a report detailing its findings on the matter. In the event that it cannot meet this deadline, it must notify the DSB and give reasons for the delay. In any instance, the proceedings or report shall not exceed 90 days.[111] The Appellate Body can uphold, modify or reverse the legal findings of a panel.[112]

The report of The Body is then circulated to members who are given 30 days to look it over. After the 30 days period, there is an automatic adoption of the A.B report unless the DSB, through consensus, decides not to adopt it.[113]

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[104]Samuel Ochieng, "African Countries And The World Trade Organization Dispute Settlement Mechanism; The Challenges, Constraints And The Need For Reforms", http://erepository.uonbi.ac.ke/handle/11295/94418 Accessed on 15th February 2019.
[105] Understanding on Rules and Procedures Governing the Settlement of Disputes.
[106] Ibid.
[107]Samuel Ochieng, "African Countries And The World Trade Organization Dispute Settlement Mechanism; The Challenges, Constraints And The Need For Reforms", http://erepository.uonbi.ac.ke/handle/11295/94418 Accessed on 15th February 2019.
[108] Dispute Settlement Understanding, Article 17(1)(2).
[109] Ibid.
[110] Ibid, article 17(4).
[111] Ibid, article 17(5).
[112] Ibid, article 17(3).
[113] Ibid, article 17(14).

2.3.4 Panel and Appellate Body Recommendations

These are covered under Article 19. Once a panel or the Appellate Body comes to the conclusion that a member state has violated provisions of WTO Agreements, in the report it mandates the defendant to bring its measures into conformity with the relevant provision.[114]In addition, the report could contain methods that the offending country could use to achieve the recommendations.[115]

2.3.5 Dispute Settlement Body Adoption of Reports

The DSB is tasked with the formation of panels, adopting panel and A.B reports and to oversee the implementation of reports. It is made up of all the member states and its core mandate is the settling of disputes stemming from the WTO Agreements.

Article 20 states that the timelines for adoption of panel and Appellate Body reports shall not be more than nine months where the panel's decision was not appealed and shall not exceed twelve months in the event of appeals.[116] In the event the panels of Appellate Body requested for extension of time in the special circumstances outlined above, the same shall be taken into account when the DSB is adopting or choosing not to adopt reports.

2.3.6 Implementation and Enforcement Stage

Implementation of reports should be done as swiftly as possible in order for the dispute resolution to work effectively.[117]Safeguards have been built in to give special consideration to developing countries.[118] The DSU provides that 30 days after adoption of the reports by the DSB, a meeting with the member is held to determine a time frame for complying and methods of complying.[119]

If the DSB has not offered a time for extension of compliance then a member must try to bring their actions in conformity with the recommendations. It is a function of the DSB to maintain records and closely monitor implementation.[120]

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[114] Ibid, article 19(1).
[115] Ibid.
[116]Ibid,article 20.
[117] Ibid, article 21(1).
[118] Ibid, article 21(2).
[119]Ibid,article 21(3).
[120] Ibid, article 21(6).

FIGURE 1.1: AVERAGE NUMBER OF PANEL REQUESTS BY YEAR[121]

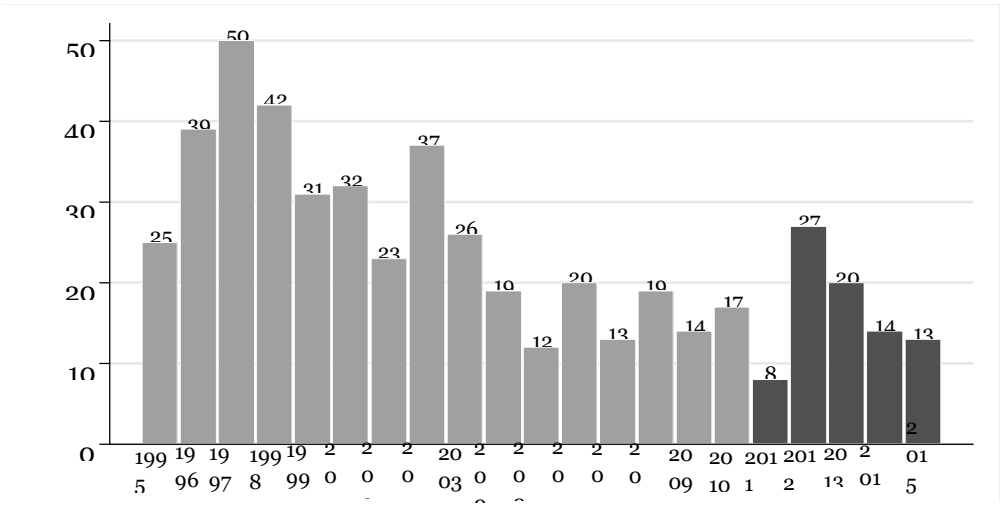


Figure 1.1 above shows how many panel requests, averaged, have been made per year with the highest number at 50. The highest numbers were witnessed in the budding years of the WTO but as countries began to settle into the new system the numbers started to drop.

FIGURE 1.2: INDIVIDUAL MEMBER STATES WHO USE DISPUTE SETTLEMENT OF THE WTO MOST

Main users of the DSS[122]

Member State:	**As Complainant**	**As Respondent**	**As Third Party**
United States	114	130	140
European Union	97	84	165
Canada	35	20	119
China	15	39	139
India	23	24	128

[121] Louise Johanneson and Petros Mavroidis, "The WTO Dispute Settlement System 1995-2016: A Data Set and its Descriptive Statistics," EUI Working Paper RSCAS 2016/72, European University Institute, 2016, Pg.3, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2888358> Accessed on 30th June 2019.

[122] Arie Reich, "The effectiveness of the WTO dispute settlement system: A statistical analysis", EUI Working Paper LAW 2017/11, European University Institute, 2017, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2997094 Accessed on 30th June 2019.

Brazil	31	16	111
Argentina	20	22	60
Japan	23	15	170
Mexico	24	14	82
Korea	17	16	112

This table shows that the United States and European Union are the biggest users of the DSS. It also shows, that out of the ten most active users, four are defined as developed countries (US, EU, Canada and Japan), accounting for more than 66% of the total cases of these ten users.[123]

Torres opines that the data above fails to incorporate the Member States' share of world trade and therefore delves into an analysis of whether the above listed information marries with the common notion held that participation on the DS of the WTO is based on economic factors.[124]

2.4 Conclusion

From the above charts, it is evident that more developed countries use the dispute settlement process as compared to developing or least developed countries. It is clear from the above table that African countries do not feature in the list of most active users of the DSS.

The argument brought out by most scholars is that the Dispute settlement system contains internal bottlenecks that hinder African countries participation in the system. These bottlenecks deny African countries an opportunity to access justice and can be said to be the main reason why African countries do not participate in the DSS.High cost of litigation and expertise requirements paired with the fear of trade and other incentives retaliation could be the cause of the imbalances in the metrics of dispute resolution use at the WTO and this is self-evident from the stages of the DSB as has been discussed above which require sufficient financial resources and expertise to enable a member state participate in the aforementioned stages of the DSB.

[123] Ibid.

[124]Raul Torres, "Use of the WTO Trade Dispute Settlement Mechanism by the Latin American Countries - Dispelling Myths And Breaking Down Barriers," World Trade Organization Economic Research and Statistics Division, Staff Working Paper ERSD-2012-03**,**February 2012**,**Pg. 4-5**,** Available at: https://www.wto.org/english/res_e/reser_e/ersd201203_e.pdf, accessed on 26th May 2019.

CHAPTER THREE: COMPARISON OF PARTICIPATION IN THE DISPUTE SETTLEMENT MECHANISM OF THE WORLD TRADE ORGANIZATION BETWEEN AFRICAN, OTHER DEVELOPING AND DEVELOPED COUNTRIES

3.1 Introduction

The contents of this chapter will be a data set on the participation of developed member states in the WTO, in contrast with that of developing countries. While carrying out research it was noted that not all developing countries perform similarly; necessitating a contrast between performance levels of developing countries and the reasons. The data sets will be accompanied by explanatory notes and brief commentaries to enable the reader gain a more in depth understanding on the data as well as context, which is essential in the processing of such data.

For the proper analysis of the data below the question that must be answered first is what amounts to participation in the DS of the WTO? Once the parameters for participation are developed it then follows that the analysis of the available data will include an inquiry into what aspects of participation were admitted and which were ignored in the compilation of individual sets of data to conclude if the data is holistic or only tells a part of the story.

The chapter will conclude with an overall analysis of the aforementioned data, the caveats on that data and the reasons as to why the data appears as so.

3.2 Quantifying Participation

This is the parameter by which a Member State's interaction with the DS of the WTO is measured. However, the means by which participation is determined is not a straightforward matter as elaborated by the author Asif. In his writing, Asif points out that the traditional method of assessing participation; if a state is a party to a dispute contrasted with its volume of trade to determine whether or not its usage is disproportionate or not, is an incomplete method of determining participation.[125] The other methods that most scholars use to determine participation he submits are;

1. **Quantitative method:** This is based on the number of cases brought forward for adjudication before the Panels and Appellate Body. From his definition this is exclusive of requests for consultation.

2. **Comparative method:** Here, participation is determined by comparison between blocks of countries; developed vs developing vs LDCs.

3. **Result Oriented:** A country's participation in the DS of the WTO is calculated based on cases referred to the Panels and Appellate Body which have either been won or lost. The more a country wins cases the more it is said to be participating in the DS process whereas the less a country wins the inverse becomes the result.

