FREE TRADE: A PIPE DREAM FOR AFRICA?

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September 27, 2019

Man is selfish! Laws are therefore created to curtail those selfish desires and laws are either instruments of change or they follow change. The AfCFTA seeks to change the manner in which African states trade with each other. The existence of the AfCFTA is what Roscoe Pound termed using the law as a tool of social engineering. The African Union in creating the AfCFTA intended to promote, facilitate and eventually experience free intra-African trade. This review appreciates the AfCFTA but seeks to criticize a loophole it has created.

The Loophole Created by the Agreement

African states continue to have disjointed trade due to the trade barriers erected amongst themselves. The AfCFTA created a loophole in using the word progressively in Part II, Article 4. It expects African states to progressively get rid of trade barriers and liberalize trade. The AfCFTA has established itself on substantial liberalization. This means that tariffs are to be lowered to a certain percentage. The African Ministers of Trade met in 2017 and decided that trade

should be liberalized to a maximum of 90%; leaving sensitive goods with 7% and 3% for excluded products. The main focus is on the 90% that has a time frame of 5-15 years to allow the least developed countries to progressively reduce their tariffs. The loophole in this is that the AfCFTA has not addressed how the 90% tariff reduction should be implemented. Reduction may be in two ways: i) reduction of tariff lines in products or ii) total reduction on a states' tariff imports. The former will promote tariff reduction in all sectors which then leads to reduction in almost if not all sectors. The latter however will cause states to lower tariffs in goods that do not matter the most to them. This eventually leads to protectionist trade ideas. The AfCFTA has the possibility of promoting growth if it leaves no stone unturned and works towards growth. Laws must therefore be unequivocal in what they intend to achieve. Words must be carefully selected for easy interpretation, to seal and eliminate any possible ambiguities. A word such as progressively will advance protectionist ideas among the states. The chances are close to nil of having the African countries working together to progressively get rid of trade barriers. Most African states with the exception of few depend on agriculture for trade. As Thomas Hobbes said, "life is short, nasty and brutish." These states will want to keep the competition at bay. Thus resulting in extreme tariffs whether non-tariff or not. Surprisingly, African states have for a long time been expected to progressively get rid of their trade barriers. In East Africa, the East African Community Common Market Protocol came into force on 1st July, 2010. It aims at enhancing free trade among the six East African states progressively under Article 2(5). East African citizens are still faced with hurdles such as multiple road blocks, documentation procedures and even delays at the weighbridge. As late 1st July 2018, Tanzania filed a complaint against Kenya with regard to a Non-barrier to trade that they have imposed. The Kenya Revenue Authority increased the cost of entry clearance by introducing the Single Custom system. The cost of clearance of bulk containers has gone up from USD $ 1506 to USD $ 8500. These types of barriers are hindrances to free movement of goods as envisioned by the East African Community Common Market Protocol. The Regional Economic Community should not be facing such challenges after eight years of having the Protocol. African states have managed to trade under African Growth and Opportunity Act (AGOA). This has been made possible by the use of incentives for an African state to be considered eligible for trade under AGOA. In addition to this, it forces African states to work on a few things

in their states for continuous eligibility. The AfCFTA should have included incentives for states that eliminate trade barriers in line with the time lines they it would have set.

Interpretation under the Vienna Convention on the Law of Treaties

Boosting Intra-African Trade (BIAT) is one of the travaux preparatoires of the Agreement. According to Article 32 of the Vienna Convention on the Law of Treaties, interpretation may be done by looking into the preparatory works. The BIAT gives time lines as to when certain acts must be implemented to improve trade among African states. The BIAT in its Action Plan categorizes duties into short term (3 years), medium term (3-7 years), and long term (beyond 7 years). One of the duties that African states have under the BIAT is to eliminate trade barriers; non-tariff barriers, tariff barriers and quantitative restrictions to trade in food. The duty is regarded as short term, meaning it should have been eliminated within three years of coming into force of the BIAT. One would expect for these trade barriers to have been eliminated by 2015. However, states have been grappling with issues of food security due to trade barriers erected by other states. Even if one was to rely on the Convention on the Law of Treaties to interpret the AfCFTA, this will not offer maximum results if the AfCFTA has glaring loopholes that may eventually stall the process.

Conclusion

The Agreement has a loophole that should be addressed. This loophole will unapologetically be abused by many states to stall the elimination of trade barriers. It should address the issues of progressively eliminating tariff barriers. The East African Community has been used as an example to bring out the need of the use of binding language in the Agreement. The East African Community has taken a long time to implement free movement as envisioned in the Protocol. Therefore, action ought to be taken as soon as possible to seal this loophole. Without this, free intra-African trade is and will remain to be nothing but a pipe dream.

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