Evaluating the Conciliation Dispute Settlement Mechanism of the African Continental Free Trade Agreement through the lens of Timor-Leste Australia

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Introduction

The dispute settlement mechanism for the African Continental Free Trade Area is fodder for academics. The Agreement establishing the AfCFTA entered into force on 30 March 2019 after twenty-four countries deposited their instruments of ratification with the African Union Commission. The Agreement establishes a Dispute Settlement Mechanism that seeks to settle state-level disputes. Such mechanism is to be administered in tandem with the provisions of the Protocol on Rules and Procedures on the Settlement of Disputes (the Protocol). The Protocol aims at providing a 'transparent, accountable, fair, predictable, and

consistent dispute settlement process.' Article 8 of the Protocol permits disputing state parties to *voluntarily* undertake conciliatory measures in a bid to amicably resolve the dispute in the event consultations, which are not strictly compulsory according to the language of Article 6(6), fail. In the event such conciliation retrogresses, the Complainant may request for the establishment of a panel. What follows such request for a panel is technically similar to what happens at the World Trade Organization Dispute Settlement Board.

Conciliation is an alternative (to litigation) dispute resolution process where a commissioner meets with the parties in a dispute, and explores ways to settle the dispute by *mutual* agreement. In so much as it is often thought to be synonymous to mediation, it is a dispute settlement mechanism available to state-state disputes only. Moreover, a conciliator is obligated to provide a report of the process, an obligation not expected of a mediator. It is noteworthy that, unlike the United Nations Convention on the Law of the Sea (UNCLOS), the AfCFTA Agreement has no space for *compulsory* conciliation as a dispute settlement mechanism. It is instead based on *voluntary* and *mutual* consent. UNCLOS in its Article 11 of Annex V mandates its disputing parties to resort to mandatory conciliation as a way of peaceful settlement of disputes. This mandatory conciliation has been attributed to the successful conclusion of the Timor-Leste-Australia maritime boundary dispute, the first-ever conciliation proceedings under the UNCLOS. A background analysis of the case is imperative.

Timor-Leste-Australia conciliation: a background analysis

Australia and Timor-Leste are neighbours whose geographical separation is the Timor Sea. The Timor Sea treaty establishes their permanent maritime boundaries. The two are to develop together the Greater Sunrise gas fields in the Timor Sea and share the benefits accruing from such development. The Greater Sunrise oil and gas fields' special regime provides a revenue-sharing ratio depending on the location of the pipeline. If the pipeline is to be located in Dili (in Timor-Leste), Australia: Timor-Leste revenue ratio will be 30:70. However, if Darwin (Australia) is to be the location of the pipes then the ratio will be 80:20 in favour of Timor-Leste. Australia preferred the latter, and Timor-

Leste the former. The rationale for such support by Timor-Leste is that, *inter alia,* the pipes' location in Timor-Leste will lead to job opportunities in the country. The long and acrimonious dispute between the two states was about a maritime boundary. UNCLOS, to which both countries are parties, permits each state to own 200 nm exclusive economic zone. However, the nearest distance between the two disputing parties is about 243 nm, thus the need to delimit the overlapping areas. The Timor treaty permits the disputing parties to first negotiate between themselves, and in the event such negotiations do not bear fruits within six months of either Party notifying the other of the existence of the dispute, either Party (or jointly) may submit a request for conciliation with the Conciliation Commission. Noteworthy it is that during the negotiations prior to conciliation, Australia committed espionage by planting 200 covert listening devices in the Dili cabinet office in order to give Australia an upper hand during the negotiations. Two months preceding Timor-Leste's independence, Australia unilaterally declared that no dispute regarding its maritime boundary shall be arbitrated or adjudicated. However, after its independence, Timor-Leste initiated compulsory conciliation proceedings against Australia under Annex V section 2 of UNCLOS. Australia submitted to the Conciliation Committee's jurisdiction under protest. Of equity and dirty hands? The Committee unanimously found it had jurisdiction. What followed was a successful conciliation.

Strengthening AfCFTA's Conciliatory Dispute Settlement Mechanism: Lessons from Timor-Leste-Australia

Despite conciliation not having a binding effect on the disputing parties, if AfCFTA is to strengthen its conciliatory dispute settlement mechanism then the following ought to be considered:

1. **Preference to non-litigious settlement of trade disputes:** African countries hardly judicialize their trade disputes in the international trade courts. In the international realms, a preference is made by trade parties to non-judicial dispute settlement. It is a wonder, therefore, that despite this fact that is well within the disposal of AfCFTA legislators, the Protocol provides for panel proceedings in the event of failed consultations. Consequently, arbitration, as per Article 27, is subject to *mutual* Question is: if a respondent does not want to conciliate, and on the flipside, the

claimant can neither litigate nor the two parties come to a mutual agreement to arbitrate, what remedy is available to claimant? The potential benefit of AfCFTA preferring non-adversarial dispute settlement, conciliation in particular, over litigation, is that the Conciliation Committee has the freedom to bring to the attention of the disputing parties a careful but lethal concoction of legal, political, economic, and diplomatic issues, having regards to the 'legal skills, backgrounds, and varying approaches at different stages of the proceedings,'a comfort non-existent in the adversarial legal systems.