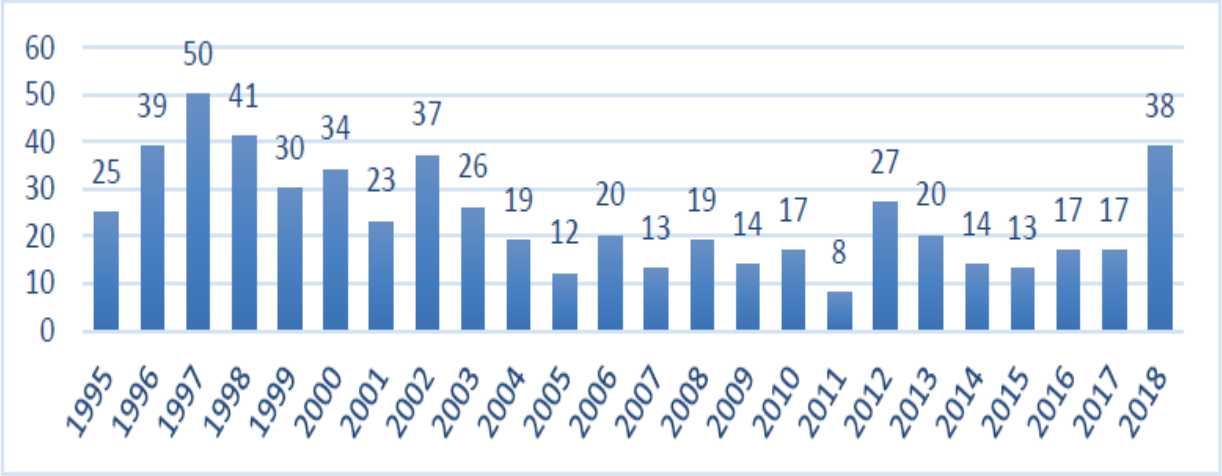
[125]Asif Queshi, " Participation of Developing Countries in the WTO Dispute Settlement System," Journal of African Law, Volume 47,No.2 (2003), School of Oriental and Africa studies, Pg. 179-180.

4. **Normative method:** This is based on the world market share a Member State holds and the calculated estimate of the number of markets across the globe.[126]

He opines that the best method of determining developing Member States' participation would be to "Perhaps the best measure is to assess the use of the dispute settlement process by a developing member against the background of an estimate of the number of disputes the developing member could possibly have brought."[127]

3.3 The Data Set on Member States' Participation in the DS of the WTO

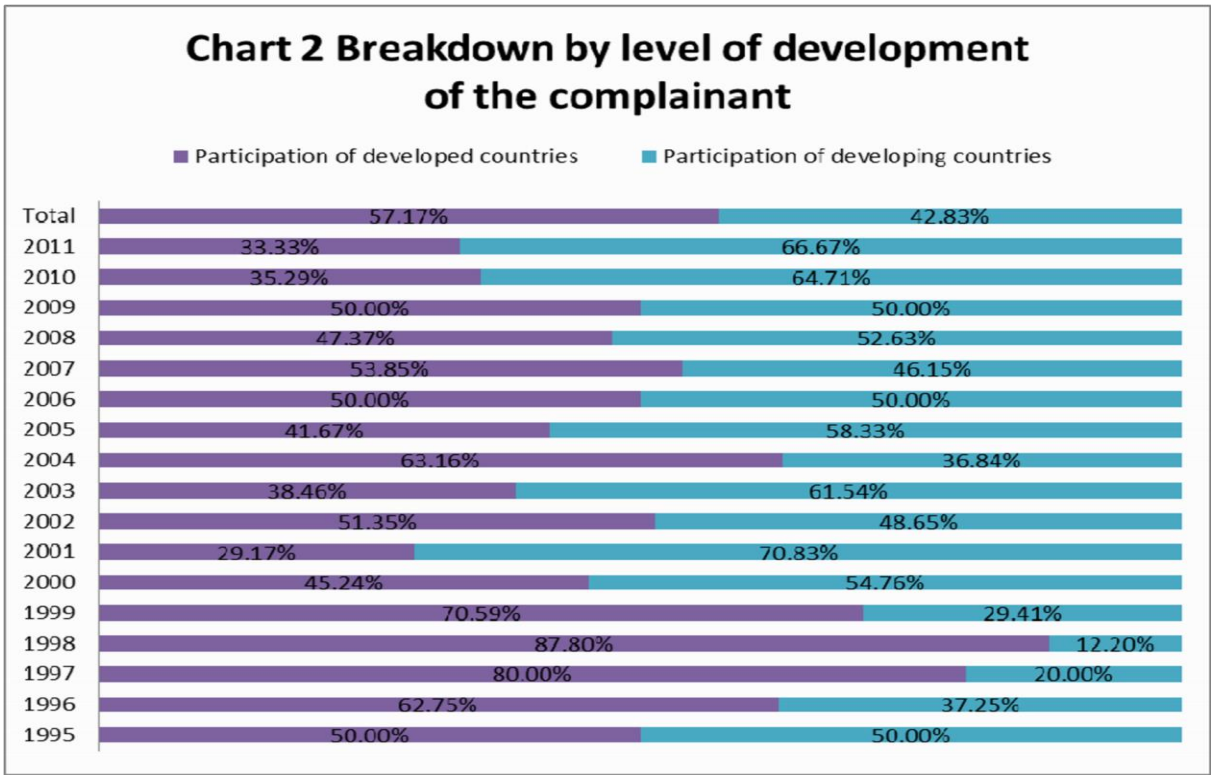
Chart 1: Requests for consultations (1995 – 2018)[128]

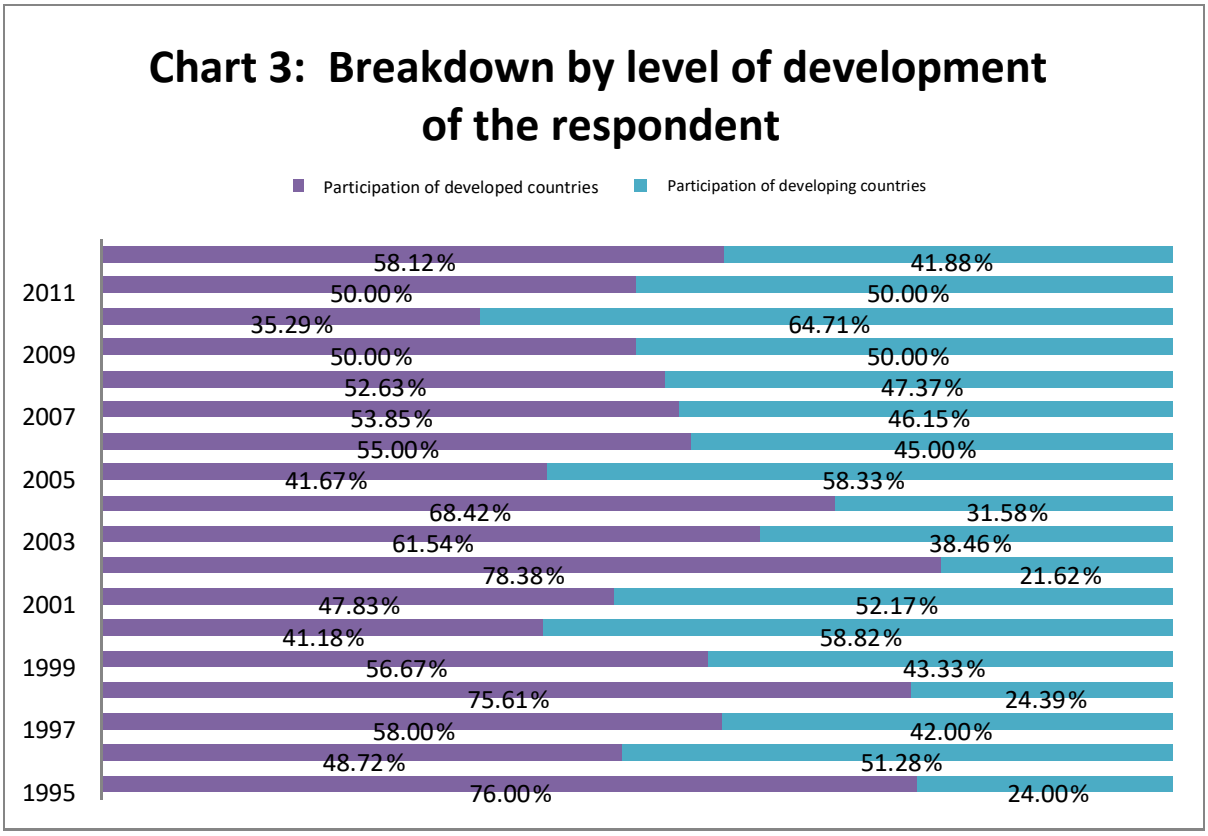


The authors Christina Davis and Sarah Blodgett have provided an analysis of participation of developed countries vis-à-vis participation of developing countries as can be seen in the charts below.[129]

[126] Ibid.
[127] Ibid.
[128] https://www.wto.org/english/tratop_e/dispu_e/dispustats_e.htm Accessed on 30th June 2019.

[129]Christina Davis andSarah Bermeo, "Who Files? Developing Countries Participation in GATT/WTO Adjudication." The Journal of Politics, Volume 71, No. 3, July 2009, https://scholar.harvard.edu/cldavis/publications/who-files-developing-country-participation-wto-adjudication Accessed on 30th June 2019.





The authors Christina Davis and Sarah Blodgett, in their writing, provide an explanation

for this data. Their paper examines the use of international courts by developing countries and seeks to offer an explanation for the more than available data, which aspect they point out is rarely the point of concentration for most authors. The writers first opine that one of the largest contributors to the lack of participation is that most developing countries have never attempted to use the DSB of the WTO. They suggest that this has a negative impact due to the fact that, from their research, countries that have past experience in instituting cases at the WTO are more likely to be repeat litigators.[130]

Table 1.1: The Most Frequent Bilateral Disputes

WTO Members		# Disputes	WTO Members		# Disputes
EU	US	63	Dominican Republic	Honduras	3
China	US	26	EU	Guatemala	3
Canada	US	20	EU	Honduras	3
India	EU	17	EU	Norway	3
Korea	US	17	EU	Panama	3
Canada	EU	15	Japan	Korea	3
Mexico	US	15	Pakistan	US	3
Argentina	EU	14	Argentina	Peru	2
Brazil	US	14	Australia	Philippines	2
India	US	14	Brazil	Japan	2
Japan	US	14	Canada	Korea	2
Brazil	EU	12	Chile	Colombia	2
China	EU	11	Chile	Peru	2
Argentina	US	10	China	Japan	2
Argentina	Chile	7	Chinese Taipei	India	2
EU	Japan	7	Costa Rica	Dominican Republic	2
EU	Korea	7	Costa Rica	Trinidad and Tobago	2
EU	Russia	7	Czech Republic	Hungary	2
Indonesia	US	7	EU	Pakistan	2
Australia	US	6	EU	Peru	2
EU	Mexico	6	Ecuador	Mexico	2
Chile	EU	5	India	Turkey	2
EU	Thailand	5	Indonesia	Japan	2
Philippines	US	5	Indonesia	New Zealand	2
Thailand	US	5	Moldova	Ukraine	2
Brazil	Canada	4	New Zealand	US	2

[130]Ibid.

