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Dispute Settlement Under the African Continental Free Trade Area Agreement: A Preliminary Assessment

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Dispute Settlement under the African Continental Free Trade Area Agreement: A Preliminary Assessment

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Abstract

The African Continental Free Trade Area Agreement (AfCFTA) will add a new dispute settlement system to the plethora of judicial mechanisms designed to resolve trade disputes in Africa. Against the discontent of Member States and limited impact the existing highly legalized trade dispute settlement mechanisms have had on regional economic integration in Africa, this paper undertakes a preliminary assessment of the AfCFTA Dispute Settlement Mechanism (DSM). In particular, the paper situates the AfCFTA-DSM in the overall discontent and unsupportive practices of African States with highly legalized dispute settlement systems and similar WTO-Styled DSMs among other shortcomings. Notwithstanding the transplantation of the WTO-Styled DSM, the paper argues that the Consultation Phase, offers the AfCFTA Member States a realistic chance of engaging with the DSM. In addition, the paper highlights other factors such as private sector involvement, strategic operationalisation of the DSM, geopolitical and power dynamics as critical to the success of the dispute settlement system.

I. Introduction

The African Continental Free Trade Area Agreement (AfCFTA) is the latest effort by African States to restructure the international economic order from below. By increasing intra-African trade, the AfCFTA aims to create a large single African market for goods, services and movement of persons.[1] The AfCFTA Phase I negotiations comprise of three key agreements: Protocol on Trade in Goods; Protocol on Trade in Services; and the Protocol on Dispute Settlement.[2] The Protocol on Trade in Goods include provisions relating to the elimination of duties and quantitative restrictions on imports, rules of origin, trade facilitation and transit, trade

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[1] Article 6, *Scope*. Pursuant to Art. 7, the Phase II Negotiation rounds are designed to address specific protocols on intellectual property rights, investment, and competition policy.

[2] The Phase 2 Negotiations of the AfCFTA will focus on contentious issues such as intellectual property rights, investment, competition policies, and possibly e-commerce.

remedies, protections for infant industries and general exceptions among others.[3] The Protocol on Trade in Services provides for transparency in service regulations, progressive liberalization of services sectors and mutual recognition of standards, licencing and certification of services suppliers among African states.[4] The formal commitments enshrined in the AfCFTA will build on the modest gains recorded in the context of informal intra-African trade.[5] To the extent that an integrated African economy would strengthen competitiveness of the local industries, enhance the realization of economies of scale for domestic producers, boost industrialization, enhance better allocation of resources and attract foreign direct investments, the AfCFTA has the potential to restructure both international and intra-African economic relations.[6] However, viewed against the background of struggles by African states to maximize existing economic integration objectives, the AfCFTA is a bold and ambitious agreement.

An important feature of the AfCFTA is the Protocol on Dispute Settlement which provides for the rules and procedures for the settlement of disputes within the AfCFTA. Unlike the majority of the African regional economic community courts that are modelled after the Court of Justice of the European Union, the AfCFTA Dispute Settlement Mechanism (AfCFTA-DSM) is modelled after the World Trade Organization Dispute Settlement Understanding.[7] This is not the first time that an African trade dispute mechanism has been modelled after the WTO model.[8] The Tripartite Free Trade Area Agreement between three regional economic communities in Africa – COMESA, EAC and SADC – preceded the AfCFTA. Its DSM is also based on the

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[3] David Luke, "Making the Case for the African Continental Free Trade Area", AfronomicsLaw Blog, January 15, 2019, Online: http://www.afronomicslaw.org/2019/01/12/making-the-case-for-the-african-continental-free-trade-area-2/

[4] *Ibid*.

