The Africa Continental Free Trade Area and the SPS Agreement: Insights for Africa

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Introduction

Agreements under the World Trade Organization (WTO) form a founding slate on which Regional Trade Agreements (RTAs) work and have since been domesticated in the Agreement establishing the African Continental Free Trade Area(AfCFTA). These Agreements stem from the Marakesh Agreement and lay down various obligations of member states to the WTO. This blog seeks to appraise the Sanitary and Phytosanitary (SPS) Agreement that provides measures to protect animal or plant life or health within the member's territory from risks. It does this with the hindsight that this Agreement greatly impacts the understanding of SPS measures taken in the African Continental Free Trade Area (AfCFTA).

This blog intends to start a conversation on how important the salient obligations and features on equivalence and harmonisation of SPS measures in the SPS Agreement are to Africa. I argue that Annex 7 of the Agreement establishing the AfCFTA is a copy-and-paste of the WTO SPS Agreement, disregarding Africa's unique challenges and opportunities. Whereas the African Union SPS policy framework lays down various ways of operationalising the measures in the AfCFTA, it does not consider the effects of the replicated WTO SPS agreement in law, implementation and interpretation in Africa. This blog, through desktop research, will do so by firstly appraising the SPS Agreement. It will proceed to analyse the Agreement in light of the AfCFTA, emphasising the challenges around equivalence and harmonisation while offering remedies. Finally, it will conclude by paving a way forward for a required SPS synergy.

The AfCFTA

The African Continental Free Trade Area (AfCFTA) has caused great delight for most African academicians and policymakers, bearing in mind that it is the biggest trading bloc and is now signed by 54 of the 55 countries on the continent. The AfCFTA aims to create a unified continental goods and services market composed of approximately 1.3 billion African consumers, with a combined GDP of over USD 3 trillion. Large trading systems have shown considerable success. The North American Free Trade Agreement, for example, has been a major success story for Canada since it entered into force on January 1, 1994. Canada's trade in merchandise with its NAFTA partners has almost doubled since 1994, reaching 573.4 billion Canadian dollars in 2004.

Africa is a major agricultural hub and supplies its products to most parts of the world. Agricultural production has been up 160% over the past 30 years, far above the global average of 100%. Eighteen Sub-Saharan African countries have reached the Millennium Development Goal's first target of halving the proportion of people who are hungry. To eliminate agricultural and food non-tariff barriers, the AfCFTA contains specific provisions for Sanitary and Phytosanitary (SPS) measures in Annex 7 of the Agreement establishing the AfCFTA. These include Article 5 on assessing risk concerning harmonisation and equivalence under Article 7. As discussed in the preceding section, these two features are pertinent to the SPS framework and more relevant to Africa because they can be either a hindrance or a catalyst to trade. The two have

been at issue in African Regional Economic Communities, and this blog asserts that if the challenges, including lack of technical capacity and fragmentation in SPS measures that have affected African countries from attaining the high WTO SPS threshold, are not addressed adequately, they will proceed to inhibit the SPS operationalisation of the AfCFTA.

Salient Features of the SPS Agreement

The roots of the WTO SPS agreement can be traced as far as Article XX (b) of the General Agreement on Tariffs and Trade (GATT), which allows governments to act on trade to protect human, animal or plant life or health, provided they do not discriminate or use these measures as disguised protectionism. In light of this, the WTO has two specific agreements meant to protect human, animal, and plant life as applied to its members: the Agreement on Application of Sanitary and Phytosanitary measures (SPS) and the Agreement on Technical Barriers to Trade (TBT). The former is the focus of this blog.

The main goal of the SPS Agreement is to prevent domestic SPS measures from having unnecessary negative effects on international trade and being misused for protectionist purposes. However, the Agreement under Annex 1A fully recognises the legitimate interest of countries in setting up rules to protect food safety and animal and plant health. The SPS measures take the form of laws, decrees, regulations, requirements and procedures that seek to protect plants and animals against pests and disease.