China	Mexico	4	Russia	Ukraine	2
EU	Indonesia	4	Turkey	US	2
Guatemala	Mexico	4	US	Venezuela	2
Argentina	Brazil	3	US	Viet Nam	2
Australia	EU	3			
Canada	China	3			
Canada	Japan	3			
Chile	US	3			
Colombia	Panama	3 [131]			

From the information above the frequency or propensity of some member states to use the DS of the WTO is highly noticeable. The data does indeed support Christina Davis and Sarah Blodgett's views on the frequency of a country's participation being influenced by experience. They further go on to state that although many authors have failed to find any discriminatory practices with the decisions of the panels and appellate bodies that there exists discrimination in the earlier stages of the process.[132]

Again, this seems to be supported by the data; in as much as active countries in the DS process tend to be repeat players, it makes sense that only the countries with the economic might and expertise will indulge in this time and resource consuming process hence the abundance of the G2 and BRIC countries as repeat participants.

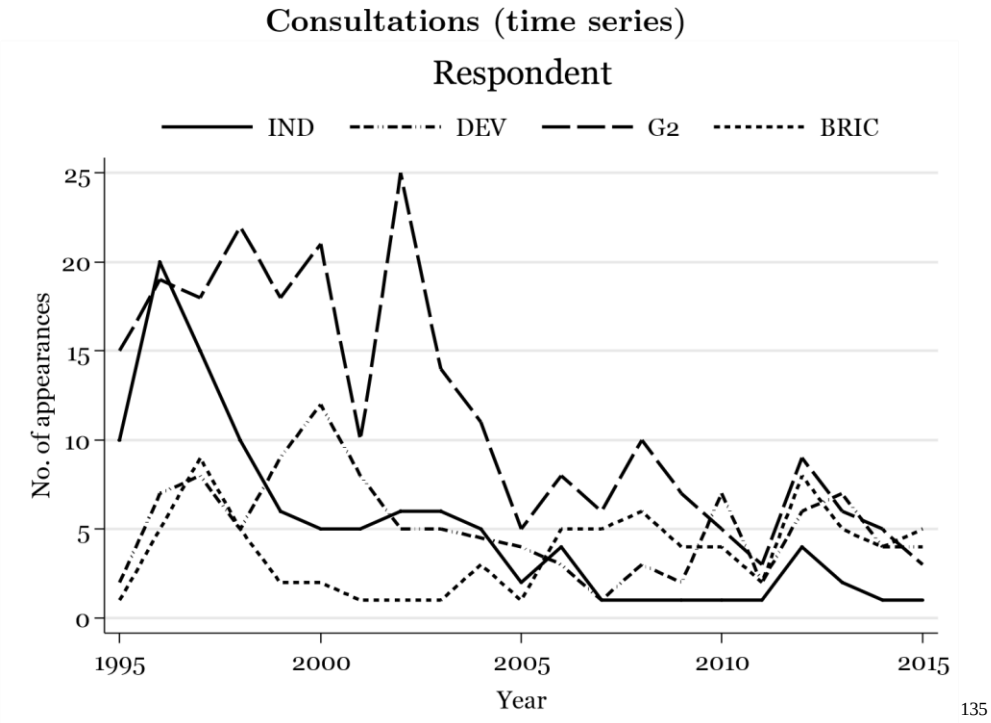
> "**G2:** EU (European Union) and US (United States.) **IND:** All members of the OECD (Organization of Economic Cooperation and Development), the club of industrialized countries, other than EU, US. **BRIC:** Brazil, Russia, India, China, the biggest marketsin

[131]Louise Johanneson and Petros Mavroidis, "The WTO Dispute Settlement System 1995-2016: A Data Set and its Descriptive Statistics," EUI Working Paper RSCAS 2016/72, European University Institute, 2016, Pg.3, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2888358> Accessed on 30th June 2019.
[132] Christina Davis and Sarah Bermeo, "Who Files? Developing Countries Participation in GATT/WTO Adjudication." The Journal of Politics, Volume 71, No. 3, July 2009, https://scholar.harvard.edu/cldavis/publications/who-files-developing-country-participation-wto-adjudication Accessed on 30th June 2019.

the developing world. **LDCs:** The least developed countries. **DEV:** All remaining developing countries."[133]

3.3.1 Panel constitution data

Developing countries have had their share of participation as both Complainants and Respondents and have brought disputes against both developing and developed countries. However, as Respondents the developing countries have had the bulk of their cases with developed countries as Complainants. [134]



[135]

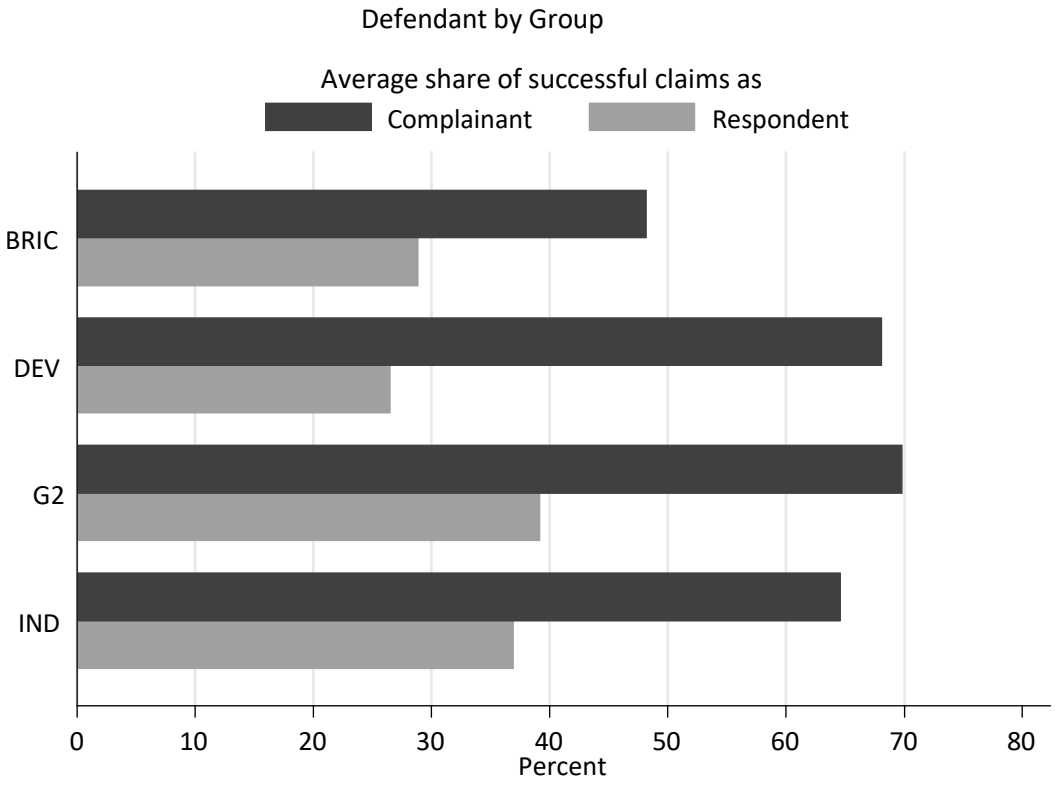
The above graph shows the trajectory of usage of the consultation process by blocs of Member States over the years. In specific, it displays how blocs of countries initiated consultations; as

[133] Louise Johanneson and Petros Mavroidis, "The WTO Dispute Settlement System 1995-2016: A Data Set and its Descriptive Statistics," EUI Working Paper RSCAS 2016/72, European University Institute, 2016, Pg. 10 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2888358> Accessed on 30th June 2019.
[134] Asif Queshi, " Participation of Developing Countries in the WTO Dispute Settlement System," Journal of African Law, Volume 47,No.2 (2003), School of Oriental and Africa studies, Pg. 176.
[135] Louise Johanneson and Petros Mavroidis, "The WTO Dispute Settlement System 1995-2016: A Data Set and its Descriptive Statistics," EUI Working Paper RSCAS 2016/72, European University Institute, 2016, Pg. 10 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2888358> Accessed on 30th June 2019.

Complainants. The graph of the developing countries' usage was at an all-time high in 2000, presumably because of the transition from the GATT and the seemingly equal legal status it afforded all countries. After this period the numbers steeply declined for all member blocs except the BRIC countries. In as much as all except one country bloc declined their usage of the DSS the highest numbers were still recorded by the developed countries while the least was from the LDCs.

The data is however promising due to the fact that at 2015 the numbers seem to be almost at the same range all blocs except the LDCs which is at an all-time low.

The graph is also indicative of the frequency country blocs have been the target of consultations; making them Respondents. In 2000 there was a spike of developing countries as Respondents and this could be attributed to the fact that under WTO they no longer enjoyed the protections they did under GATT thus it left them open to more legal action. However the LDCs remained at the same level, it may be argued that this is attributed to the fact that developed countries may have evaluated the risk-benefit aspect and found it not to be in their favour if they could not be sure of compliance. In addition to that, LDCs under the WTO are afforded longer timelines within which to bring their actions in conformity with WTO law.

