AfCFTA: An emergent concept of ‘Lex Mercatoria Africana’?

By:

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September 19, 2020

Introduction

This blog post focuses on the Agreement for the establishment of the African Continental Free Trade Area (AfCFTA) and the implications for the evolution of *lex mercatoria* in Africa. This blog post is primarily based on a recent paper by Chisa Onyejekwe and Eghosa Ekhator titled ‘AfCFTA and Lex Mercatoria: Reconceptualizing International Trade Law in Africa’. The paper argues that some of the major innovations embedded in the AfCFTA (such as variable geometry and dispute settlement amongst others) form the crux of an emerging African practice of *lex mercatoria*. Consequently, the creation of AfCFTA has engendered what can be termed as an emerging concept of ‘*Lex Mercatoria Africana’*. In the context of the AfCFTA, this is exemplified by the notion that the AfCFTA explicitly promotes African trade principles. In our paper, we argue that concepts of variable geometry and dispute settlement mechanism in the AfCFTA have led to the development of an African-oriented slant of international trade law (*Lex Mercatoria Africana*). This post is thus an

initial distillation of my preliminary thoughts on what can be termed *Lex Mercatoria Africana* and forms part of a larger ongoing research project on the role of pre-colonial Africa in the evolution of international trade law principles. [1]

AfCFTA as *Lex Mercatoria Africana*?

The Agreement establishing the AfCFTA entered into force on May 30, 2019 in 24 countries that deposited their instruments of ratifications. The aim of the AfCFTA is to develop a single market for goods and services and promote the movement of goods and persons on the African continent.

This blog post argues that the development of the AfCFTA as Africa's contribution to the evolution of modern *lex mercatoria* fits within recent scholarship on international economic and trade law in Africa. According to Sweet, *lex mercatoria* can be defined as:

> a multi-faceted term which serves both to draw boundaries around a community and its practices, and to denote a legal system. It describes the totality of actors, usages, organizational techniques, and guiding principles that animate private, transnational trading relations, and it refers to the body of substantive law and dispute resolution procedures that govern these relations.

Lex mercatoria is a trading system that can be traced back to the activities of traders in Europe in the 11th and 12th century. This trading system was a legal regime for trade in the medieval period and it was organized by the traders and their agents. The overarching academic view is that Africans and pre-colonial Africa did not contribute significantly to the evolution of *lex mercatoria*. For instance, scholars such as Sempasa have argued that Africa did not contribute to the evolution of the modern rules on international trade. In our paper, we however suggest that a more nuanced approach should be taken in analysing the contributions of pre-colonial Africa to the development of *lex mercatoria*.

Importantly, our paper argues that the evolution of *lex mercatoria* should not be solely traced to a western/European origin. Pre-colonial Africans engaged in cross-border commercial activities and developed distinctive indigenous trading

devices or mechanisms that boosted trade or commercial activities in pre-colonial Africa. An example is the Wangara Trading Network, which was a widespread business and trading empire that spread across West Africa between the 14th and 19th centuries. According to Ochonu, the Wangara Trading Network 'feature prominently in the economic and mercantile history of West Africa because they pioneered intra-regional long-distance trading and investments.' Hence, according to Kufuor, the pre-colonial commercial activities that African traders, kingdoms, and communities were engaged in, therefore 'mirrored the phenomenon of European law merchant [*lex mercatoria*] that was at the heart of Western Europe's commercial revolution that spanned the 13th to 18th centuries.'

Furthermore, our paper analyses the concept of variable geometry which is embedded in Article 5 of the AfCFTA. Variable geometry which is a key principle of African RTAs gives 'poorer countries more time to implement agreed trade and other commitments. This principle promotes flexibility in the harmonisation and implementation of the AfCFTA Agreement by State Parties. The variable geometry principle has been used by several scholars (for example, Gathii and Akinkugbe) to analyse the various regional economic integration arrangements in Africa. Gathii has argued in some of his writings that variable geometry and flexibility are at the crux of regional integration in Africa. In our paper, we argue that 'Article 5 contains the universally accepted standards and principles that will govern trade disputes arising from the provisions of the AfCFTA. These principles are African-oriented, and they can be argued to reflect the African or African Union's approach to resolving state or international trade disputes.'