There is a policy framework on sanitary and phytosanitary measures that the African Union has developed to operationalise AfFCTA's Annex 7. This framework is intended to provide guidance and support to the Member States as they strive to implement the Malabo goal of boosting intra-African (and global) trade, promote consistency with the WTO obligations. The framework also seeks to bolster trade by creating an enabling environment for smaller-scale commercial farms and agribusinesses to reach compliance with international SPS standards, as well as helping to facilitate zero-tariff access for exports from and between least developed countries. The framework intends to achieve its goal through the AfCFTA Sub-Committee for Sanitary and Phytosanitary Measures, which takes an overarching perspective and generally monitors and periodically reviews the Framework's implementation. Regional

Economic Communities (RECs) and member states are supposed to incorporate the SPS policy framework in their development plans. However, this framework does not consider the effects of the broader SPS agreement on the AfCFTA, as discussed herein.

AfCFTA and the SPS agreement: Equivalence and Harmonisation

This blog aims to show that the broader SPS agreement obligations on equivalence and harmonisation benefit the AfCFTA; however, the two have been an issue in African Regional Economic Communities. This blog henceforth asserts that various challenges include lack of technical capacity to attain the WTO threshold and fragmentation in SPS measures playing out in the WTO SPS Agreement copied and pasted AfCFTA Annex 7. Whereas the challenges are not completely due to the copied law, if they are not addressed adequately, they will affect the operationalisation of the AfCFTA.

- Harmonisation

Under harmonisation, members must base their SPS measures on guidelines or recommendations from international standards if there is a scientific justification or where a country determines a higher level of sanitary phytosanitary protection based on an assessment of risks would be appropriate. Countries are urged to use risk assessment techniques developed by relevant international organisations in carrying out a risk assessment. This is provided for under Article 8 of Annex 7 of the Agreement establishing the AfCFTA. Article 3 read, together with Article 7 of the SPS Agreement, makes the provision for harmonisation.

Sanitary and phytosanitary measures, specifically harmonisation, have continued to attract considerable attention from African governments such as Kenya, Mozambique, Tanzania and Uganda because they pose significant challenges to smallholder farmers and agro-processors. This is usually based on the fact that most countries do not take due cognisance of smallholder farmers and hence leave their products out due to risk assessment constraints. These constraints include poor pesticides that do not comply with international standards used by these farmers. This catapults the region's equivalence challenges since pesticides that are used in African countries may not be allowed in other countries. Recommended pesticides are also not on the African

Countries national markets. Also, whereas some pesticides are allowed in the US, some are not allowed in Europe and vice versa. This indicates the high threshold under the SPS harmonisation obligation to which the AfCFTA has subjected itself. Most African countries fall short of meeting the standard set by the WTO SPS Agreement. This henceforth calls for proper understanding of Africa's place in negotiating a favourable position for African countries cognizant of the lack of capacity most of these countries have but without compromising the health of human, animal and plant life.

The 'spaghetti bowl' of SPS frameworks in the AfCFTA through the various RECs poses a challenge to the harmonisation goal that could be carried on. However, there have been significant harmonisation efforts across several RECs, such as the Tripartite Free Trade Area of Africa (TFTA), which aims to promote the harmonisation of SPS standards across SADC, EAC and COMESA. However, much work remains to be done to increase capacity for risk assessment on the continent and adopt equivalence measures that meet international standards. This is because of the challenges affecting the success of this Tripartite and hence the AfCFTA: high levels of poverty, huge infrastructure and poor social infrastructure in health, education and social services.

- Equivalence

The SPS Agreement recognises that, due to differences in geographical, climatic and epidemiological conditions prevailing in different countries or regions, it would often be inappropriate to apply the same rules to products coming from different regions and countries. The SPS Agreement allows countries to apply different SPS measures depending on the origin of the products. This is known as equivalence and is provided for in Article 7 of Annex 7 of the Agreement establishing the AfCFTA. State parties are mandated to follow the measures developed by the WTO SPS Committee.