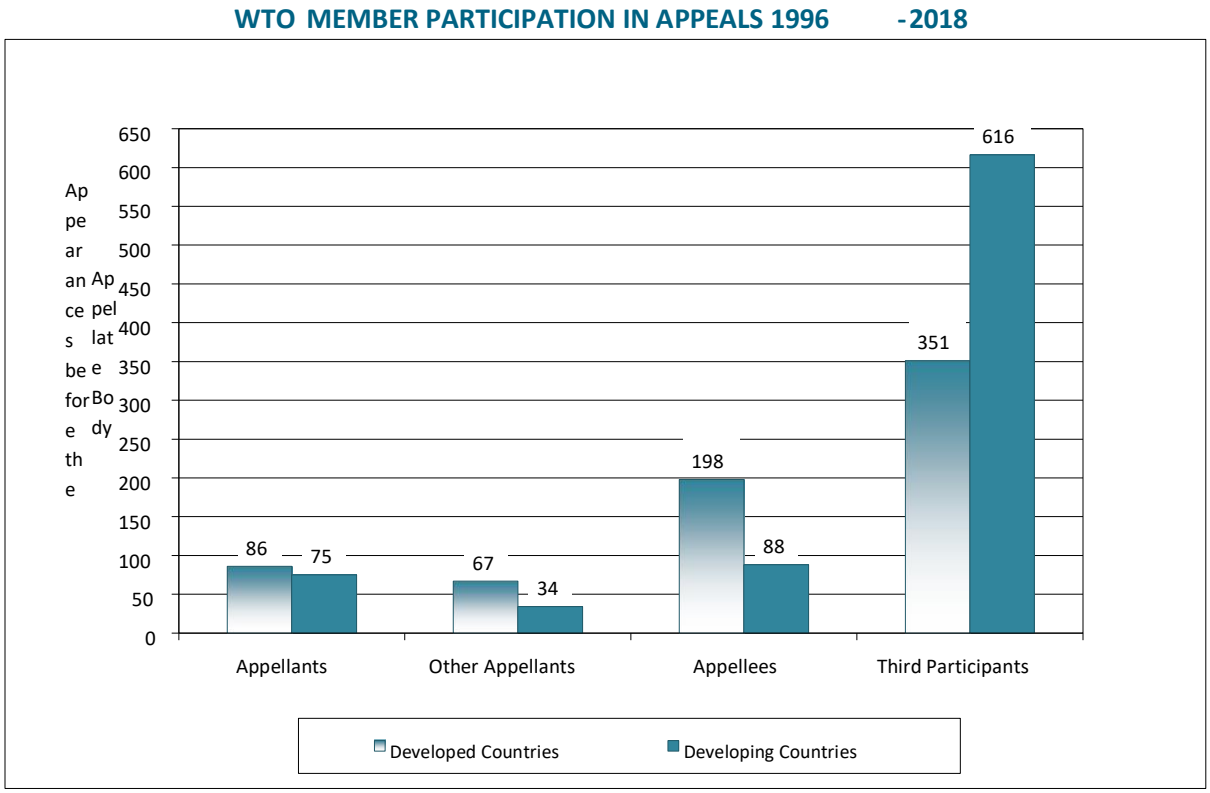


[136]

The above chart illustrates the country blocs average wins as either the complainant or respondent. From the chart, the consistency is that a Member State has higher chances of winning if they institute the case against another Member. For all blocks, the Respondents chances of winning are always lower. This would then support the data that frequent users; especially complainants have better chances of winning their cases at the WTO.

[136]Ibid.

3.3.2 Appellate Body data[137]



From the above information developed countries are also more active in the Appeals process of the WTO; they participate more regardless of their party status in the Appeals; be it as those preferring the Appeal (Appellants), those to whom the Appeal is against (Appellees) or parties appealing together (other appellants). They dominate all areas with the exception of one; as third participants.

Developing countries have a much higher participation rate here than the developed countries. Three factors could logically explain the numbers. The first is that if the developed Member States are dominating as other parties to the Appeal process it would mean that a fewer number of them could actually participate as third parties. A country that has preferred an Appeal after all, could not also be a third party in the same instance.

[137] Appellate Body Annual Report For 2018, https://docs.wto.org/dol2fe/Pages/FE_Search/DDFDocuments/254571/q/WT/.../29.pdf Accessed on 30th June 2019.

Secondly, the only way a Member State can appeal a dispute is if it first went through a panel and findings in respect of the matter in dispute were made. Data on panel usage shows that developed countries dominate panel proceedings therefore, statistically it makes sense that they are the ones with the most usage of the appellate process of the DSB.

Lastly, a defence for developing countries not using the DSS of the WTO is that they lack the resources and expertise to lodge and sustain disputes in the system; at least for most of the countries. Now, a third party comes into the Appellate proceedings when they have an interest in the matter being the subject of the dispute but have not previously- at the panel stage- been parties. The benefit being that a third party is able to monitor proceedings in respect to matters they have interest in while at the same time maintaining a bit of legal distance and costs from the proceedings. This would explain why many developing countries who have opted to be third parties use this type of representation in the system more than the others.

3.4 CONCLUSION

From the above information, it is clear that African countries are least participants of the DSB. The major users of the system are member states with strong economic power that are able to infiltrate the hindrances in the DSB that are faced by African countries in their bid to participate in the system. Constraints such as high litigation costs and lack of expertise make it difficult for African countries to access justice in the system however, developed countries have economic power which enables them bypass these constraints.

There is clearly a disparity between the performance of developing and developed countries in the WTO. Whether this is attributable to the structure of the WTO, external factors or self-sabotage tendencies by the developing countries, dramatic changes need to occur to level the playing field and fully achieve the Dispute Settlement System's goals and vision.

CHAPTER FOUR: PARTICIPATION OF AFRICAN COUNTRIES IN THE DISPUTE SETTLEMENT MECHANISM OF THE WORLD TRADE ORGANIZATION

4.1 Introduction

This chapter will focus on African countries and their participation in the Dispute Settlement Mechanism (DSM) of the World Trade Organization and the factors that have led up to and contributed to their current level. Authors on this subject matter are divided as to whether the participation of African countries is dismal or is quite adequate. There are also contrary views and opinions as to whether these factors are an internal matter to be addressed, a symptom of systematic and inherent inequality in the structure of the WTO or an amalgamation of the two.

Stemming from this, different authors give legitimacy to different theories on why there is lack of or dismal participation. However, most, in their discourse have a common thread as to the reasons why African countries are currently performing as they are. These reasons are the sole focus of this chapter.

4.2 Challenges Facing African Countries in Participation in the DSM of the WTO

The dispute settlement system has drastically changed under the WTO. Admittedly, the system has now shifted to a rule-based model in which the playing field has been supposedly levelled for all players. However, the participation of African countries in the WTO has not increased as the countries rarely refer matters to the panel yet still seem to be on the receiving end of this process. Henrik Horn and his co-authors make an interesting observation in regards to the whole process. They opine that the conundrum is not as to whether African Member States have been afforded equal rights to adjudication of matters before a panel, however, the question at hand should be whether there are bottlenecks in and outside of the system that are preventing the African

countries from making full use of the system.[138] Scholars have attributed African countries' limited participation in the DSM to factors that have been discussed below.

4.2.1 The high cost of instituting cases at the WTO

The high cost of litigation in the DSB is a major obstacle for African countries in their participation in the DSS. The high costs attributable to the DSS demonstrate the inability of the DSS to level out existing power imbalances between member states and therefore does not provide equality before the law.[139] Furthermore, high litigation costs is akin to denial of access to justice in that the member states that lack the adequate financial resources are left out of participating in the system due to the bottleneck of high litigation costs.

The processes relating to the initiation and sustenance of a trade dispute at the WTO are expensive. These expenses start to build up from the onset where it takes huge sums of money to monitor trade patterns of trade partners in order to pick out discrepancies and to identify trade measures being undertaken by other countries that are meritorious of legal action at the WTO.

The legal expertise has to be one of the most expensive parts of the adjudication process of the WTO. This may be because it is a niche area of study therefore not many lawyers practice it and it takes up resources in researching the relevant material; mostly because there is no stare decisis rule in the WTO and each case really is determined on its own facts and merits. Furthermore, the diversity of exports and imports present at the WTO means that indeed no one case is alike in its facts. Therefore, the human capital that goes into researching the most intricate circumstances surrounding a specific country's violation of trade measures is what attracts such hefty fee notes.

Due to the lack of homegrown experts in this sector, most African countries would have to hire foreign lawyers to litigate such matters and such lawyer fees could estimate between USD 400,000 and USD 20,000,000.[140]

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[138] Henric Horn, Petros Mavroidis, Hakan Nordstrom, "Is the use of the World Trade Organization Biased?" 1999, http://www.econ-law.se/Papers/Disputes000117.PDF Accessed on 28th March 2019.

[139] Sebastian Wilckens, "Should WTO dispute settlement be subsidized?" Economics Working Paper, No. 2007-02 <https://www.econstor.eu/bitstream/10419/22020/1/EWP-2007-02.pdf> Accessed on 11th November 2019.

[140] Gregory Shaffer, "Developing Country Use of the WTO Dispute Settlement System: Why it Matters, the Barriers Posed, and its Impact on Bargaining", <https://www.ictsd.org/sites/default/files/downloads/2013/02/developing-country-use-of-the-wto-dispute-settlement-system_shaffer.pdf> Accessed on11th November 2019.

