Symposium: Assessing the First Years of Implementation of the AFCFTA: Challenges and Opportunities — A Critical Analysis of Dispute Resolution under the African Continental Free Trade Area (AfCFTA) Regime

By:

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Introduction

The AfCFTA is the world's largest free trade area since the advent of the World Trade Organisation (WTO). The AfCFTA Agreement entered into force in May 2019. In July 2019, the Niamey Declaration was adopted, launching the operational phase of the AFCFTA.[1] As at August 2024, 48 member states of

the 54 signatories had ratified the AfCFTA. Official trading under the AfCFTA began in January 2021. One of the biggest milestones of the AfCFTA is the launch of the Guided Trade Initiative (GTI) in October 2022. The GTI piloted preferential trading between eight member states namely: Kenya, Rwanda, Cameroon, Egypt, Ghana, Mauritius, Tanzania and Tunisia, for ninety six goods.[2] Currently, under the phase 1 negotiations, the AFCFTA Agreement consists of the protocols on goods, services and dispute settlement. This piece focuses primarily on the Protocol on Rules and Procedures on the Settlement of Disputes. Based on the single undertaking approach, the dispute settlement is a mandatory obligation to all members' states. [3]

Dispute settlement is a central tenet of any economic block as it provides the necessary security and predictability for the state parties. The Architecture of the AfCFTA is reflective of these principles as the AfCFTA Agreement has introduced a rules-based dispute settlement regime which mirrors the WTO's Dispute Settlement Understanding. The success of the AfCFTA is highly dependent on the effectiveness of the dispute settlement mechanism. In considering the Dispute Settlement Mechanism (DSM) of the AfCFTA this piece highlights the salient features of the DSM and explores some of the challenges that should be anticipated. This piece fronts the argument that the AfCFTA should have diverged from the traditional dispute settlement mechanisms adopted by the WTO. Further, it attempts to answer the question on whether African States will utilize the DSM given the current status quo of the dismal use of the WTO's DSM.

The AFCFTA's Dispute Settlement Mechanism Framework

The AfCFTA Agreement establishes the DSM, which is regulated by the Protocol on Rules and Procedures for Settlement of Disputes (the Protocol).[4] Its scope of application is limited to state to state disputes thus excluding disputes from private parties.[5] The Protocol anticipates the possibility of forum shopping and partly cures this by providing that a party cannot approach another forum whilst they have invoked the DSM over a similar matter.[6] A central theme across the protocol is alternative dispute settlement; the protocol requires member states to engage in consultations prior to presenting a dispute before the DSM.[7] The timeline for conclusion of the consultations is 60 days, where there is no amicable dispute resolution the complaining party may approach

the DSB.[8] The protocol also permits parties to employ arbitration, good offices, conciliation and mediation in amicably solving disputes.[9]

The Dispute settlement institutions are the Dispute Settlement Body, the Dispute Settlement Panel and the Appellate Body. The dispute settlement body is made up of representatives from member states. The Protocol bestows the DSB with authority to establish panels and an Appellate Body as well as to adopt both panel and appellate body reports. It also oversees implementation of rulings and recommendations of panel and the appellate body, and it authorizes suspension of concessions.[10] The panel constituted by the DSB is composed of three members where there are two disputing parties, and five members where the disputing parties are more than two. Member states nominate two panelists annually who are included by the Secretariat in the indicative list or roster.[11]

The Appellate Body comprises of seven persons serving on a rotational basis, noting that only three of the seven hear and determine an appeal per time.[12] A remarkable safeguard clause of the protocol is on the appointment of the members of the appellate body. Article 20 (6) of the Protocol foresees a situation where the DSB may fail to appoint an appellate body member within the set timelines of two months. Where such a vacancy arises, the protocol mandates the Chairperson of the DSB in consultation with the Secretariat to fill the vacancy within a month's period. This provision departs from the consensus tradition of the WTO,[13] which is the basis of the deadlock of the WTO's appellate body, resulting from the USA blocking the appointment of members of the appellate body.

Potential Obstacles in the Operationalisation the AfCFTA Dispute Settlement Mechanism

The AfCFTA's DSM has faced criticism for transplanting the WTO's DSM almost entirely overlooking the unique social, legal and political realities of the African trade dispute landscape.[14] Nonetheless, it is worth noting that constructive emulation is a valid approach, and the AfCFTA's DSM cannot be entirely dismissed. The AfCFTA DSM should be credited for breaking away from the WTO's consensus-based tradition and drawing lessons from its shortcomings. This notwithstanding, this section will consider potential shortcomings that

might be encountered while implementing the DSM as a result of the emulation of the WTO system. Will the DSM achieve its desired outcome given the following challenges: jurisdictional overlaps, enforcement of decisions, and accessibility for non-state actors.

First, is the Jurisdictional overlap which is likely to result in forum shopping. While the AfCFTA aims at deepening economic integration the *'spaghetti bowl'* effect of Regional Economic (RECs) Blocks poses a complex challenge. Considering that the African Union recognizes eight other major RECs under its administration namely; the Common Market for Eastern and Southern Africa, the Arab Maghreb Union, the Community of Sahel-Saharan States, the East African Community, the Economic Community of West African States, the Intergovernmental Authority on Development, the Southern Africa Development Community, and the Economic Community of Central African States. All these RECs have equally established dispute resolution mechanisms, not to mention the WTO's DSU. While the Protocol provides for the fork-in road provision under Article 3(4) of the protocol the same is problematic. This is because it only prevents parties from approaching another forum whilst they have invoked the DSM over a similar matter. However, it is silent on the reverse scenario where parties approach the DSM when they have instituted a dispute in another forum thus leaving room for cherry picking.

