What Lessons can the AfCFTA learn from the WTO's Dispute Settlement Mechanism's Challenges?

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The Agreement establishing the African Continental Free Trade Area (AfCFTA) represents the collective effort of African states to promote intra-African trade through the formation of a single continental market to allow the free movement of goods and services, investment, and people. The Agreement embodies an ambition shared by African leaders from the dawn of the independence era in the late 1950s, which has been pursued by the erstwhile Organization of African Unity and the current African Union (AU) alike. The mantra has been Africa's success will be fully realized through the political cooperation and economic integration of African states. The United Nations Conference on Trade and Development forecasts an increase in intra-African trade of US$ 34.6 billion (52.3% above the 2022 baseline), upon full implementation of the AfCFTA.

The AfCFTA seeks to facilitate dispute settlement through a Dispute Settlement Mechanism (AfCFTA DSM) that is administered by a Dispute Settlement Body (DSB) through the Protocol on Rules and Procedures on the Settlement of Disputes (the Protocol). The Protocol is modelled after the WTO's procedural text, the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU). The Protocol thus provides for a rules-based system for settling disputes that is familiar to the State Parties. However, drawing inspiration from the WTO's dispute settlement system is hardly an innovation that the AfCFTA can claim. In fact, the dispute settlement mechanisms of another of Africa's regional integration initiatives, the Tripartite Free Trade Area Agreement (TFTA), and each of its composite three regional economic communities (RECs) (COMESA, EAC and SADC) have also drawn heavily from the DSU.

In light of the challenges that have dogged the WTO's disputes settlement system, this piece points to the lessons that the AfCFTA DSM can draw from the WTO's dispute settlement system. The authors first demonstrate some similarities between the two texts and then point to the improvements that the Protocol introduced to the DSU. These innovations will go a long way in avoiding some of the issues that have contributed to malaise facing the WTO's Dispute Settlement Mechanism.

1. **Similarities between the AfCFTA and the DSU**

Article 20 of the AfCFTA Agreement establishes a DSM with the mandate of settling disputes arising between State Parties. Like the WTO organ from which it draws inspiration, the Protocol stipulates that the DSB is composed all representatives of the State Parties. It has the authority to establish dispute settlement panels and the appellate instance, unsurprisingly called the Appellate Body. Like the WTO's DSB, it also empowered to adopt panel and Appellate Body reports, maintain surveillance of and implement the "rulings and recommendations" of the two adjudicative dispute settlement bodies, and authorise the "suspension of concessions and other obligations". Similar to WTO dispute settlement proceedings, the Protocol provides that every dispute will be initiated by formal consultations. If those fail, a panel will be established and if parties wish to appeal a panel report they may do so at the Appellate Body of the AfCFTA. Like the DSU, the Protocol provides that there is a preference for

mutually agreed solutions. It also provides for good offices, conciliation and mediation and for procedures for third parties. The Protocol also contains an arbitration provision that is quite similar to the infamous Article 25 of the DSU. WTO Members have created an interim appeal mechanism called the Multi-Party Interim Appeal Arbitration Agreement(MPIA) to fill the gap left by the defunct WTO appellate review mechanism. The MPIA establishes an arbitration-based alternative appellate review mechanism between the participants under the auspices of Article 25 of the DSU.

Arguably, the most significant import of WTO rules into the Protocol is decision-making by negative consensus for (i) the adoption of panel and Appellate Body Reports and (ii) authorising the suspension of concessions or other obligations. This ensures the automaticity of these decisions. Interestingly, the Protocol is silent on whether panels will be established by negative consensus. If this is a deliberate omission, the entire AfCFTA DSM might turn out to be a toothless dog because the respondent could always block the establishment of a panel and dispute settlement will never see the light of day.