The high cost of initiating disputes at the WTO can be deemed as being prohibitive for the African countries, who's GDPs fall way below that of developed and industrialized countries.[141] One pivotal aspect where resources are required is in the detection of violation of trade measures. This process requires constant monitoring and on the ground feedback from exporters which is time and resource consuming. Countries with more human and legal resources stand a better chance at monitoring and detecting illegal trade practices being carried out by another Member State.[142]The writer, Samuel, controverts this by offering a contrasting opinion that even though African Member States were to put themselves in a position to become alive to the measures from which they could take legal action, this would not be sufficient to safeguard their rights and interests as they are even less likely to come up with pro-active solutions to combat the occurrence of such measures in the first place.[143]

The growing complexity of trade laws has in essence made it difficult for all countries to identify trade measures that are violations of the WTO Agreements and this is because trade law has now grown to mesh or closely relate with other branches of law which may for the most part be deemed as private law such as environmental and labour laws.[144]The authors then go ahead to make the nexus between the current complexity of trade and the amount of money and expertise required to make the distinction between private and international law so as to advise a country to either initiate or refrain from initiating dispute mechanisms at the WTO. They state that more advanced countries are better equipped to identify trade questionable measures and then to further make preparations for the panel stage of the dispute settlement mechanism and this is evident in the overrepresentation of the industrialized countries as complainants in the process, with the exception of Japan.[145]

Even if the African countries did have the capacity to identify trade measures that violate WTO Agreements, there is an argument to be made that they would still be hesitant to pursue the matter to its full completion at the WTO. The reason provided for this is that as with all transactions of commercial nature a rational decision must be made as to whether the choice to

[141]Samuel Magezi, "The WTO Dispute Settlement System and African Countries: *A Prolonged slumber?"*<https://core.ac.uk/download/pdf/58912787.pdf> Accessed on 15th February 2019.
[142]Henric Horn, Petros Mavroidis, Hakan Nordstrom, "Is the use of the World Trade Organization Biased?" 1999, http://www.econ-law.se/Papers/Disputes000117.PDF Accessed on 28th March 2019.
[143]Samuel Magezi, "The WTO Dispute Settlement System and African Countries: *A Prolonged slumber?"*<https://core.ac.uk/download/pdf/58912787.pdf> Accessed on 15th February 2019.
[144]Henric Horn, Petros Mavroidis, Hakan Nordstrom, "Is the use of the World Trade Organization Biased?" 1999, http://www.econ-law.se/Papers/Disputes000117.PDF Accessed on 28th March 2019.
[145] Ibid.

pursue a particular course of action will end up yielding profits, breaking even or losses. The author Brown is of the view that one of the reasons African countries do not institute cases at the WTO is that no member state would pursue litigation if the cost of undertaking the said litigation will end up exceeding the potential benefits such country may receive from successfully defending their case thereby making breaches in Agreements more tolerable for Countries that are economically weaker.[146]

4.2.2 Power-based factors

Due to the different volumes of trade, different countries, and indeed different regions of the world, there stands to be a risk of a power imbalance at the world market level. The countries with the most buying power tend to dictate the terms of trade to those with weaker or even dependent economies; whether directly or indirectly.

Such an imbalance may lead countries with the weaker economies to refrain from subjecting questionable trade measures to the jurisdiction of the WTO for a number of reasons. The first could be that most African countries are already afforded preferential treatment by the developed countries. This treatment allows the African states to sell their raw material, which would otherwise fetch low prices, at more favourable (expensive) prices than those offered at the world market. If countries receiving such treatment were to go ahead and institute proceedings against the countries that offer them preferential treatment there is a well understood apprehension that such concessions may be revoked.

Secondly, there exists the lack of retaliatory power. Even if developing countries are able to get favourable orders they may not be able to enforce them as they do not possess retaliatory power therefore have nothing to leverage the performance of the violating Member State on.

The third aspect of the power dynamics could be evident in the reality that owing to the fact that countries with poorer economies depend on those with healthier economies for aid as well as loans and grants, it logically follows that if such dependent countries tabulate the pros and cons

[146]Chad Bown, "Participation in WTO Dispute Settlement: Complainants, Interested Parties And Free Riders", (2005) Pg 11, <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.598.7914&rep=rep1&type=pdf> Accessed on 10th April 2019.

of instituting a trade dispute against a donor at the WTO they may very well find that it would cost them more if they did gain favourable orders at the WTO but lost aid, loans and grants from the country that was a Respondent in the case. It then renders itself a classic case of not looking a gift horse in the mouth. However, this tiptoeing on eggshells mentality could end up causing African states a chance at not only diversifying their exports and income streams but also an opportunity to be taken seriously at the world stage and getting a seat at the table is slowly inching away.

It has been argued that African countries lack the impetus to institute disputes in the DSM because their exports are already the subject of preferential treatment, which treatment can be revoked at any time due to its non-binding nature; given at the will of the Member State making such concessions.[147] It may very well be that some African countries fear retaliation in the form of the retraction of such preferential treatment if they embark on dispute mechanisms.[148]It is important to note that a country may at any time and without providing reasons revoke preferential treatment offered to such countries.

A large percentage of African countries' exports are raw materials which would not attract very high prices at world markets, as such, African countries tend to be very dependent on the preferential treatment as it grants them more market access than they would have had while according them an opportunity to sell at competitive rates. This kind of dependency leaves plenty of room for the countries offering such preferential treatment to exercise indirect undue influence and leverage.

Another argument brought forth is that less developed countries may refrain from submitting trade disputes to the jurisdiction of the WTO in the instance they deem that their chances of enforcing decisions made in their favour are bleak and they lack sufficient retaliatory power to enforce such decisions in another manner.[149]

One of the stark contrasts between the GATT and the WTO that can be drawn is the fact that the WTO system ushered in a "rule-based" era in international economic disputes that was supposed

[147]Edwini Kessie and Kofi Addo, "African Countries and the World Trade Organization Negotiation on the DSU", <https://www.ictsd.org/sites/default/files/downloads/2008/05/african-countries-and-the-wto-negotiations-on-the-dispute-settlement-understanding.pdf> Accessed on 10th April 2019.
[148] Ibid.
[149]Henric Horn, Petros Mavroidis, Hakan Nordstrom, "Is the use of the World Trade Organization Biased?" 1999, http://www.econ-law.se/Papers/Disputes000117.PDF Accessed on 28th March 2019.

to insulate countries will smaller economies from "power-politics" hence improve their participation in the DS of the WTO. However, with the opposite being the case it can be said of the DS procedure to be biased against developing countries.[150] A counter argument to this view is provided that countries with extremely diverse exports are more likely to institute trade disputes at the WTO, effectively dismissing the theory on there still being a power dynamic under the WTO.[151]

In response to this, the authors Besson and Mehdi posit, "Horn, Mavroidis and Nordstrom (1999) ignore the fact that developing countries may exercise self-constraint in picking their fights because of unfavourable distortions in the DS procedure."[152]To further support this point the author opines that one of the flawed aspects of the WTO is the extremely long timelines for compliance with orders arising out of trade disputes and furthermore, there are not enough incentives for members to comply.[153]

"The experience so far with those few cases that have reached the retaliation stage shows that, unless other rules are changed, countries can avoid being subjected to retaliation for a very long time. Many countries under this threat simply invoke the DSU provisions giving parties the option to ask for re-examination of the other party's measures, without any time limit for how long this might take."[154]

The third way in which this imbalance of power may manifest itself is in the humanitarian, intellectual and financial aid given to developing and LDCs by the industrialized and developed countries. Although the system under the WTO was established under the "all countries are equal" banner that smaller countries may face challenges instituting cases against the larger economic countries due to the fact that they either lack sufficient retaliatory power and/or they

[150]Fabien Besson and Racem Mehdi, "Is WTO Dispute Settlement System Biased Against Developing Countries? An Empirical Analysis", <https://ecomod.net/sites/default/files/document-conference/ecomod2004/199.pdf> 13> Accessed on 10th April 2019.
[151]Henric Horn, Petros Mavroidis, Hakan Nordstrom, "Is the use of the World Trade Organization Biased?" 1999, http://www.econ-law.se/Papers/Disputes000117.PDF Accessed on 28th March 2019.
[152]Fabien Besson and Racem Mehdi, "Is WTO Dispute Settlement System Biased Against Developing Countries? An Empirical Analysis", <https://ecomod.net/sites/default/files/document-conference/ecomod2004/199.pdf> 13> Accessed on 10th April 2019.
[153]Carolyn Gleason and Pamela Walther, "The WTO Dispute Settlement Implementation Procedures: A System In Need of Reform", Law and Policy in International Business Volume. 31, No. 3, (2000), Pg. 713.
[154]Amin Alavi, "African Countries and the WTO's Dispute Settlement Mechanism" Development Policy Review, 2007, 25 (1): 25-42, Pg. 34 <https://www.peacepalacelibrary.nl/ebooks/files/Alavi_African-Countries.pdf> Accessed on 10th April 2019.

depend on those countries economically or politically and they therefore find it pointless to institute cases.[155]

Sheila Page asserts that many African countries have continued the tradition of Agreements with the European Union (EU) and the United States (US) which in effect not only provides free market access for their major markets but also includes special assistance for some of their exports therefore, it is not surprising that their efforts have not been concentrated on the WTO.[156]

Samuel Magezi, in his paper, states that, "Therefore African countries with their small economies and limited resources believe that such a system cannot be an option for enforcing their rights. Engaging in the dispute settlement process to them would entail spending millions of dollars in return for a twenty to seven percent chance of success."[157]Sheila Page, in her paper, seems to provide a rebuttal for this by simply stating that the African Member States are a special case as the Carribean countries rely on the same aid and concessions that their African counterparts get yet they are still active in the DS of the WTO.[158]

4.2.3 Lack of diversity in trade

In his paper, Samuel Magezi posed a question as to why there was poor performance by African states in the WTO and whether this was indicative of the fact that this group of countries had no rights to protect.[159]Context to this statement is provided by the trade volume that Africa, as a continent, contributes to the world, which stands at 2% only.[160] Noting that Africa's participation in world trade is low, other scholarsposit that the participation by African countries may not be dismal but instead simply focus on removing supply-side barriers because they majorly focus on