RECs such as the East African Community (EAC) and Southern African Development Community (SADC) are the building blocs of the AfCFTA. However, in the EAC and SADC, the SPS measures have been used to restrict or discriminate against African goods from overseas markets. This is based on the fact that international standards set by the Codex Alimentarius Commission, International Plant Protection Convention (IPPC) and the Office of International

des Epizooties (OIE) on which equivalence under Article 4 is based, have been put at a higher level than what is already required by most global north countries to their benefit. Most African countries already have not met these standards and are negatively affecting their trade. For example, in Kenya, studies have shown that for the country to comply with high EU standards, farmers would have to spend 10 times more than they were previously spending.

As shown above, implementation of these SPS standards is complicated and illustrates the regional challenges, including the lack of technical capacity of African states in general. The challenge of equivalence is one that the AfCFTA will have to struggle with based on the continued divergence of measures that various RECs have been taking individually.

A long history of close working relations between African countries' regulatory authorities is important for equivalence purposes. It suggests that the countries are aware of each other's SPS measures. However, there has continuously been limited intra-African trade, indicating limited working relations across AU member states and RECS. With the AfCFTA in place and its intended goal of increasing intra-African Trade, equivalence levels will be increased due to close working relations that will be established, thus benefitting the African SPS regime. Measures taken by developing countries (which most African countries are categorised as) are provided preferential treatment to participate in the global trading system; henceforth ironic that we uphold a standard that is always tilted for our benefit.

The effects of the SPS agreement on RTAs may be hard to ascertain because they may be catalysts or barriers to trade. However, overall, SPS measures are catalysts for trade because RTAs potentially offer a greater bargaining power for negotiating SPS commitments that facilitate trade, creating conditions for signatory countries to satisfy each other's requirements on adequate levels of safety, thus boosting trade. By analogy, the AfCFTA as an RTA is of importance in ensuring that a viable SPS regime is adopted. However, for a successful sanitary and phytosanitary regime, equivalence and harmonisation must be conceptualised with proper measurement, implementation and monitoring systems.

Recommendations:

Which way for Africa?

All hope is not lost since, as of 2019, four of the eight RECs had operating regional SPS Committees/working groups; four had existing SPS policy frameworks for the region; six had WTO ad-hoc observer status on a meeting-by-meeting basis, and six including SADC, EAC, ECOWAS, IGAD, COMESA and CEN-SAD had CODEX observer status. This shows the bold steps taken but also indicates that half of the AU member states still have a long way to go.

The AfCFTA is a good platform to ominously argue for a proper SPS regime. Various agreements under the WTO have taken more favourable approaches for African countries because they pay attention to their peculiar conditions. For example, The Trade Facilitation Agreement is unique among WTO agreements due to the innovative and flexible trade rules that were influenced by African countries. This shows an interesting interplay with global south ideals. Whereas an amendment to the WTO SPS agreement may not be sought as of now, the AfCFTA provides a platform to negotiate a uniform SPS framework that is cognizant of the above equivalence and harmonisation challenges.

The capacity to take on proper risk assessment is crucial for African products' success and penetration into international markets. However, due to various challenges like limited budgets, risk assessments taken by countries, as illustrated above, have been problematic. African countries, therefore, need to increase their scientific and technical capacity. There is a need to update technical capacity and infrastructure for national-level plant and animal health and food safety conditions. Therefore, the AfCFTA, the AU DREA, through its specialised Technical Offices AU-Inter-African Bureau for Animal Resources (AU-IBAR) and the Inter-African Phytosanitary Council (IAPSC) need to develop better systems that guarantee compliance and a uniform equivalence regime that facilitate access of international markets by African goods.

Conclusion

The various lessons from the performance of the SPS measures in light of the Regional Economic Communities are of great importance to reflect upon in light of the impact the broader WTO SPS agreement framework will have on the AfCFTA. Whereas the Agreement is of great importance in ensuring that

humans, animals and plants are protected, this blog discusses how the Agreement's salient features, specifically equivalence and harmonisation, will play out in the AfCFTA. It also suggests what can be done to harness the potential of the WTO SPS Agreement and the AfCFTA.

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