What the African Continental Free Trade Agreement Protocol on Dispute Settlement says about the culture of African States to Dispute Resolution

By:

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An effective Dispute Settlement Mechanisms (DSM) upholds a rules-based trade regime; enunciates, clarifies and develops the jurisprudence of its constituent trade agreement; and also ensures predictability in the trading regime. Article 20 of the African Continental Free Trade Agreement (AfCFTA) establishes the DSM. The AfCFTA Protocol on Dispute Settlement ("Dispute Protocol") provides for the rules and procedures for the settlement of disputes. Unlike the majority of the African regional economic community courts that are modelled after the Court of Justice of the European Union, the AfCFTA-DSM follows a handful of other regional judicial bodies – such as the Southern African Community Development Community (SADC) and the Tripartite Free Trade Area Agreement

(TFTA) – that are modelled after the World Trade Organization (WTO) dispute settlement mechanism.

The Dispute Protocol establishes a Dispute Settlement Body (DSB) and provides for the settlement of dispute in a transparent, accountable, fair, and predictable way that is consistent with the provisions of the AfCFTA. The Dispute Protocol applies to disputes between State Parties relating to their right and obligations, subject to such special and additional rules and procedures on dispute settlement contained in the AfCFTA. Perhaps to guard against forum shopping, where a State Party has initiated a proceeding under the Dispute Protocol regarding a specific matter, the State Party shall not invoke another forum for dispute settlement on the same matter. The AfCFTA-DSM will be nestled in a culture of African States that does no pursue formal settlement of trade disputes before judicial or quasi-judicial bodies. Given the dearth of core economic integration disputes before the African regional economic community courts; and, the failure of previous WTO-like DSM transplanted at the regional level, what potential if any, has the AfCFTA-DSM to chart a new course? Similarly, what can we garner about the culture of African States towards trade disputes?

A Past Culture of Non-Litigation of Trade Disputes

There are at least five (5) functional regional economic community courts in Africa. With the exception of the OHADA Court of Justice and Arbitration, all the others have been mostly active in relation to their expanded jurisdiction in human rights violations arising from the Member States. The fault here is not that of the regional courts. Rather, the Member States of the respective regional economic communities retain exclusive power to sue in relation to disputes on economic integration. The downside is that, in the majority of cases, they have simply not approached the courts. The East African Community Court of Justice (EACJ) appears to be setting a new precedent though. The recent decisionof the EACJ is indicative of this potential shift. This isolated case notwithstanding, the non-litigious culture in relation to regional trade disputes remains pervasive among African states.

At the WTO level, the record of African-state initiated disputes maps on to the culture described in this article. Disputes involving African states have not

proceeded beyond the Consultation phase of the WTO-DSM. The Consultation stage – which is also available under the AfCFTA-DSM – is an informal stage that encourages settlement between the parties within a time framework. As Regis Simo laments in his recent post on Afronomicslaw blog, "the record of trade disputes in African RECs continues to be blank, and likely will remain so for quite some time". While it may be contended that the low record of formal intra-African trade has contributed to the near absent record of economic integration disputes, the elephant in the room remains the embedded non-litigious culture of African states towards regional trade disputes between and among themselves. This fact is further evident in previous WTO-like DSMs in Africa where the Member States have simply not engaged with the dispute settlement regime.

Failure of Previous WTO-like DSM at the Regional Level

The AfCFTA-DSM is not the first time that the WTO model has been adopted in Africa. First, the original Southern African Development Community (SADC) Tribunal which was suspended provides the earliest example that was modeled after the WTO. Joost Pauwelyn has examined this overlap while explicitly acknowledging the complexity of judicial regime it breeds. Pauwelyn predicted that "overlaps between international courts and tribunals will increase", but also cautioned that treaty negotiators explicitly regulate the question of overlap and choice of forum. Second, the Tripartite Free Trade Area Agreement (TFTA) between three regional economic communities in Africa – COMESA, EAC and SADC – preceded the AfCFTA. The TFTA's dispute settlement mechanism (Part IX, Article 30) is also based on the WTO model. Although the TFTA is yet to be fully ratified, one is left surprised that despite the abundance of practices from the regional courts, the negotiators have looked in a completely different direction for an AfCFTA-DSM. In essence, as far as economic integrated related trade disputes are concerned,tribunals and WTO-like DSMs in Africa have a worrisome culture of non-engagement. The rules-based dispute mechanism under the AfCFTA exacerbates this problem.

Will the AfCFTA change the Culture of African States towards formal Dispute Resolution?

The imperative to re-align trade regime in the continent is a bold decision. So is the potential for the AfCFTA-DSM to provide a genuine way forward to forge an engaged dispute resolution that is relevant for integration. As a believer in the African integration project, I will be remiss to dismiss the AfCFTA-DSM conclusively as another instance of “regime boosting” which according to Fredrik Söderbaum “implies a vivid game of rhetorical and symbolic regionalism, but without implementation words.” The challenges abound. Yet, I remain cautiously optimistic about the efforts of African leaders to get it right. At a time when multilateralism is "waning", Africa is gaining momentum on integration font. The narrative for African states in economic integration has never aligned with the mainstream. Perhaps, the AfCFTA-DSM will signal the beginning of a shift in culture towards formal settlement of economic integration disputes.

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