[155]Henric Horn, Petros Mavroidis, Hakan Nordstrom, "Is the use of the World Trade Organization Biased?" 1999, http://www.econ-law.se/Papers/Disputes000117.PDF Accessed on 28th March 2019.
[156]Sheila Page, "Developing Countries in the GATT/WTO Negotiation", Working Paper, Overseas Development Institute (2002), Pg. 43<https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/4738.pdf> Accessed on 10th April 2019.
[157]Samuel Magezi, "The WTO Dispute Settlement System and African Countries: *A Prolonged slumber?"*<https://core.ac.uk/download/pdf/58912787.pdf> Accessed on 15th February 2019.
[158]Sheila Page, "Developing Countries in the GATT/WTO Negotiation", Working Paper, Overseas Development Institute (2002), Pg. 43<https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/4738.pdf> Accessed on 10th April 2019.
[159]Samuel Magezi, "The WTO Dispute Settlement System and African Countries: *A Prolonged slumber?"*<https://core.ac.uk/download/pdf/58912787.pdf> Accessed on 15th February 2019.
[160] Ibid.

raw material exportation.[161]They go on further to state that although this may be the case it does not account for the fact that many countries have complained about the trade barriers, sanitary and phytosanitary measures that continue to pose a challenge to the process of diversifying their exports.[162]

The general view on this matter is that the dispute patterns of a country can almost certainly be determined by the amount of trade and partners that the country has. In essence, it is postulated that there is a direct correlation between the probability of encountering a trade measure that is disputed and the diversity of that country's export and trade partners.[163]However, the same authors admit that although this model is quite useful and in some aspects accurate in predicting WTO DS patterns of Member States, it cannot be the only measure indicative of the frequency of WTO DS use by countries as it does not account for those with high volumes of trade who are not regular users of the system raising the question as to whether factors outside volume of trade exist.[164]

Ziemblick makes reference to Horn and Mavroidis et al on the fact that the probability of encountering disputed trade measures is directly related to the volume of trade a Member State will at a certain point in time have.[165] This reference ignores the above counter arguments produced by the authors shortly after the said statements. Nevertheless, the author introduces his own counter argument. He admits that the accuracy of the surveys that inform this opinion are imperfect therefore the background factors that led to the information appearing as is have not been taken into consideration.

The conclusion here, therefore, seems to be that while most scholars may agree that there is semi-full proof evidence that the more diversified a country's exports and trade partners are the more likely it is to institute cases at the WTO.These findings do not account for; developed countries that do not so often make use of the WTO like Japan and Canada, developed countries and trade blocks' that overuse the DS process of the WTO system and some developing

[161]Edwini Kessie and Kofi Addo, "African Countries and the World Trade Organization Negotiation on the DSU", <https://www.ictsd.org/sites/default/files/downloads/2008/05/african-countries-and-the-wto-negotiations-on-the-dispute-settlement-understanding.pdf> Accessed on 10th April 2019.
[162] Ibid.
[163]Henric Horn, Petros Mavroidis, Hakan Nordstrom, "Is the use of the World Trade Organization Biased?" 1999, http://www.econ-law.se/Papers/Disputes000117.PDF Accessed on 28th March 2019.
[164] Ibid.
[165] Bartosz Ziemblicki, "The Controversies of the World Trade Organization Settlement System." Pg. 215 <http://www.www.bibliotekacyfrowa.pl/Content/32203/0014.pdf> Accessed on 10th April 2019.

countries like India and Chile that are making more use of the DS system. In essence, the data is not self-explanatory and cannot by itself be relied on as an independent reason for less developed Member States such as African Countries lack of participation in the DS system of the WTO and must be considered conjunctively with the other reasons provided for lack of participation.

4.2.4 Lack of expertise in WTO law

This is one of the most prevalent causes of lack of participation. The correlation between lack of human resource in the area and the dismal performance in the WTO is obvious to say the least. African Member States have failed to hone and develop the human resource needed to; monitor trade measures undertaken by other countries, undertake the necessary research needed to institute cases at the WTO and apply the knowledge of the WTO legal systems and processes.

With a pure lack of understanding of the pre, mid and post processes required of a Member State protecting its trade interests, many African States are operating in darkness. The wilful ignorance has caused African Countries to stagnate in their participation in the body of jurisprudence of the WTO.

The most overt symptom of this problem is the fact that most African countries do not have home-grown and locally available lawyers that are well vast with and currently practicing WTO trade law. Further to this, there is little to no evidence of African Governments consulting private firms on matters WTO.[166] It then follows that with such ignorance in play many African states lose the impetus to institute cases at the WTO.[167]

This impediment is deeply rooted in the fabric of African Member States' educational system. After all, that is where human resource gains its first interaction with the subject matter and skills and knowledge subsequently gained. The author Chad Bown provides vital statistics and states

[166]Sheila Page, "Developing Countries in the GATT/WTO Negotiation", Working Paper, Overseas Development Institute (2002), Pg. 43<https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/4738.pdf> Accessed on 10th April 2019.
[167] Ibid.

that there are only 10 WTO law professors in the whole African continent as compared to one of the Member States, the United States, which has 100 professors teaching across the country.[168]

The attitude that African Countries have toward the WTO is clear from the backseat they take on this matter even from the grass root level. This complacency has in turn led to scarcity of knowledge on matters WTO. The authors Busch and Reinhardt posit that the reason most African countries are unable to institute cases at the WTO is because of their inability to identify trade measures that have been violated and this they attribute to the lack of experts on the Continent.[169]

The writers Henrik Horn et al submit that it is the Member States which have devoted a substantial amount of their resources to the screening of both domestic and international trade policies that are clearly more equipped to identify trade breaches of the WTO Agreements.[170]The authors then introduce the subject of the Secretariat, which is tasked with assisting developing and LDCs however, the authors state that in as much as the Secretariat is tasked with helping such member states with public reports which ease in identifying suspect trade measures there is a limit to such help as the Secretariat can only provide them with general legal advice because they must remain and seem to remain impartial to all other Member States.[171]

This then has a nexus to another problem African countries face on lack of experts which is twofold in its effect. The domestic aspect has already been discussed above however; the other effect is displayed internationally. African countries do not have representation in the form of delegates at Geneva. The author Sheila Page quoted the number of unrepresented African countries as of 2002 at 13.[172] The Monitor Newspaper in Uganda reported that in East Africa Kenya has three delegates in Geneva while Uganda and Tanzania have two each.[173]

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[168]Chad Bown and Rachel Mcculloch, 'Developing Countries, Dispute Settlement, and the Advisory Centre on WTO Law' [2009] SSRN Electronic Journal, <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1541964> Accessed on 5th November 2018.

[169] Marc Busch and Eric Reinhardt, "Testing International Trade Law: Empirical Studies of GATT/WTO Dispute Settlement", Pg. 477, <http://faculty.georgetown.edu/mlb66/titl.pdf> Accessed on 10th April 2019.

[170]Henric Horn, Petros Mavroidis, Hakan Nordstrom, "Is the use of the World Trade Organization Biased?" 1999, http://www.econ-law.se/Papers/Disputes000117.PDF Accessed on 28th March 2019.

[171] Ibid.

[172]Sheila Page, "Developing Countries in the GATT/WTO Negotiation", Working Paper, Overseas Development Institute (2002), Pg. 43<https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/4738.pdf> Accessed on 10th April 2019.

[173]Samuel Magezi, "The WTO Dispute Settlement System and African Countries: *A Prolonged slumber?"*<https://core.ac.uk/download/pdf/58912787.pdf> Accessed on 15th February 2019.

Some authors have argued, sensibly so, that the African countries simply do not have trade issues to adjudicate upon because there are non-existent or even if they exist, they are minimal in cause and effect as compared to the concessions they would lose by pursuing dispute mechanism at the WTO against their donors. However, it is my view that African countries will not always service the world with raw materials and when this industrialization happens, African countries will have more trade interests in the world to pursue but will be unequipped to deal with the new trade and legal demands stemming from such growth.

In as much as the ***stare decisis*** principle does not apply to DSU procedure and proceedings, it has been a point of criticism that many judges have been undertaking judicial activism and from time to time deviate from the rules. Wrong as it is, it is the current practice, and all things constant previous cases may be persuasive. That, added to the fact that judges sit for a period of 7 years; it is easy to see that there might be a consistency in the way they rule.

Therefore, in as much as the requirement to have trade and WTO legal experts may seem farfetched as the supply has not yet met the demand, if African Member States of the WTO are to be proactive it would work in their interests to encapsulate the future into the present paradigm with the thought that the present world trade dynamics are not set in stone and are bound to change if proper effort is put into it. It has been opined that the more a country participates in the DS procedure of the WTO, the better its chances of being in a better position to mould the WTO law's application to its favour gradually, over a substantial period of time.[174]

4.2.5 Failure by African governments in cultivating close relationships with the private sector

In the previous point African States' complacency with the human resources as regards WTO law was pointed out. In furtherance to this discussion, there exists a disconnect between African States and their private sectors. The manner in which this disconnect negatively and directly impacts African Member States' performance is that the private sector by and large has the most information on trade patterns exhibited by other Member States. In furtherance to that, such

[174] Gregory Shaffer, "How to make the WTO Dispute Settlement System Work for Developing Countries: Some Proactive Developing Country Strategies", International Centre for Trade and Sustainable Development (2003), Pg. 5-7, <https://www.scribd.com/document/325604701/How-To-Make-DSU-Work-for-Developing-Country> Accessed on 10th April 2019.

entities are in a better position to understand and assimilate such information into useful data that can then be easily compiled, sector by sector into research much needed in defending cases of trade violations at the WTO.

More importantly, the Member States at the WTO negotiate on their behalf and of that of their citizens, industries and corporations.Due to the fact that in most cases, African governments seem to be far removed from the actual trade situations it would make more sense to have frequent and meaningful interactions with the private sector as, in the event of trade violations their interests are the most closely and directly affected thus it would come to their attention at a much faster pace than if the Governments did the trade policing by themselves.

"Sectors with powerful lobbies, such as textiles, clothing and agriculture, are presumably more successful than other sectors also in the lobbying for trade measures of a doubtful legal nature."[175]

There seems to be a consensus on this issue that there is too much law and not enough of politics in the trade policies of African countries[176]. In essence, this thereby makesAfrican countries' international trade processes good or even maybe great on paper, but that is as far as they go. The construction and implementation of such policies should be in consultation with the private sector as they are more adept with the international trade landscape, further they may add relevant information to the policies to enable them not only be sound but realistic and effective once implemented. In addition, this process may help with public participation and interest in international trade matters with citizens as that is the source for future expert human resource on matters international trade. This, is where the political aspect comes in.