[5] See, Christopher Changwe Nshimbi, "Issues in African Informality: What is the Relevance for Regional or Continental Integration?", (2018) 48:1 African Insight, pp. 41-61; (Special Issue on *Borders, Informal Cross-border Economies and Regional Integration in Africa*, Guest Edited by Christopher Changwe Nshimbi, Samuel Ojo Oloruntoba, & Innocent Moyo); Cristina Mitaritonna, Joachim Jarreau and Sami Bensassi, "Regional Integration and Informal Trade in Africa: Evidence from Benin's Borders", (2018) Journal of African Economies, pp. 1-30; The Economist, "Informal trade is ubiquitous in Africa, but too often ignored", Sept 1 2018, online: https://www.economist.com/finance-and-economics/2018/09/01/informal-trade-is-ubiquitous-in-africa-but-too-often-ignored

In the context of the AfCFTA, Mariam Olafuyi, argues that it is important to avoid overlooking the informal sector. See, Mariam Olafuyi, "The Informal Economy and the African Continental Free Trade Agreement: Making Trade Work for the Often Overlooked", AfronomicsLaw Blog, January 15, 2019, Online: http://www.afronomicslaw.org/2019/01/10/the-informal-economy-and-the-african-continental-free-trade-agreement-making-trade-work-for-the-often-overlooked/

[6] See, Dr. Mukhisa Kituyi, Secretary-General of UNCTAD, "Africa has phenomenal potential for intra-continental trade", 27 August 2018, https://unctad.org/en/pages/newsdetails.aspx?OriginalVersionID=1838; Mesut Saygili, Ralf Peters and Christian Knebel, "African Continental Free Trade Area: Challenges and opportunities of Tariff Reductions", United Nations Conference on Trade and Development (UNCTAD) Research Paper No. 15, UNCTAD/SER.RP/2017/15, February 2018. Online: http://unctad.org/en/PublicationsLibrary/ser-rp-2017d15_en.pdf

[7]See, James Thuo Gathii, "Evaluating the Dispute Settlement Mechanism of the African Continental Free trade Agreement", Afronomicslaw Blog, April 10, 2019; Online: http://www.afronomicslaw.org/2019/04/10/evaluating-the-dispute-settlement-mechanism-of-the-african-continental-free-trade-agreement/; Karen J. Alter, "The Global Spread of European Style International Courts", (2012) 35 West European Politics, pp. 135-154.

[8] For an analysis of the SADC Trade Tribunal and its overlap with the WTO dispute settlement system, see, Joost Pauwelyn, "Going Global, Regional, or Both? Dispute Settlement in the Southern African Development Community (SADC) and Overlaps with the WTO and other Jurisdictions", (2004) 13 Minn. J. Global Trade, pp. 231-304

WTO model. While there is nothing inherently wrong in the transplantation of dispute systems such as the WTO model, the success of such transplants depends on the extent of the adaptation to the socio-political realities of the destination. In Africa, whether the model was transplanted from the European Union or the WTO, the experience reveals a strong discontent and apathy towards a highly legalized and formal trade dispute system. In relation to the Economic Community of West African States (ECOWAS), the Southern African Development Community (SADC) and the East African Community (EAC), the discontent has manifested in one form of backlash or the other with varying success.[9] While the conundrum that has arisen from the discontent remains, the shift towards a more rules-based dispute mechanism under the AfCFTA exacerbates this problem.

In the ensuing section of this paper, I examine the challenges of operationalizing the AfCFTA's DSM. I situate the AfCFTA-DSM in the context of discontent with similar WTO-styled DSM in African regional economic communities, and international arbitration at the national level. Drawing on these analyses, I argue that there is every reason to be sceptical about the potential of the AfCFTA-DSM. Yet, there are reasons to be optimistic about the potential of the AfCFTA-DSM to influence the substantive aspiration of a single African market in ways that the existing trade dispute settlement systems have not. To do this, I suggest that African leaders and the negotiators should draw on lessons from the experiences of existing regional economic courts to inform an AfCFTA-DSM that is Africa-centric in its norms. Finally, I draw attention to the critical role of the private sector and business for the success of the DSM; as well as geopolitical challenges and power dynamics of the African continent as a relevant factor that must be borne in mind in operationalizing the AfCFTA and its DSM.

