Addressing Possible Institutional Bottlenecks in the Agreement Establishing the African Continental Free Trade Area

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February 18, 2019.

1. **Introduction**

On 21 March 2018 44 Africa States signed up to the Continental Free Trade Area (AfCFTA) which aims at liberalizing trade in goods and services on the African continent. The Agreement Establishing the AfCFTA also envisions further liberalization and rules in the areas of investment, intellectual property rights and competition policy. When the AfCFTA becomes fully operational, it will become the biggest free trade agreement outside the WTO in terms of number of country participants. With the Doha Round trade negotiations effectively dead, members of the World Trade Organization (WTO) are increasingly seeking opportunities to promote their trade interests outside the multilateral trade regime.

The AfCFTA is thus a positive development for Africa as it seeks to advance its own interests through intra-African trade. For a region of the world that contributes to only about 3% of global trade, increasing intra-African trade is a laudable project. For example, while intra-Asia and intra-Europe trade account for 59 per cent and 69 per cent of exports respectively, intra-African trade accounts for only 18 per cent of total exports. However, despite the modest successes at improving intra-African trade through the eight African Union-recognized regional trade agreements on the continent, there are genuine apprehensions regarding the viability of the proposed AfCFTA. In the two proceeding sections, I explore two main institutional issues that a viable AfCFTA must take seriously:

1. Institutional provisions on legislative decision-making; and
2. Institutional provisions on judicial decision-making

Institutional Provisions on Legislative Decision-Making

The provisions on legislative decision-making in the AfCFTA are of fundamental importance because, as has become evident in the WTO system, a failure to establish a decision-making system that can respond proactively to the need for new rules will cause the system to grind to a halt. The impasse in the Doha Round Trade Negotiations and the current resort to unilateral measures and counter measures are typical offshoots of a failed decision-making system at the WTO. Interestingly, the Agreement Establishing the African Continental Free Trade Area replicates the rigid procedures of legislative decision-making in the WTO. With respect to legislative decision-making, the AfCFTA establishes three main institutions – the Assembly, the Council of Ministers and the Committee of Senior Trade Officials. The Assembly of Heads of State and Government of the African Union serves as the Assembly of the AfCFTA. This is the highest decision-making body in the AfCFTA. The Council of Ministers is the second highest decision-making Body followed by the Committee of Senior Trade Officials. The Assembly has the exclusive authority to adopt interpretations of the AfCFTA Agreement. In exercising this authority, the Council of Ministers makes a recommendation to the Assembly and the Assembly decides by consensus whether to adopt an interpretation of the treaty. This Article 10 provision in the AfCFTA Agreement is an almost direct replica of Article IX:2 of the Agreement Establishing the WTO which vests in the Ministerial Conference

the exclusive power to adopt interpretations.

In WTO law, the Ministerial Conference has exclusive authority to adopt decisions on interpretations. This makes the Ministerial Conference have the final say on interpreting WTO law. This means that power does not lie with the WTO's judicial arm, the Dispute Settlement Body. Of significance for the viability of the AfCFTA is the fact that while even the impasse-prone WTO decision-making system makes provisions for voting with respect to the adoption of interpretations by the Ministerial Conference by majority vote when the issue cannot be decided by consensus, in the AfCFTA Agreement the Assembly makes decisions on interpretations solely by consensus. This will invariably make the AfCFTA decision-making procedure on interpretations more rigid than what pertains in the WTO. In fact, per the provisions in Article 14 of the AfCFTA Agreement, decisions of the Assembly, the Council of Ministers and the Committee of Senior Trade Officials are to be taken by consensus. The simple majority voting procedure is only to be used for decisions on questions of procedure. Also, per Article 15, decisions on waivers of obligations can be taken by a three-fourths majority vote if consensus fails. The AfCFTA Agreement does not define what constitutes consensus. However, Article 1(c) of the Protocol on Rules and Procedures on the Settlement of Disputes provides that consensus is achieved when there is no formal objection by a member of the Dispute Settlement Body present at the time a decision is taken. This is consistent with the WTO definition and practice of consensus. While decision-making by consensus has the advantage of ensuring that all members present agree on an issue, if only one member disagrees and formally objects to a decision, the decision will not be adopted.

Consequently, every member of the legislative decision-making bodies of the AfCFTA effectively wields a veto power. One may hope that the stagnation that has plagued the WTO will not occur in the AfCFTA. However, the very design of the legislative decision-making provisions raises legitimate apprehensions of gridlock. Thus, no matter how laudable the substantive provisions in the AfCFTA Agreement are, if the decision-making provisions required for operationalizing them are too unwieldy, the full benefits of the Continental Free Trade Area will become a mirage. It is not clear why the framers of the AfCFTA Agreement will adopt such a rigid decision-making system when they have had the benefit of knowing its fundamental flaws in the WTO.

Institutional Provisions on Judicial Decision-Making

Like the provisions on legislative decision-making, the Protocol on Rules and Procedures on the Settlement of Disputes in the AfCFTA replicate the provisions in the WTO Dispute Settlement Understanding almost word for word. The said Protocol establishes an entirely member-driven Dispute Settlement Body (or DSB) which is empowered to establish ad hoc Panels and a seven-member permanent Appellate Body. Decisions of Panels can be appealed to the Appellate Body and both Panel and Appellate Body decisions are automatically adopted unless the DSB decides by consensus not to adopt them. This establishes the negative consensus provision with respect to adoption of Panel and Appellate Body reports and ensures the judicial independence of the Dispute Settlement System.

While the stated dispute settlement provisions in the AfCFTA ostensibly benefit from the positive aspects of the WTO system upon which it has been modelled, a more robust system could have been developed. It is quite disappointing that after more than 20 years of constructive critique of the WTO dispute settlement system and the numerous cogent suggestions for reform, the State parties to the AfCFTA did not find it useful to incorporate particularly valuable suggestions on law enforcement. For example, just as pertains in the WTO, the AfCFTA establishes a State v State dispute settlement system. Article 3(1) of the Protocol on Dispute Settlement states that: “This Protocol shall apply to disputes arising between State Parties concerning their rights and obligations under the provisions of the Agreement.” Thus unlike EU law where domestic courts can refer cases to the European Court of Justice (ECJ) for a preliminary ruling on interpretation, this very useful approach to law enforcement does not feature in the AfCFTA system.

One of the major disadvantages of State v State dispute settlement on matters relating to trade is that states may choose to act out of political expediency instead of an objective commitment to ensuring compliance with a rules based system. Considering the fact that the main actors in international trade are private commercial entities, it stands to reason to give these entities the power to enforce their rights in domestic courts against states that breach such rights. Their vested commercial interest serves as a natural motivation for seeking the enforcement of rules that are beneficial to them. Also, private enforcement

through the operation of the principle of direct effect relieves States of the logistical burdens and the politics that result from seeking redress on behalf of their citizens through State v State dispute settlement. By allowing private parties to bring cases to enforce their rights, the AfCFTA would also likely have imported the important principle of direct effect that is so fundamental to EU law and that has allowed private entities to pursue enforcement of their rights under EU making it the system quite effective.

Conclusion

In conclusion, while the AfCFTA project is a very laudable one, there is genuine apprehension with respect to its viability and success. Good laws cannot be implemented if the political organs are saddled with rigid rules that promote gridlock in the decision-making system. Good laws are also not self-enforcing. They require effective enforcement mechanisms. Making AfCFTA law directly effective in the domestic law of member States can contribute positively to law enforcement.

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