Secondly, is exclusion of non-state actors, the AFCFTA dispute settlement mechanism is state centric as it precludes non-state actors from filing disputes. This paradoxical because non-state actors are the majority of traders in the intra-African trading system,[15] for instance, SMEs comprise of 80% of African traders. The state-centered architecture of the DSM has been termed as a mistake which favours powerful actors including corporations that can influence the initiation of disputes by states.[16] A special consideration is the resolution of disputes involving trade remedies given that non-state actors being the exporters, importers, and consumers are the ones who are most affected. Additionally, the jurisdiction of the DSB is limited in scope as it covers only disagreements on the application or interpretation of the AfCFTA Agreement. It does not anticipate other key aspects including violations of human rights in the context of business and human rights. In this case, judicial bodies of RECs are instructive for instance the EACJ has expanded its jurisdiction by of judicial craft to include human rights adjudication.

Thirdly, is the enforcement of decisions of the DSB, like other international dispute settlement bodies the AfCFTA's DSM is not immune the enforcement challenges that plaque such institutions. The Protocol allows leniency in state compliance by providing extension of time when states find impracticable to comply with recommendations. The remedies of compensation and retaliation under the Protocol have been deemed as insufficient due to their voluntary nature, which fails to compel compliance. To enhance compliance alternative measures such as group retaliation and widespread loss of privilege for nonconformist have been recommended. [17]

Will African states utilise the AFCFTA'S DSM given the trend of litigious absence in the WTO's DSU?

In practice, African countries are non-litigious and have consistently been reluctant to pursue litigation of trade disputes.[18] This trend has a historical underpinning dating back to the OAU Charter which provided for peaceful dispute settlement. Strangely, of the 44 African member states of the WTO only four countries (South Africa, Egypt, Morocco and Tunisia) have been parties to the WTO disputes and of the four only two (South Africa and Tunisia) have initiated the dispute.[19] This inclination has been attributed to factors including a lack of expertise, high cost implications, lack of trust in WTOs institutions, limited market share and inadequate capacity to retaliate.[20]

Akinkugbe argues that consultations within the framework of the AfCFTA DSM presents an opportunity for African states to entrench the culture of non-litigation, therefore, finding a natural home in the consultation phase.[21] Mosoti cautions against overuse and isolation of consultation from the other steps within the framework. He argues that it may impede the development of jurisprudence thus endangering the formal regime.[22]

Within this context, this author thinks that history is unlikely to repeat itself in the AfCFTA DSM; it is unlikely that the status quo will remain the same under the AfCFTA DSU. African states are likely to considerably improve their use of the DSM whether by the formal or informal mechanism. Given the monetary nature of trade disputes, most members will prefer formal mechanisms which offer stringent enforcement measures. This hypothesis is further strengthened because African states are the only member states within this FTA hence

fostering a sense of ownership of the FTA. It is estimated that by 2040 intra-African trade would increase between 15 per cent ($50 billion) to 20 percent ($70 billion). This anticipated increase in the Intra-African trade will give rise to disputes which will correspondingly necessitate the use of the AFCFTA's DSM. As such, this author remains hopeful.

Conclusion

In light of the above analysis, it is imperative to note that the AfCFTA's DSM anchors the AfCFTA by offering a predictable and secure framework which is critical for its success. Be that as it may, it is not without its challenges. These limitations should be addressed in the subsequent phases of negotiations to enhance its suitability for the African context. Member states should relinquish a degree of sovereignty in empowering the DSM with supranational authority to guarantee its long-term success. Without such a commitment the DSM risks being reduced to a toothless mechanism lacking the force necessary to uphold the rules of the AFCFTA.

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[2] Accessed at <https://au-afcfta.org/2022/10/what-is-the-afcfta-guided-trade-initiative-all-about/>

[3] Article 8, AfCFTA Agreement.

[4] Article 20, AfCFTA, Protocol on Rules and Procedures for Settlement of Disputes.

[5] Article 3, AfCFTA Protocol on Rules and Procedures for Settlement of Disputes.

[6] Article 3(4), AfCFTA, Protocol on Rules and Procedures for Settlement of Disputes.

[7] Article 6(1), AfCFTA, Protocol on Rules and Procedures for Settlement of Disputes.

[8] Article 8, AfCFTA, Protocol on Rules and Procedures for Settlement of Disputes.

[9] Article 9, AfCFTA, Protocol on Rules and Procedures for Settlement of Disputes.

[10] Article 3(4), AfCFTA, Protocol on Rules and Procedures for Settlement of Disputes.

[11] Article 5(3), AfCFTA, Protocol on Rules and Procedures for Settlement of Disputes.

[12] Article 10, AfCFTA, Protocol on Rules and Procedures for Settlement of Disputes.

[13] Article 20, AfCFTA, Protocol on Rules and Procedures for Settlement of Disputes.

[14] Article 2(4) of the Understanding on Rules and Procedures Governing the Settlement of Disputes of the WTO provides that: 'Where the rules and procedures of this Understanding provide for the DSB to take a decision, it shall do so by consensus'.

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