A Future Court without Cases? On the Question of Standing in the AfCFTA Dispute Settlement Mechanism

By:

Regis Simo

August 19, 2019

The African Continental Free Trade Area (AfCFTA), whose treaty was signed on March 28, 2018, entered into force on 30 May 2019. The AfCFTA intends to create a market rich of more than 1.2 billion souls disseminated across the 55 Member States of the African Union (AU), thus becoming the largest commercial space in the world since the advent of the World Trade Organization (WTO). Grounded on the free movement of goods, services, people and investments, the AfCFTA intends to a stepping-stone toward the completion of the African Economic Community (AEC). The signing of the Agreement, its recent entry into force, and the launch of the operational phase, only mark the end of a first step, since it is now up to the Member States to implement it. Pursuant to Article 23(1) of the AfCFTA Agreement, its entry into

force also results in the coming into force of the Protocols on Trade in Goods, Trade in Services and the Rules and Procedures for the Settlement of Disputes, of which they form an integral part. Hence, based on the principle of single undertaking (per Article 8 AfCFTA Treaty), the settlement of disputes through the Protocol relating thereto is a compulsory obligation for all Member States.

Article 20 of the AfCFTA Agreement establishes a dispute settlement mechanism (DSM) tasked to administer disputes arising between the States Parties. This is the legal basis for the adoption of the Dispute Settlement Protocol. The objective of the latter to ensure that the settlement process of any disagreement is not only transparent and objective, but also equitable and predictable and conducted in accordance with the provisions of the Agreement. However, and this is the purpose of this analysis, the AfCFTA dispute settlement system is only accessible to States, either as parties to the dispute or as third parties. Therefore, only states have standing and the right of direct participation in the proceedings. With the credo of boosting intra-African trade, AU Member States are fully mindful of the fact that the negotiated rules are not worth much without a system in place responsible to enforce them and to solve any issues of interpretation of the legal instruments, in the same manner as in the WTO.

However, it is an open secret that WTO African-country Members have rarely, if ever, made use of its dispute settlement system, which nevertheless guarantees a de jure equality between its Members regardless of the economic weight of the parties to the conflict. The non-participation of African states in this system has not escaped the literature, which has critically addressed the issue rather extensively. Celebrated as the jewel of the crown for the WTO and contributing to the stability of the global economy, the impressive number of disputes decided by its Dispute Settlement Body (DSB), currently in crisis and on the verge of collapse, is simply unprecedented in the history of international relations. The same cannot be said of African regional courts, whose taciturnity for some and desuetude for others in trade matters have also not escaped careful scrutiny. Notwithstanding the foregoing, the AfCFTA Dispute Settlement Protocol was nevertheless carefully modelled after the WTO DSM.

Considering that none of these States Parties has ever initiated dispute before a

regional courts regarding trade matters, one is entitled to question the sincerity of their investment in setting up this inter-state dispute mechanism in the AfCFTA. To think that it all was simply a deliberate choice of the negotiators to nip the project in the bud would probably be cynical but not quite farfetched. If one were to recall the demise of the SADC Tribunal, and the fact that most of the African regional courts with the initial mandate of adjudicate trade disputes have over time morphed into human rights courts sometimes without any explicit treaty basis[[1]], one would genuinely be pessimistic about the effectiveness of the AfCFTA DSM under the WTO model.

Indeed, the SADC Tribunal, initially empowered to hear disputes not only between SADC member states but also between natural and legal persons against the states, suffered from a stinging setback after its first landmark decisions in *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe* resulting in the amputation of its competence to be seized by individuals. This backlash, which now confines the tribunal to an advisory role in the future, had the effect of seeing this court die slowly. In case of a subsequent restoration, its role would be limited to interstate matters. In contrast to this slow death in the SADC region, one rather observes a buoyant dynamism of the Courts of Justice of ECOWAS, COMESA and East Africa which, in the absence of disputes between states, have positioned themselves as the bulwark of justice in terms of human and investors' rights in their respective regions.

The recent British American Tobacco case before the East African Court of Justice, where the judges held that a Ugandan additional excise duty imposed on cigarettes imported into East Africa constituted a violation of the Common Market Treaty, testifies of the need to broaden access to natural and legal persons in order to advance the interpretation of regional trade agreements. Moreover, the media recently reported that individuals were dragging Uganda and Rwanda before the same court over what they see as "arbitrary border closure" between these countries, claiming that these actions violate EAC free movement treaty provisions and therefore seeking compensation resulting from their economic losses. This goes to show how standing for individuals tend to contribute to guaranteeing the rule of law in RECs in a context where states are reluctant to litigate against one another.

The WTO dispute settlement has also had over the years to make an introspection on its modus operandi to respond to mounting criticisms. For instance, accused of meeting "behind closed doors" in Geneva, the WTO took note some years ago of the legitimacy crisis and transparency criticisms of its DSM, and undertook to somehow "democratize" its procedures, notably through the acceptance of amicus curiae briefs (albeit without being bound to consider them in deciding the cases) and the opening of panels and the Appellate Body's hearings to the public. These reforms certainly marked a progress in third-party participation in the WTO dispute mechanism, even though states kept their right to be the only parties to those disputes. Therefore, in order to be effective, the AfCFTA's dispute settlement system cannot be content with its dispute settlement provisions in their present state.

Yet, one cannot disregard the "African system" of peaceful settlement of disputes where political solutions (through negotiations and conciliations) are always preferred over judicial settlements so much so that any criticisms over lack of adjudication may seem improper. Mediation, according to the saying that "a bad settlement is better than a good trial", is the typical means of settling disputes in Africa. Even though the dockets of the International Court of Justice (ICJ) regularly feature African territorial disputes, it is often only after the failure to reach amicable solutions. However, it also demonstrates the interest of African states in border issues and their neglect of trade matters.

From the foregoing, one would be justified in thinking that AU member states have intentionally created a court which they consciously know they would hardly use given the inertia identified above. If the reforms that would extend standing to private parties are not undertaken, there is little guarantee that Member States will suddenly change their habits. Assuming for once that they trigger the mechanism, it is also very likely that, consistent with their practice for political solutions to legal problems, they would not proceed beyond the consultation and good offices stages provided in Articles 7 and 8 of the Dispute Settlement Protocol.

In other words, and taking into account the inclination of African States, no case is likely to reach the stage of the panels, let alone that of the Appellate Body. It is possible that the Protocol on Investment currently under negotiations would

feature the investor-state dispute settlement (ISDS) just as the Pan-African Investment Code did, unless objectors such as South Africa prevail. How that would eventually reflect on the Trade Protocol DSM remains to be seen. Suffices to say that Article 3(2) of the AfCFTA Dispute Settlement Protocol regulates any future conflict between the provision of the Protocol and any other dispute settlement mechanism by relying on the *lex specialis* principle. On the issue of standing reserved to State Parties, the potential dormancy of the AfCFTA DSM would deprive the States Parties of the AfCFTA of the security and predictability of the African continental trading system.

[[1]] see also Alter, Gathii & Helfer (2016)

View online: A Future Court without Cases? On the Question of Standing in the AfCFTA Dispute Settlement Mechanism

Provided by Afronomicslaw