4.3 Conclusion

The various factors discussed under this chapter include a mix of internal and external factors that are contributing to African Member States' stagnation in participation at the DSM of the

[175]Henric Horn, Petros Mavroidis, Hakan Nordstrom, "Is the use of the World Trade Organization Biased?" 1999, http://www.econ-law.se/Papers/Disputes000117.PDF Accessed on 28th March 2019.
[176]Amin Alavi, "African Countries and the WTO's Dispute Settlement Mechanism" Development Policy Review, 2007, 25 (1): 25-42, Pg. 34 <https://www.peacepalacelibrary.nl/ebooks/files/Alavi_African-Countries.pdf> Accessed on 10th April 2019.

WTO. It is important to point out that the internal causes are easier to remedy whereas the external ones will need a huge push in change in perception of developing and LDCs. This may be a difficult task as the world markets are more determined by buying power and the exports of a country.

It might be a counter argument that changing the external causes may only be as difficult as changing the internal ones; to mean that when African States decide to change the internal factors then the world view of the same States will gradually but automatically change as well hence affording more opportunity to equal access to the African States.

A third alternative is that the reasons as to why African countries are not participating as expected in the WTO are in a sequencing manner, cascading, one flowing from and as result of the other.[177] The bottom line is that the DSS contains a number of hindrances that make it difficult for African member states from accessing justice which is caused by the internal constraints that limit their participation in the system.

[177] Sheila Page, "Developing Countries in the GATT/WTO Negotiation", Working Paper, Overseas Development Institute (2002), Pg. 43<https://www.odi.org/sites/odi.org.uk/files/odi-assets/publications-opinion-files/4738.pdf> Accessed on 10th April 2019.

CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

5.1 Introduction

A large part of this thesis has been dedicated to highlighting the inequalities in the use and outcomes of DS processes in the WTO. Sufficient evidence has been provided to support the author's assertions. However, the thesis not only aims at proving assertions but offering corrective measures which if implemented may increase African States' participation in the DS process of the WTO. This chapter will attempt to summarize the thesis and provide useful suggestions on ways to correct the areas that breed non-participation while adding new frontiers that have not been incorporated in the WTO DS framework.

5.2 Conclusion

Trade relations between African countries and developed countries has increased drastically and as such, it is imperative that African countries' participation in the dispute settlement procedures of the WTO is encouraged so as to avoid a situation where the developed trading partners exploit African countries owing to their lack of active participation in the WTO dispute settlement mechanism.

It has been demonstrated that African countries have not been active participants in the WTO DSS, with only two member states participating as Respondents i.e South Africa and Egypt whereas no African country has participated as a Complainant.

It is clear that the WTO DSS can be blamed for the dismal participation of African countries in the Dispute Settlement System in that it contains bottlenecks within the system which prohibit African countries from accessing justice despite the system priding itself to be an equal playing field for all member states. The constraints have been discussed in detail and it is clear that African countries fall victim to these primarily due to their inability to bypass these constraints as developed countries due. It is also evident that the playing field provided by the DSB is not equal and as such, it is necessary to implement reforms to curb the said constraints so as to enhance the participation of African countries in the DSB and provide an opportunity for these member states to reap the benefits that accrue from utilizing the said system.

The initiative to increase the African Member States' participation in the WTO DSS is a viable idea that is achievable however, not without effort and goodwill from the DSS in general. To achieve the necessary reforms required to catalyze African countries participation in the DSS, it requires an amalgamation of legislative reforms, intention of member states, resources, policy change and attitude of both the international community and the ones in Africa.

5.3 Recommendations

5.3.1 Introduction of interim relief measures upon the institution of a claim

One of the common reasons raised for non-participation by African countries is that the process can be long and the reliefs that may be eventually achieved at the end of the process would not match the costs attendant to the prosecution of claims by Member States with less economic capacity therefore, many chose to look the other side when it comes to breaches of WTO obligations.

Most African Countries are disinclined to prosecute their claims due to the uncertainty of the enforcement of the Recommendations of the DSB.[178] Another consideration that African countries have to bear in mind is that the claims may sometimes be against countries with larger GDPs hence more resources to sustain a Defence against a claim.[179]

[178] Henric Horn, Petros Mavroidis, Hakan Nordstrom, "Is the use of the World Trade Organization Biased?" 1999, pg. 2, http://www.econ-law.se/Papers/Disputes000117.PDF Accessed on 28th March 2019.
[179] Samuel Magezi, "The WTO Dispute Settlement System and African Countries: *A Prolonged slumber?"*<https://core.ac.uk/download/pdf/58912787.pdf> Accessed on 15th February 2019.

The proposed recommendation would kill two birds with one stone; not only would it reinforce belief in the system but it would also catalyse some reliefs in the process by allowing screening of claims on a prima facie basis before the relatively long panel process begins leaving more Member States satisfied.

This essentially would act as injunctive reliefs pending the hearing and determination of a Member State's claim. The procedure would follow guidelines set out in civil practice in various jurisdictions. The claiming Member State would put in an Application detailing the nature of the claim and the reliefs that, if successful, would ordinarily be granted at the end of the hearing. Based on this the Member State would be awarded these reliefs on a temporary basis.

The veracity of the Member State's claim would be determined on a ***prima facie*** basis to test if there exists a probability of breach of obligations and a high chance of successfully prosecuting the case. Also, in the instance, the Applicant would have to prove that there exists a substantial risk that if not granted they would suffer irreparable and irreversible harm hence a miscarriage of justice.

Due to the fact that this would be an avenue to attain immediate and temporary reliefs pending the hearing of the claim hence a matter of great urgency the proper forum to raise this would be at the consultation stage. This would be aided by the fact that this part of the process is not litigious hence tension between parties undergoing the DS process is at an all-time low. The Application would be submitted to and considered by the DSB which would have to tender their decision 14 days after the close of consultations. This, to accommodate decisions parties have reached at the end of the consultation period; in that if parties have agreed to resolve the dispute at that stage there would be no need to consider the Application but if parties have not reached a consensus and wish to proceed to the panel stage then a decision on the Application would have to be rendered.

5.3.2 *Pro bono* expertise in WTO matters for African countries

Another reason advanced for non-participation is that African countries largely do not have the expertise to fully and successfully prosecute their claims at the DS of the WTO due to the fact that the legal fees are too high in these matters given the subject matters and the forum in which parties are attending. Again, the issue of the GDP arises; the author Magezi submits that the

lower a country's GDP the less likely it is to detect trade measure violations.[180] Because of this many African countries have had to relinquish their claims.

He further extrapolates his point by submitting that a country with a higher GDP has more resources at its disposal and can therefore not only detect trade violations but can institute and sustain Claims against another Member State.[181]

In as much as there already exists an advisory centre in Geneva for LDCs and developing countries it comes at a cost as countries have to sponsor their own delegates. Currently, only a handful of African countries have permanent delegations to the WTO. Be that as it may, even the countries with delegates have not been performing well in the DS of the WTO. This means that the input into the human resource aspect of the participation of African countries is a vital element which has received minimal attention and aid at best. Further, the Secretariat of the WTO is obligated to give LDCs and developing countries assistance. However, that assistance only goes so far as the Secretariat is not allowed to delve into the merits of the various disputes a Member State would have or currently has as this would be demonstrative of bias.[182]

To cure this it is recommended that ***a pro bono*** initiative be formed within the WTO to especially give legal aid to countries which are still building in expertise and knowledge of the WTO DS systems. This should not be a permanent measure but is instead intended to put developing countries and LDCs on equal footing with those countries which have had time to develop and contribute to the WTO jurisprudence due to abundance of time, resources and human capital.

The initiative should be separate from the Secretariat to enable the Organization maintain impartiality. The various LDCs and developing countries would each be awarded, once in 5 years, an opportunity to prosecute or defend claims against other Member States. The period should last 20-30 years to accord the countries sufficient time to learn the ropes. If these countries make sufficient use of the program they could end up having acquired very important litigation skills.

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[180] Samuel Magezi, "The WTO Dispute Settlement System and African Countries: *A Prolonged slumber?"*<https://core.ac.uk/download/pdf/58912787.pdf> Accessed on 15th February 2019.
[181] Henric Horn, Petros Mavroidis, Hakan Nordstrom, "Is the use of the World Trade Organization Biased?" 1999, http://www.econ-law.se/Papers/Disputes000117.PDF Accessed on 28th March 2019.
[182]Ibid.

Taking into account that the WTO legal process is expensive it would run smoother if the countries intending to make use of this contributed a subsidised amount of money to help keep operations going. The countries would be benefitting mostly from human resource and experience of litigators who have dealt with the WTO.

5.3.3 Periodic workshops regarding WTO issues across the African continent

The onus of teaching and preparing the human resource on WTO matters falls on the African Governments themselves. This important task cannot be left to the WTO as that time has passed; African countries had the disadvantage of being relatively new countries while the GATT was controlled by power politics. These circumstances did not afford Member States, many of whom had just attained independence, an opportunity to have a say or really learn how to use the system.

Fast forward to the WTO era and now African States are in a much better position to defend their trading interests. In that spirit, knowledge of the systems and procedures can only now be learnt by observation and tactful application of that knowledge. The African states have not invested in this invaluable resource and have unfortunately underestimated its negative impact on world trade. If a country does not have the financial resources to hire, equip and maintain human resource capable of detecting breaches in trade violations then not only does the country become complacent with its rights being abused it also loses revenue.[183]

One of the ways in which this knowledge can be achieved is by having workshops designed to offer legal training on the DS procedures and processes. Advocates from various jurisdictions can attend these and attain qualification points which would enable various countries choose their duly qualified representatives from the list of Advocates who have attended these workshops.

