Concurrent Jurisdiction between the World Trade Organization and the AfCFTA Dispute Settlement Systems

By:

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Introduction

On March 21st 2018, the Agreement establishing the African Continental Free Trade area (AfCFTA) was signed in Kigali Rwanda. It subsequently came into force on 30 May 2019 after receiving the required number of ratifications (22). AfCFTA forms part of the objective of African Countries in establishing an African Economic Community by 2063. This objective is embodied in the Abuja Treaty which was adopted in June 1991. AfCFTA seeks to create a common market within the continent; boost intra-African trade; increase competition in trade and address the problem of multiple membership in regional economic communities among African countries.

Dispute settlement in the African Continental Free Trade Area Agreement

Article 20 of the AfCFTA Agreement speaks to dispute resolution. It establishes a dispute settlement mechanism which is administered by the DSB. In expounding on the provisions of Article 20 AfCFTA Agreement, the AfCFTA establishes the Protocol on the Rules and Procedure on the settlement of disputes. The overall objectives of the dispute settlement mechanism is the preservation of predictability and security of the regional trading system, and safeguarding the rights and obligations of the member states.

Settlement of disputes in the WTO

The WTO Dispute Settlement Understanding (DSU) applies to disputes arising from WTO Agreements. Article 2 of the DSU creates the Dispute Settlement Body (DSB). The DSB consists of the representatives of all the WTO members and has the mandate of administering dispute settlement proceedings. In administering the proceedings, the DSB approves the requests to create panels, adopts reports from Panels and the Appellate Body and gives authorization to WTO member countries to impose retaliatory measures when the defending country is not complying with the judgment.

Interaction between the two dispute settlement systems

The AfCFTA seeks to economically integrate all the countries in the continent. Majority of African countries are members to the WTO except for Sudan, Ethiopia and Algeria. In my view, in the event of a dispute among African countries which are both members of the WTO and AfCFTA, then the matter can be referred to either the WTO dispute settlement system or the AfCFTA approach to the resolution of disputes. However, if the parties seek redress in one of the two dispute resolution systems then the other option is not available to them. This is because both dispute resolution systems act as “courts” of first instance and not appeal mechanisms as will be explained below.

The AfCFTA dispute resolution Protocol makes this clear when it provides that a state party which has invoked the rules and procedure of the Protocol in relation to a specific matter shall not invoke another dispute resolution forum

with regards to the same matter. Further on the procedure for the resolution of disputes, the Protocol establishes that the dispute settlement body shall make a determination of the matter (dispute between state parties) and in doing so, its decision shall be binding and final to the parties of the disputes. In essence, this means that an AfCFTA member state cannot resort to the WTO DSB or any other Regional economic community dispute settlement system after the instituting a dispute with AfCFTA's DSB.

The WTO and overlapping jurisdictions in regional trade agreements' (RTA) dispute settlement systems

Overlap of jurisdictions in the context of dispute resolution refers to a situation where the same dispute or aspects of the same dispute can be settled by two or more dispute resolution systems. Article 23 of the DSU sets out the jurisdiction of the WTO. It states that the DSU procedure shall provide recourse to WTO members whose rights, obligations or benefits have been violated by another WTO member. Such a violation must also be in relation to a WTO Agreement.

Nothing in this jurisdiction clause speaks directly to the effect of overlapping jurisdiction between the WTO and dispute resolution systems in RTAs. However, the effect of judgments made by other bodies on the jurisdiction of the WTO has been clarified in ***Japan Alcoholic beverages case.*** The Appellate Body stated that the *res-judica* effect of judgments is applicable to the WTO system. This means that a country which is a member of both the WTO and AfCFTA cannot resort to either the WTO or AfCTA's dispute settlement system after choosing one of the two options as the matter will be considered to be *re-judicata.*

In conclusion, in order to address a scenario where a AfCFTA member might resort to the WTO and still want the dispute to be resolved under the AfCFTA's dispute resolution protocol, then this article proposes that the latter Protocol should be amended to the effect that, matters raised in the WTO context and in AfCFTA's context should be considered not to be the same. This is because the law governing the two entities are different and that the WTO dispute resolution system does not have the jurisdiction to enforce provisions of regional trade agreements.

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