Evaluating the Dispute Settlement Mechanism of the African Continental Free Trade Agreement

By:

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The recently negotiated Agreement for the Establishment of the African Continental Free Trade Agreement, (AfCFTA), is almost a carbon copy of the dispute settlement understanding of the World Trade Organization (WTO). This wholesale adoption of the dispute settlement system established by those WTO rules is premised on the desire to make the AfCTA's dispute settlement system as successful as that of the global trading system. This adoption is also informed by a desire to judicialize trade disputes in a context in which African states have been reluctant to litigate trade disputes between themselves. It remains to be seen whether this transplantation of WTO rules into the AfCFTA is likely to replicate the success of the WTO dispute settlement system, particularly in introducing predictability and certainty in the new continental trading system that is now certain to enter into force. A lot of political will among AfCFTA member states will be required to establish a viable secretariat, identify panelists and appellate body members and most

importantly, to have States to use the new system.

To make this dispute settlement efficacious when it is activated, several challenges will have to overcome. First, the transplantation of these rules is inconsistent with the overwhelming preference of business actors not to judicialize their trade disputes in Africa's international trade courts. Instead, these actors overwhelming prefer to non-judicial resolution of their trade disputes. When these actors judicialize their disputes, they tend to do so in national courts where since national courts can issue remedies that have a record of enforceability. As such, transplanting WTO rules that have been effective in that context, is itself insufficient to trigger potential litigants to use this new judicial mechanism to resolve their trade disputes in Africa.

A second challenge that will face this new system of dispute settlement in the AFCFA is that unlike the WTO system, it is not an exclusive dispute resolution system. Article 3(2) of the AfCFA's Protocol on Rules and Procedures on the Settlement of Disputes provides that any special additional rules and procedures established in other parts of the AfCFTA for resolution of disputes prevails over the rules in the Protocol on Rules and Procedures on the Settlement of Disputes.[1] Therefore and quite significantly, a major difference between the AfCFTA and the World Trade Organization's Dispute Settlement systems is that dispute settlement in the WTO does not have competing mechanisms for resolution of disputes. Under Article 23(1) of the WTO's DSU, it is the sole forum for the authoritative determination of disputes among WTO members. The availability of additional mechanisms for dispute settlement in the AfCFTA, is an acknowledgment that judicial settlement of disputes is unlikely to be the exclusive mechanism for resolution of most trade disputes.

Third, the fact that business actors overwhelmingly prefer non-litigious strategies to resolve trade disputes and to promote their interests closely mirrors the reluctance of African governments to resolve trade disputes within Africa in international courts as Olabisi Akinkugbe's and Mihreteab Tsighe's contributions to this symposium argue. It is unclear therefore why the drafters of the AfCFTA assumed that the traditional reluctance of governments and business actors to litigate should be any different under the new treaty. The experience with sub-regional trade courts like the East African Court

of Justice, (EACJ), and the Economic Community of West African Community Court of Justice, (ECCJ), is that the most organized groups at a sub-regional level are the ones likely to use these courts. Thus it is not surprising that it is human rights actors that have repeatedly used these sub-regional courts. Therefore the Dispute Settlement Mechanism established by the AfCFTA is likely to be used by African subsidiaries of multinational corporations who do business across Africa. We have already seen the tobacco multinational, BAT institute a successful suit against Uganda in the East African Court of Justice. Tobacco companies have shown a particular propensity to litigate across many types of courts at the national and international level. BAT's case against Uganda in the East African Court of Justice shows that multinational actors can use international courts to leverage the best tax and regulatory deals made available by international rules when national rules do not favor their interests. This type of arbitrage will likely be more attractive to multinational business actors at the continental level.

