Can the Dispute Settlement Mechanism be a Crown Jewel of the African Continental free Trade Area?

By:

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The African Continental Free Trade Area (AfCFTA) and its supplemental Protocol on Rules and Procedures of the Settlement of Disputes (RPSD) emerged at a peculiar time. Multilateralism in general and International Courts (ICs) in particular is in a state of crisis, with states pulling out or threatening to withdraw from international organization and ICs. Indeed, some states have withdrawn from ICs. Brexit is covered in the news on a daily basis. Rwanda's withdrawal from proceedings before the African Court of Human and People's rights (African Court) and Burundi's withdrawal from the International Criminal Court (ICC), South Africa's threat of withdrawal from the ICC and Philippine's recent notice of withdrawal from ICC are some examples of resistance against ICs. In other instances, States have changed the provisions of treaties establishing ICs, such as the Treaty Establishing the East African Community, to

control or limit the authority of the East African Court of Justice. In extreme cases, Sates acted and suspended ICs. In Southern Africa, the Southern African Development Community Tribunal (SADCT) emerged from suspension after a new protocol that removed individual access to the Tribunal was introduced. Such actions aside, there is increased negative rhetoric against ICs. For example, the US Government Security Advisor John Bolton's recent statement that "We will let the ICC die on its own" is a continuation of resistance to the ICC that begun when African States started to question the legitimacy of the ICC and failed to cooperate and threatened to withdraw on mass from the Rome Statute.

Apart from the crises in the form of resistance and backlash, it is generally known that there is virtual idleness of inter-state dispute settlement mechanisms. The situation in Africa is no exception. African states rarely litigate against each other in African ICs. Notwithstanding this the AfCFTA's Protocol on Rules and Procedures of the Settlement of Disputes is likely to soon come into force since the requisite number of ratifications for the AfCFTA has been reached. The settlement of disputes under the AfCFTA will be governed by the Protocol on Rules and Procedures of the Settlement of Disputes which provides for the establishment of Dispute Settlement Body with authority to establish panels to receive and determine interstate trade disputes. Thus, individuals do not have direct access to the DSP. Therefore, this raises the question: Is this mechanism attractive and would states use it? It is premature to predict whether or not states will use it. However, we can safely say that dispute settlement mechanisms have more cases when they provide access to individuals. The regularly functioning dispute settlement mechanism in Africa are those that allow individuals direct access (EAC and ECOWAS). Indeed, litigation has seen significant use in regional international Courts (RICs) in Africa primarily initiated by individuals rather than by states. Moreover, the overwhelming majority of cases before African ICs have been non-economic in nature. The relatively most active RICs in Africa have transformed from being economic courts to human right courts (EACJ and ECOWAS). This is perhaps because the business community have other options than regional courts to resolve disputes. Similarly, states have at their disposal different options to solve disputes.

Therefore, the DSB established under the ACFTA is a welcome addition to the existing options.Nothing is therefore lost, and much can be gained by allowing states to use the dispute settlement mechanism under the ACFTA. It should be noted that, international law merely requires disputes to be resolved peacefully. It does not force states to follow certain type of dispute settlement mechanisms among the available options. The ACFTA dispute settlement system has provided different options for dispute settlement such as arbitration, conciliation, good office and mediation, if the states prefer such mechanisms. A formal panel under the DSB will be established if the parties fail to resolve their disagreement using one of the dispute settlement options. Unless the parties to the dispute fail to resolve their disputes through the other available options, the DSB remains optional. However, the DSB's jurisdiction becomes compulsory if the parties fail to resolve their dispute through the other available options, and the parties are obliged to participate in the proceedings. The compulsory jurisdiction of the DSB means thatthe respondent state may not block the adjudication procedure and this arguably alters disputes into law enforcement through surveillance of implementation of recommendations and rulings by the panel.

However, the ACFTA in general and its dispute settlement system in particular will succeed only if States are willing to support it and allow the participation of the private sector. Sensitization of the system is required so that the private sector and the legal profession in Africa are aware of the pros and cons of the system. On this basis, the business community can pressure member States to negotiate for the inclusion of, inter alia, private access to the DSB. More active involvement of the private sector and lawyers in terms of advocacy is required to ensure predictability to trade through the smooth functioning of the DSM. Thus the success of the SDB will arguably be based on its visibility and on the confidence that a high quality report will be issued within a reasonable period of time. Time will tell whether the dispute settlement mechanism will become a crown jewel of the AfCFTA as it has been for the WTO.

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