In terms of structure, in section II, I provide a brief overview of the substantive provisions of the AfCFTA. In section III, I analyze the steps in an AfCFTA dispute as enshrined in the Protocol on Rules and Procedures on the Settlement of Dispute. The AfCFTA-DSM is a transplantation of the WTO dispute settlement system. Despite the poor record of formal trade dispute by African States, I argue that *Consultation*, the informal process for settling disputes amicably offers the AfCFTA Member States the most realistic chance of engaging with the AfCFTA-DSM. In section IV, I deepen the analysis of the AfCFTA-DSM by situating it in the broader context of discontent with similar WTO-styled dispute settlement system at the regional level in Africa and the broader growing apathy with international arbitration by African states at the national level. To contextualize the analysis, I draw on the Southern African Development Community (SADC) and the Tripartite Free Trade Area Agreement (TFTA). In the concluding section, I briefly examine four factors that are critical to the success of the AfCFTA-DSM, particularly in the implementation phase.

II. **The African Continental Free Trade Area – An Overview**

On 9 March 2018, the African Union (AU) Ministers of Trade approved the Declaration launching the Agreement establishing the AfCFTA, the AfCFTA Agreement, Protocol on Trade in Goods and associated annexes, Protocol Trade in Services and its annexes, as well as the

[9] Karen J. Alter, Laurence Helfer, and James Thuo Gathii, "Backlash against International Courts in West, East and Southern Africa: Causes and Consequences", (2016), European Journal of International Law, Vol. 27 No. 2, 293–328

Protocol on Rules and Procedures on the Settlement of Disputes.[10] The AfCFTA has a *general* and *specific* set of objectives that are mutually reinforcing. The *general objectives* of the AfCFTA, inter alia, are the creation of a single market for goods, services, and movement of persons and investments among African countries; creation of a liberalised market for goods and services based on successive rounds of negotiations; lay the foundation for the establishment of a Continental Customs Union and enhance the competitiveness of the economies of African States both with the continent and the global market.[11] The agreement aspires towards a better coordination of African trade regimes and the elimination of challenges associated with multiple and overlapping trade agreements across the continent.[12]

Although the AfCFTA is progressive in enshrining provisions that aims to address the perennial problem of multiple and overlapping trade agreements, the practicality or modus operandi for achieving the objective remains obscured in light of the historical trajectories and heterogeneity of the different regions in Africa. The objectives of the agreement also include socio-economic development, gender equality, structural transformation of the state parties,[13] as well as healthcare.[14]

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[10] The AfCFTA will come into force thirty (30) days after ratification by the parliaments of at least 22 countries. Art. 23 – *Entry into Force*. For the "Status of AfCFTA Ratification", see, TRALAC's AfCFTA Ratification Barometer, https://www.tralac.org/resources/infographics/13795-status-of-afcfta-ratification.html

[11] See Art. 3 – *General Objectives*. See, Jonathan B. Rudahindwa, "IEL and the AfCFTA: Beyond Trade Liberalisation, Economic Transformation and Development", AfronomicsLaw Blog, February 11, 2019, http://www.afronomicslaw.org/2019/02/11/iel-and-the-afcfta-beyond-trade-liberalisation-economic-transformation-and-development/; David Luke and Jamie MacLeod, *Inclusive Trade in Africa: The African Continental Free Trade Area in Comparative Perspective*, (2019: Routledge).