Another challenge is raised by this adoption of a WTO-type system of dispute settlement is in a context where African states have no history of litigating trade issues against each other. In light of the crisis of trade multilateralism particularly in the continued viability of the Appellate Body of the WTO, how can we explain the AfCFTA's commitment to this vision of dispute settlement? I have some thoughts that might provide possible explanations for the AfCFTA's drafters' adoption of the WTO's dispute settlement system notwithstanding the distinctive historical, legal and political contexts in Africa that have so far prevented the establishment of a highly legalized trade dispute settlement system. The adoption of a WTO style dispute settlement system in my view reflects the preferences of a small set of African states and technical experts, favoring a strong system of dispute settlement as a guarantee of ensuring compliance with the commitments embodied in the AfCFTA. This commitment to ensuring the AfCFTA does not become dead-letter law prevailed over a more gradualist approach that would have appended AfCFTA dispute settlement to a new trade chamber of the African Union's African Court of Human and Peoples' Rights. By establishing a new dispute settlement system at the continental level, disconnected from the already established judicial architecture of the African Union, the AfCFTA's dispute settlement is likely to become irrelevant if AfCFTA signatory states do not also explore non-litigious settlement of trade

disputes to complement it. In short, by failing to selectively incorporate the successful elements of the global trading system within the existing institutional architecture of the African Union[2], the likely success of the dispute settlement system of the AfCFTA will be constrained by that isolation. In addition, the lack of local relevance and rootedness as well as the high start-up and administrative and bureaucratic costs of an entirely new and parallel system of dispute settlement in Africa raises resource challenges in a context where contributions to existing regional economic communities from African States has not always been timely or sufficient to fund their operations.[3] The Kagame-led institutional reforms of the African Union, including self-financing of the Union will hopefully be enforced to create the necessary resources to implement the AfCFTA. A recent US $ 4.8 grant from the African Development Bank given to the African Union to jump-start the AfCFTA is likely to fill that gap in the short-term.

Even setting aside funding issues, the failure to creatively blend the dispute settlement mechanisms that already exist at the sub-regional level with what has worked with disputes in the global trading system is perhaps the biggest handicap the new dispute settlement system established by the AfCFTA is likely to suffer. There is certainly no harm in trying to out this system, but because most of the experience and expertise in handling trade disputes and matters has been at the sub-regional level, the new AfCFTA Dispute Resolution Mechanism has a lot to learn from the sub-regional level.

Finally, one of the most significant advances the AfCFTA's Protocol on Rules and Procedures on the Settlement of Disputes is that it recognizes the availability of other mechanisms of resolution of trade disputes. The relatively successful experimentation with mechanisms for identifying, reporting, resolving, monitoring and eliminating NTBs at the sub-regional levels has been adopted in the AfCFTA. The strength of this mechanism is that it gives private actors, economic operators, national focal points responsible for removal of NTBs, REC Secretariats, academic researchers and other interested partiesthe opportunity to report NTBs. This mechanism also obliges institutions of the AfCFTA to make progress towards their elimination. The fact that the NTB mechanism is triggered, not by States, but rather by non-state actors including traders is likely to replicate the positive experience in the sub-regions and that is a good

thing. In addition, a variety of AfCFTA institutional bodies will play an important role in dispute settlement. As I have argued in a background paper on the implementation of the AfCFTA for the Economic Commission on Africa 2018 report, Assessing Regional Integration in Africa VII, the AfCFTA could borrow a leaf from the Common Market for Eastern and Southern Africa (COMESA) for non-litigious settlement of disputes.[4] Non-litigious methods of resolving trade problems are an important feature of Africa's Regional Economic Communities.[5] For example, in its February 2014 COMESA Council of Ministers meeting, the COMESA Secretariat was empowered to participate in verification missions to investigate the removal of contentious NTBs which the State that had imposed them argued were justified as being supported by legitimate policy goals. In three instances, the COMESA Secretariat facilitated the hiring of consulting firm KPMG to undertake a cost assessment of three contentious NTBs relating to COMESA's rules of origin. The involvement of a third party facilitator is incorporated in COMESA's NTB Regulations. These NTBs were soap from Mauritius to Madagascar; palm oil from Kenya to Zambia and fridges and freezers from Swaziland to Zimbabwe.[6]