2. **Have provisions on compulsory conciliation:** Conciliation is ordinarily voluntary and mutual. Despite Australia not wanting to submit to the jurisdiction of the Conciliation Committee, it had no option but to do so since UNCLOS permits a party to a dispute to seek such jurisdiction of the Committee *without* the consent of the other party to the dispute. This meant that Australia, being a signatory of UNCLOS, had to be compelled to participate in the conciliation proceedings. The compulsory nature of the conciliation played a central role in resolving the dispute. AfCFTA's conciliatory measures are wholly voluntary and mutual consent must be obtained. As stated above, African countries do not litigate against each other on trade issues. This means that in a dispute where a party does not fancy conciliation and the other does not equally want to litigate, dispute resolution can easily be stalled. Therefore, in response to the question raised in (a) above, just like the UNCLOS, it is imperative that the Protocol introduces compulsory conciliation as a way of dispute resolution.
3. **Time factor:** UNCLOS permits parties to a dispute to conciliate within a span of one (1) year. On the other hand, in AfCFTA, **'**when conciliation is entered into after the date of receipt of a request for consultations, the complaining party must allow for a period of sixty (60) days after the date of receipt of the request for consultations before requesting the establishment of a Panel. However, the complaining party may request for the establishment of a Panel during the sixty (60) day period if the State Parties to the dispute *jointly* consider that the conciliation process has failed to settle the dispute.' The short time limit in both legal instruments aids in mounting pressure to both parties to a dispute and the Committee to quickly come up with a workable proposal. Of short time frames and good results! However, whereas the time limit for conciliation in AfCFTA is

fairly short and commendable, it is highly improbable that state parties to a dispute will resolve their dispute in under one (1) year, if the duration of the Timor-Leste-Australia dispute settlement is anything to go by. Besides, African countries have a negative narrative of dragging their disputes. As such, if conciliation is to be a success and not a mere formality, the Protocol can make a fairly reasonable time limit of one (1) year and strictly adhered to by both state parties and the Committee.

4. **Competence of the Conciliatory Commission:** In AfCFTA, the Secretariat is expected to maintain an indicative roster of persons *willing* and *capable* of serving as panellists. Each State Party is to annually nominate two individuals to the Secretariat for such inclusion, indicating area(s) of expertise in, *inter alia,* law and international trade. Such nomination should be strictly objective, reliable and based on sound judgement. This sounds good on paper, however, if Africa's antiquity of chronic cronyism, nepotism, tribalism and all illism is anything to go by, then composition of an ideal Panel as anticipated by the Protocol is a needle in haystacks. Therefore, in order to get the competent conciliators, then African countries should maintain objectivity in their nominations in order to have an active, united, available, and highly qualified conciliators.
5. **Strong political will:** Despite Australia submitting to the jurisdiction of the Committee under protest, once the conciliation began it showed a strong political will to ensure an amicable solution was the end-result. Similarly, if AfCFTA conciliation is to be successful, a strong political will for its success by the parties is imperative. Anything shy of that during the process will be mere formality.

Conclusion

Having regards to the above analysis, it is evident that the legal framework surrounding state-level dispute settlement in AfCFTA is fairly weak in comparison to UNCLOS. One may advance a theory of lemons and oranges between the two legislative instruments, but one unifying factor is that both are citrus fruits i.e. both UNCLOS and AfCFTA aim at resolving their state-level disputes through conciliation. Therefore, it is imperative that the dispute settlement mechanism in AfCFTA, having been fodder for intelligentsia that have hardly proffered any pragmatic solutions, draws the above propounded lessons from UNCLOS in order to strengthen its own conciliation process and

diminish its preference for litigious approach to resolution. The rationale for such proposal is that African states' *brotherhood* mantra is deeply entrenched and hardly do 'brothers sue brothers.' However, brothers can talk and resolve their dispute if given the conducive atmosphere to do so. This is what conciliation aims at achieving. And the stronger the foundation it has the more the confidence states will have in it, for trade disputes among states are inevitable.

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