An African Response to WTO Reform Proposals

By:

Makane Moïse Mbengue

September 3, 2019

At the outset, I would like to point out that it is not very clear whether the WTO is engaged in a real reform process. There have been proposals on the table but what is going on right now are more "discussions" than "negotiations" on the future of the WTO. This means that African countries should take this opportunity to build a strategy and come with a common voice in the current discussions in order to make sure that we can offer a strong negotiation position when time comes. Waiting till real negotiations start might be too late and counter-productive. In my view there are three important aspects that African states need to clarify in the context of the future reform of the WTO and which are of peculiar interest for them.

First of all, African states need to clarify the "investment" issue at the WTO. There is today a disagreement within the African Group at the WTO on whether the WTO should launch discussions (and later on) negotiations on "Investment Facilitation for sustainable development". While some African states support

discussions on that topic in the multilateral trading system (e.g. Nigeria), some others are very much opposed to it (e.g. South Africa). Basically, African states (but also some other developing countries) disagree on how to interpret the Singapore consensus (which allegedly excluded investment issues from the WTO mandate). Discussing future reform at the WTO should, from the point of view of Africa, allow to clarify this sensitive issue. The issue of investment facilitation will be also very important in the context of the Investment Protocol to the AfCFTA. The current disagreements between African states in the WTO could have a chilling effect on investment negotiations at the level of the African Union.

Secondly, I believe that African states should take advantage of the present discussions on a potential reform of the WTO to discuss the impact of trade-related measures to fight global warming on Africa. Several developed states have included in their Nationally Determined Contributions (NDCs) under the Paris Agreement on Climate Change, measures that would consist in trade measures to tackle global warming. Many of those measures will have a negative impact on the potential trade development of African countries. The WTO is the proper forum to discuss these trade impacts and to contemplate measures to make sure that African states will not be affected by the said measures. Current Climate Change negotiations do not address enough the interrelationship between Trade and Climate Change. So African states should use the current debate on the reform of the WTO to finally incorporate climate change issues and adaptation challenges for them that might arise from these measures adopted to fight global warming. This is fundamental if they want to have a better share of global trade.

Lastly, African states need to be more engaged with the current crisis of the WTO dispute settlement system. By blocking appointments to the Appellate Body (AB), contrary to its express treaty obligations (Articles 17.1 and 17.2 of the DSU), the United States has gotten WTO Members to sit up and take notice of its concerns in relation to the functioning of the AB, which predate the current Trump administration. However, the present United States administration’s approach, if continued left unchecked till year end year, threatens to undermine the entire multilateral trading system and, in doing so, risks throwing out the proverbial baby with the bath water. The concerns

outlined by the United States in relation to the functioning of the AB, namely, (i) the 90-day issue; (ii) the Rule 15 issue; (iii) municipal law as fact issue; (iv) advisory opinion issue and the (v) precedent issue, appear to be in the nature of procedural objections. These objections are an outcome of a number of factors including increased workload, increased complexity of disputes, reduced resources, and the application of customary rules of treaty interpretation.

While these are systemic issues that can impact the rest of the dispute settlement system, the United States objections, in principle, can be easily resolved by either amending the text of the treaty or adopting appropriate guidelines. But the discussions or reform of the WTO dispute settlement system should not be limited to concerns of developed WTO Members (for instance, whether positive consensus should apply to the adoption of panel reports or whether trade remedies should not be dealt with by the Appellate Body). African countries should take advantage of the present crisis to advance proposals that would allow them to take into account their specific needs. The lack of participation of African states in the WTO dispute settlement system is indicative to a certain extent of the discomfort that most African states feel vis-à-vis the said system. A future reform of the DSU must necessarily include procedural and substantive aspects to render dispute settlement more flexible for African countries. These are just ideas I wanted to put in the discussion and I am looking forward to more exchanges.

Many thanks to Jan Yves and the editors of AfronomicsLaw for organising such an interesting discussion on the WTO Reform proposals and eventual implications for Africa.

View online: An African Response to WTO Reform Proposals

Provided by Afronomicslaw