COMESA has another innovation that could be replicated in the AfCFTA. COMESA member states that have a complaint against another member state are required to write to that member state requesting additional information. This communication has to be copied to the COMESA Secretariat. If the member state from which additional information is sought does not respond, the Secretariat then writes to the Member State seeking a response. Where there is no resolution, the matter is taken up by the COMESA Committee on Trade and Customs.[7]This committee has authority to receive complaints on COMESA treaty violations. The Committee on Trade and Customs may then submit a report to the Council of Ministers or to the COMESA Secretary General requesting investigations to be undertaken. The COMESA Treaty empowers the Council of Ministers to make binding decisions on Member States in order 'to promote the attainment of the aims of the common market.'[8]Thus even though COMESA has a Court of Justice, there are many other ways in which disputes are successfully resovled.

In conclusion, the AfCFTA can learn both from the experience of the WTO's dispute settlement system as much as from the non-litigious settlement of

disputes from Africa's sub-regional systems. In addition, the experience and expertise of the sub-regional courts in Africa should inform how the AfCFTA's dispute settlement system develops and evolves. If nothing else non-litigious approaches to dispute settlement should be understood to be bargains made in the shadow of the law – that is law is not entirely irrelevant – settlement by diplomacy happens in the shadow of these legal commitments. It is therefore inapposite that African or even ASEAN trade and investment relations must be understood as deviant forms while in fact they are legitimate forms of legalization. It is not always analytically useful to relativize non-European dispute settlement using the baseline of European or courts overwhelmingly used by developed/Western economies.

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[1]An example of such special additional rules and procedures can be found in Annex 5 to the Agreement for the Establishment of the AfCFTA titled, Non-Tariff Barriers. It provides for the establishment of a mechanism for identifying, reporting, resolving, monitoring and eliminating Non-Tariff Barriers, (NTBs). This mechanism unlike the AfCFTA's Protocol on the Rules and Procedures for Dispute Settlement, makes this mechanism accessible to States Parties' Economic Operators, National Focal Points, REC Secretariats, academic researchers and other Interested Parties. The NTB Annex therefore makes available a variety of non-judicial mechanisms including an independent expert or person agreed upon by the parties in addition to the AfCFTA NTB Coordination Unit which will be responsible for identifying, reporting, resolving, monitoring and eliminating NTBs.

[2]The only exception in the AfCFTA that seeks to integrate existing mechanisms is the NTB Annex that provides for exhaustion of NTB procedures prior to the resorting to those under the AfCFTA.

[3]It may very well be that the small set of States and technical experts who supported this new dispute settlement system regarded it as one of the spoils to be distributed, perhaps to their benefit, upon entry into force of the AfCFTA.

[4]James Gathii, "Institutional IssuesRelated to Successfully Implementing the African Union's Continental Free Trade Agreement," Background Paper Prepared for the African Economic Commission's Eighth Edition of Assessing African Regional Integration Report, February 2017.

[5]James Gathii, “The Variation in the Use of Sub-Regional Integration Courts Between Business and Human Rights Actors: The Case of the East African Court of Justice,” 74 Law and Contemporary Problems (2014)

[6]COMESA Secretariat, All But Four Non-Tariff Barriers Resolved, June 10, 2016 available at http://www.comesa.int/all-but-four-non-tariff-barriers-resolved/

[7]This committee is established under Article 13(k) of the COMESA Treaty.

[8]Article 9(2)(g) of the COMESA Treaty. See also Article 9(2)(d) empowering the Council to “…issue directives, take decisions, make recommendations and give opinions in accordance with the provisions of this treaty.” As noted above, another institutional feature in COMESA is the Inter-Governmental Committee that comprises of Permanent/Principal Secretaries from COMESA Coordinating Ministries in all Member States that plays an educational role in NTB issues.

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