The African Member States would have to decide on a common curriculum and which institutions to be licensed to offer such services for the quality assurance of the information being passed on.

[183] Ibid.

5.3.4 Implementation of systems to ensure compliance with recommendations

One of the dissuaders against institution of claims by African countries is the lack of strict guidelines on time to comply as well as methods of complying leaving the most important aspect of the DS procedure in limbo. Why would a country go through an expensive process to get the violation of its rights acknowledged only to have to wait for an indefinite period of time to witness compliance?

This is an internal WTO legislative mandate that would have to be lobbied for by the Member States that are most affected by it. The push for legislative change therefore needs to be advanced by the LDCs and developing countries.

Part of the amendments to legislation should be the strict time limits set for compliance with DSB recommendations. To make it a fair process and in light of the fact that the DSB does not operate on precedents parties should be able to agree on a period of time that is agreeable for corrective measures to be set in place. The Claimant should have the opportunity to raise the period of time first and the Respondent should then accept or oppose the Claimant's timelines. Once agreed upon the timeline should be adopted as a recommendation of the DSB but in the even that parties do not agree the DSB should have the power to recommend a timeline halfway between the suggestions of the Claimant and the Respondent.

Owing to the fact that compliance with Recommendations has been one of the failures if the WTO it would only be reasonable to suggest that upon the lapse of the time stipulated in the Recommendation the Respondent be given 60 days in which to conform as well as a deposit of security (monetary sum to be decided upon by the DSB) which would be accruing interest and if after the 60 days the Respondent fails to being measures in conformity that deposit is relinquished to the Claimant.

There should be parameters for the amount of money to be deposited. In the least it should cover the Claimant's legal costs and at most it should not be more than the value of the subject matter.

5.3.5 Popularization of the WTO law training in African Universities

Most of the previously discussed recommendations have been centred around the improvements that can be made by the WTO community. However, African states have also contributed to the low participation levels in the DS of the WTO and from that there are corrective measures they can take to increase participation.

A number of authors have indicated that African countries lack expertise on the law of the DS of the WTO because not enough attention and resources are directed at imparting and perfecting that knowledge at tertiary education levels.[184] The impact is that the African countries are often forced to outsource legal expertise from out of the continent, the fees which can run upwards of USD 10,000 per session.[185] There also seems to be a wide availability of competent human resource on matters WTO in other countries, say for example the United States which has over one hundred lecturers on WTO law.[186] This outsourcing has led to an overdependence on expertise from abroad which leaves the academic populous in the continent underdeveloped; to the detriment of the entire continent.

The proposition here is that for sustainable human resource in this area the Governments of African Member States in the WTO must cultivate a curriculum based on the legal processes taking place in the WTO as a whole and establish institutions of higher learning with a special focus on WTO law. The graduands of these institutions would then be offered jobs as legal counsel for the countries they represent meaning that the job market for lawyers in Africa will not only be expanded but will be also be guaranteed upon completion of the course.

Further, the human resource will be trained on how to identify breaches of obligations and the appropriate measures to take as studying the world markets and the politics in the WTO will enable experts assess when to institute claims and what outcomes could be expected.

5.3.6 Crowd funding and human resource pooling by African states

Lack of funds and expertise is a major contributor to the lack of participation at the DS of the WTO by African states. Currently, they have not heavily invested into the legal protection of their interests in the WTO. It is understandable that most states are undergoing rapid economic

[184] Ibid.
[185] Samuel Magezi, "The WTO Dispute Settlement System and African Countries: *A Prolonged slumber?"*<https://core.ac.uk/download/pdf/58912787.pdf> Accessed on 15th February 2019.
[186] Chad P Bown, "Participation in WTO Dispute Settlement: Complainants, Interested Parties And Free Riders", (2005) Pg 11.

growth and require that most of their capital is regenerated to industrialisation needs of their countries, leaving very little for the international obligations; many members of which have already industrialized.

If African states would have a pool of funds and human resource then it would make it easier for the successful prosecution of claims which would lead to an increase in participation, contribution to jurisprudence and an overall better grasp of the inner working of the WTO DS system. The more the countries use it the better their chances at winning claims.

However, this would be one of the hardest implementations to enforce as African states are not known for their cooperation with each other. There would also be the issues of prioritizing which countries could institute claims in a given year in the event that there are various countries with obligation violation claims within the same timeframes.

To avoid this the African states would have to sign a Charter which would lay down the principles that would guide the resource-sharing process; it would detail the amount of money and expertise each Member State is to contribute, the various ways in which such contributions can be done, the prioritization of claims and the procedures of repayment.

5.3.7 Diversification of exports by African countries

Many scholars have pointed out that Africa's low trade volumes and output are somewhat to blame for poor performance in world trade.[187] It has been argued that the less volume of trade the less likely it is to run into Agreement violations. The more industrialized a country is, scholars say, the more likely it is to prosecute claims at the WTO.[188] It indeed makes sense statistically as the core function of the DS is to resolve disputes emanating from the breach of The Agreements hence if there are no disputes detected by a certain group of countries it reduces their participation quotas.

[187] Edwini Kessie and Kofi Addo, "African Countries and the World Trade Organization Negotiation on the DSU", <https://www.ictsd.org/sites/default/files/downloads/2008/05/african-countries-and-the-wto-negotiations-on-the-dispute-settlement-understanding.pdf> Accessed on 10th April 2019.
[188] Henric Horn, Petros Mavroidis, Hakan Nordstrom, "Is the use of the World Trade Organization Biased?" 1999, http://www.econ-law.se/Papers/Disputes000117.PDF Accessed on 28th March 2019.

More importantly, the exports, mainly raw materials, receive preferential treatment from developed member states[189] therefore it may present itself as an attractive offer to continue with the raw material trade as opposed to value added goods. However, this is a short term solution to a very complex problem.

The issue of limited participation has two aspects; the first is that the limited exports by African countries can be said to be an explanation for the low performance at the WTO based on mathematical calculations on probability as discussed above. However, there is a new dynamic affecting performance which can be introduced- the second aspect.

The second aspect is that lack of diversity in exports leads to pedestrian claims that if weighed against the litigation costs at the WTO will always yield a negative cost-benefit ratio. In simpler terms the value of the goods currently being traded by African countries will never be enough to ensure a successful "return on investment" as calculated against the amount of money required to prosecute a claim at the WTO. Further, that such an attempt could not only not ensure breaking even but could be a loss-generating exercise.

In view of the foregoing, for African countries to increase their participation they would have to carry out the much needed value addition on their goods which would in turn increase not only their volume of trade but would also increase the number of trading partners as well as the value of the goods which could possibly be the subject matters before the DSB. This increase could see that the costs attendant to the litigation process are worth it and end up being lower than the value of goods or services litigated on.

This way, the litigation process to preserve market access and such like rights will seem worth it; not only in terms of protection of a nation's industries but economically as well.

5.3.8 Reliance on the African bloc to negotiate at the WTO

It is well noted that most African countries, if not all, are going through in one way or the other an industrialization process and this leaves minimal time, resource and attention for pursuing

[189] Edwini Kessie and Kofi Addo, "African Countries and the World Trade Organization Negotiation on the DSU", <https://www.ictsd.org/sites/default/files/downloads/2008/05/african-countries-and-the-wto-negotiations-on-the-dispute-settlement-understanding.pdf> Accessed on 10th April 2019.

concerns of a global nature. In that same breath, there is an avenue offering real and far-reaching potential impact that has not been explored.

A trading bloc has more bargaining as well as actual power to influence decisions or legislation change by an organization. It has already been well traversed that at the WTO a country has better chances of prosecution claims when industrialised but African countries are still undergoing this process. The best way to approach the WTO, as an interim measure, is gaining safety in numbers.

One of the main reasons why African States do not institute claims is the fear that when Recommendations are made there would be no retaliatory power to ensure compliance.[190] If African States were operating as a bloc at the WTO and there was a breach of obligations it would be easier to get a country to bring its measure into conformity if it faced the real risk of losing the whole of Africa as a trading partner on some specific good, as opposed to the small loss that would be felt if it aggrieved only one country.

One of the most frequent users of the DSM is the EU. Again, one of the most successful litigants in the system is the EU. So amalgamated is the trading bloc that when considered as a participant in the process it is thought of as an entity on its own.

It is important to note that when the EU litigates it does so as a bloc and not on behalf of the various individual countries that constitute it. In the same way, if African Member states were to replace their current membership with that of the African Union (AU) there would be a centre point for negotiating, detecting obligation breaches and it would be easier to pool resources together in order to establish a stronger unit rather than the individual Member State having scattered efforts at protecting their trading rights and increasing performance and participation in the DS of the WTO.

5.3.9 Bridging the gap between private sector and government affairs in relation to the WTO

[190] Ibid.

Lastly, there is a disconnect between the private sector and the various African Governments when it comes to matters trade.[191] This disconnect is responsible for a number of factors affecting participation; it has brought about the inability to detect breaches of obligations as and when they arise, the lack of opportunity for private investors to shoulder the legal costs of the DS claims, the lack of contribution of expert opinions by the private sector, the lack of input by stakeholders in strengthening market share.

The private sector's input could be codified in legislations by countries. Policy could be set up in such a way that there are stratifications in the sense of management of foreign trade and the private sector could be placed at the grassroots and in upper level management to direct the Governments on where to direct their focus to terms of trade facilitation.

Another way to incorporate input from the private sector is to send representatives from the most active and most income generating industries as delegates to Geneva to represent the various countries. The benefit would be that those who know where the show pinches the most would be able to grasp the issues that adversely affect them and how to put in place measures to protect themselves and their industries. They could also have a larger capacity to internalise and make use of the information they would attain while at the delegation due to their interests. After all some authors have pointed out that even if African countries were able to identify the trade measures being violated they would still lack impetus to prosecute their claims.[192]

[191] Samuel Magezi, "The WTO Dispute Settlement System and African Countries: *A Prolonged slumber?"*<https://core.ac.uk/download/pdf/58912787.pdf> Accessed on 15th February 2019.
[192] Ibid.

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