A major justification for the adoption of variable geometry and flexibility in the AfCFTA is that Africa has a mix of developing and least developing countries on the continent – with variations in social and economic structures/capacities. This is especially exemplified by the intra-African trade in Africa which is dominated by a few regional hegemons.Ndonga et al argues that Member States 'with large productive capacities in manufacturing or stronger supply capacities in non-manufactured products may reap more rewards than weaker landlocked and smaller economies, particularly the least developed countries (LDCs).' Hence, the adoption of variable geometry, flexibility, and special and differential treatment (SDT) enhances the implementation of the AfCFTA

Agreement in the different Member States. Arguably, this is in contradistinction with other trade frameworks such as the World Trade Organisation (WTO). Presently, variable geometry only applies to plurilateral agreements in the WTO. It should be noted that some WTO Agreements such as the TRIPS Agreement do however contain flexibilities. According to Hoekman and Mavroidis, 'Plurilateral agreements in the context of the World Trade Organization (WTO) allow sub-sets of countries to agree to commitments in specific policy areas that only apply to signatories and thus allow for 'variable geometry' in the WTO.' Some scholars (for example, Lewis and Hoekman and Mavroidis) have 'advocated that the principle of variable geometry should be fully adopted by the WTO'.

The utility of the concepts of variable geometry and flexibility in African Regional Trade Agreements (RTAs) have been criticised by some scholars (for example, Fasan and Akinkugbe). Akinkugbe argues that in some instances, variable geometry provides a cover for Member States that are reluctant to fulfil their obligations. Furthermore, Fasan argues that variable geometry could deter the creation of a single market in Africa as its purpose might clash with the aim of the Member States operating at identical levels of obligation and implementation or domestication of the AfCFTA. However, notwithstanding the strident criticisms of variable geometry and flexibility enshrined in the AfCFTA Agreement, in acknowledging this peculiarity of the continent, State Parties took a conscious decision to adopt the principle of Special and Differential Treatment (SDT) that ultimately affords national governments ample manoeuvring space to sequence pro-development polices in a manner that enables them achieve well defined national policy objectives. A corollary of this is the peculiar treatment of poorer countries that must be afforded the requisite support in their quest at participating in the single market. Articles 6, 7, and 29 of the Protocol on Trade in Goods, amongst other provisions, also promote flexibility in the implementation of the AfCFTA.

Article 20 of the AfCFTA Agreement establishes a dispute settlement mechanism (DSM) governing the disputes between state parties. Also, under Article 20, the Protocol on Rules and Procedures on the Settlement of Disputes shall establish a Dispute Settlement Body (DSB). The AfCFTA dispute settlement mirrors the WTO settlement processes and mechanisms.

The consultation phase which is an informal mechanism to resolve disputes between State Parties is also an important stage in the dispute settlement mechanism under the AfCFTA. Despite the fact that the AfCFTA provides a highly judicialised and legalized dispute settlement process, the consultation phase can be utilized by States and this would strengthen the AfCFTA-DSM procedures. However, in our paper, relying on Kuhlmann and Agutu, we argue that 'the adoption of a WTO-inspired DSM by the AfCFTA shows the willingness of African states in favouring a robust system of dispute settlement to ensure compliance with the obligations enshrined in the AfCFTA Agreement.'

Conclusion

These institutional provisions, together with the robust dispute settlement mechanism enshrined in the Agreement, arguably remain profound contributions of the AfCFTA to Trade Law practices and contemporary discourse on *lex mercatoria*. Under the AfCFTA, the principle of variable geometry allows for concerns and agreements to be divided into parts and approached in phases or stages, thereby tailoring the impact of the AfCFTA on the continent. Hence, the principle of variable geometry accentuates the AfCFTA's approach as an incremental or gradualist trade agreement. Furthermore, if the AfCFTA is going to achieve the much-desired economic integration in Africa, it is essential that the projected dispute settlement resolution mechanism is effective. Fasan argues that, for AfCFTA to succeed, African leaders must show the requisite political will to fully implement the Agreement. In the same vein, Herreros states that for the AfCFTA 'to be economically meaningful and politically credible, it is crucial that a critical mass of key economies sign up to the main commitments.'

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[1] Comments are welcome.

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