As previously noted, African RECs have relied heavily on the DSU to create their dispute settlement systems so the continuation of this trend in the AfCFTA is hardly surprising. Olabisi Akinkugbe asserts that one of the principal reasons the sub-regional dispute settlement systems have failed is that they have merely transplanted the WTO's Dispute Settlement Mechanism without recognising the socio-economic and political realities of African states. These realities include what James Gathii calls the traditional reluctance of African states to bring cases against each other. We depart from Akinkugbe and Gathii and argue that there is no need to reinvent the wheel. Particularly, if African RECs adopt some provisions of the DSU that have proven to be effective, like the principle of negative consensus. We do nevertheless agree that the incorporation of African socio-political realities into the WTO-styled AfCFTA DSM is crucial or else it, like its sub-regional forbearers, will essentially be nothing more than beautifully drafted legal text.

2. **The innovations introduced by the AfCFTA: lessons learnt from the DSU**

The Protocol seems to capture the lessons learnt from the blocking of the appointment of WTO Appellate Body members by the US, which has resulted in the demise of this body for lack of quorum. The ultimate result is that the WTO's Dispute Settlement Mechanism is slowly grinding to a halt since panel decisions will not be enforceable if a party to the dispute decides to appeal. Thus far, five panel reports have been appealed into the void by parties to avoid the implementation of unfavourable results.

Article 20 of the Protocol has guarded against such internal sabotage by providing an alternative to Appellate Body appointments by the AfCFTA DSB. Ordinarily, the DSB must fill a vacancy at the Appellate Body within two months of that vacancy arising. As with all the other decisions, unless otherwise specified, the decisions of the DSB are made by consensus. This also means that the DSB must appoint the AfCFTA Appellate Body Members by consensus. However, if the DSB is unable to make the appointment within the required two-month period, the chairperson of the DSB, in consultation with the Secretariat of the AfCFTA, will fill the vacancy within one month of the DSB's failure to do so. This fall-back method acts as a safeguard against any State Party potentially paralysing the DSB through blocking Appellate Body appointments.

Article 25 of the Protocol has also resolved the "sequencing problem" contained in the DSU. Currently, the procedural steps and timelines in Articles 21 and 22 of the DSU have the following effect:

- If the responding party requests negotiation on compensation but there is no agreement within 20 days of the termination of the reasonable period of time for implementation (RPT), the complaining party may request retaliation;
- The DSB may authorise retaliation to take place within 30 days of the RPT, which means that the complaining party may retaliate 10 days after the compensation negotiations yield no agreement;
- However, the responding party may object to the level of retaliation proposed by the complainant by requesting an arbitration, which must be completed with 60 days of the end of the RPT;

- But, the complaining party already has the authority to retaliate so it could do so before the Arbitrator makes a decision on the appropriateness of the level of retaliation.

WTO Members have tried to resolve these problems through Sequencing Agreements. However, in more recent years, some Members have refused to conclude these agreements, which has caused considerable upheaval. The solution stipulated under Article 25 of the Protocol is as follows:

- If there are negotiations on compensation, 20 days from the beginning of the negotiations (and not the end of the RPT), the complaining party may request retaliation;
- The DSB will grant the complaining party the authority to retaliate within 30 days of the request to retaliate (and not the end of the RPT);
- If the responding party objects to the level of retaliation, it may request an arbitration, which must be completed within 60 days of the appointment of the arbitrator (and not the end of the RPT); and
- During course of the arbitration, the complaining party may not retaliate.

These procedures essentially provide order to the retaliation proceedings and eliminate the need to conclude a Sequencing Agreement.

3. **Conclusion**

Notwithstanding the similarities between the Protocol and the DSU, African State Parties to the AfCFTA have already improved some aspects of the DSU to avoid the same pitfalls experienced at the WTO. However, there are other potential issues that State Parties are advised to address before WTO history repeats itself at the AfCFTA DSM. For example, the timelines for resolution of disputes under the Protocol essentially mirror those of the DSU. This is concerning since experience has shown that the WTO timelines are unworkable, particularly with the increase in the complexity of disputes and the use of the Dispute Settlement System. That said, perhaps the timelines in the Protocol will not be problematic given the low traffic of disputes in African RECs dispute settlement bodies.

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