[12] Art. 3(h) provides that the general objectives of the AfCFTA includes the resolution of "the challenges of multiple and overlapping memberships and expedite the regional and continental integration processes." Article 1(t) of the Agreement Establishing the AfCFTA lists the eight (8) Regional Economic Communities (RECs) recognized by the AU, to wit, Arab Maghreb Union (UMA); Common Market for Eastern and Southern Africa (COMESA); Community of Sahel-Saharan States (CEN-SAD); East African Community (EAC); Economic Community of Central African States (ECCAS); Economic Community of West African States (ECOWAS); Intergovernmental Authority on Development (IGAD); and Southern African Development Community (SADC). See, Collins C. Ajibo, "Regional Economic Communities as the building blocs of African Continental Free Trade Area Agreement: Challenges and Way Forward" AfronomicsLaw Blog, February 4, 2019, Online: http://www.afronomicslaw.org/2019/02/04/regional-economic-communities-as-the-building-blocs-of-african-continental-free-trade-area-agreement-challenges-and-way-forward/

[13] See, Oyeniyi Abe, "Gender Mainstreaming and Empowerment under Agreement for the Establishment of the African Continental Free Trade Area", January 30, 2019, AfronomicsLaw Blog, http://www.afronomicslaw.org/2019/01/30/gender-mainstreaming-and-empowerment-under-agreement-for-the-establishment-of-the-african-continental-free-trade-area-afcfta/

Similarly, Vera Songwe, Executive Secretary of the United Nations Economic Commission for Africa noted that "One of the big indirect effects of the African Continental Free Trade Agreement (AfCFTA) will be that women become a lot more economically empowered…" See, Saïd Business School News, "AfCFTA will boost economic empowerment of women in Africa", 22 March 2019; online: https://www.sbs.ox.ac.uk/news/afcfta-will-boost-economic-empowerment-women-africa

[14] Walter Ochieng, "Will Free Trade Make Africans Sick?", Project Syndicate, April 15, 2019; https://www.project-syndicate.org/commentary/africa-free-trade-agreement-health-risks-by-walter-ochieng-2019-04. With respect to healthcare, Walter Ochieng argues has been neglected with "alarming oversight" in the discourse so far. Further, he notes that "the pact raises concerns about the weakening of government-funded public-health systems, increasingly unequal access to care, a medical brain-drain, higher drug prices, increased consumption of unhealthy products, and the spread of diseases. African governments should act immediately to assess these threats and counter the AfCFTA's potential negative health implications."

To realize the *general* objectives, the AfCFTA provides for the following *specific* measures: the State Parties are to progressively "eliminate tariffs and non-tariff barriers to trade in goods" and "liberalise trade in services"; cooperate "on investment, intellectual property rights and competition policy on all trade-related areas", and "on customs matters and the implementation of trade facilitation measures"; establish "a mechanism for the settlement of disputes concerning their rights and obligations; and "maintain an institutional framework for the implementation and administration of the AfCFTA."[15] Article 5 of AfCFTA incorporates principles such as variable geometry[16]; consensus decision-making; adoption of regional economic community free trade areas and as building blocs; as well as best practices in the RECs, State Parties, and International Conventions binding the African Union among other traditional provisions in trade agreements. The institutional framework for governance and implementation of the AfCFTA consists of the Assembly, as the highest organ, and in descending order, the Council of Ministers, the Committee of Senior Trade Officials and the Secretariat.[17]

The foregoing provisions of the AfCFTA is ambitious and aims for a rules-based continental trading regime. The implementation of the agreement, which has been a major problem in previous regional economic integration schemes in Africa, is critical to its success. For example, the African Economic Community, which was established by the Treaty Establishing the African Economic Community, 1991, is a case in point. This treaty came into force in 1994. It envisages the establishment of an African Economic Community in six treaty-defined stages, over a period of 34 years. Going by those treaty-defined stages, there should be by now at least an African Common Market. Another continental initiative that has achieved less than the desired impact is New Partnership for Africa's Development (NEPAD). Hence, an important factor for the implementation of the AfCFTA is that it must reflect the socio-economic and political realities and practices of its Member States. Even as it aims to construct a new continental economic order, it must not only build on the formal experiences of the regional economic communities, but also, extend to the informal economy that make-up an important sector in intra-African trade. Without a doubt, the effective regulation of the formal and informal economies, when combined with the potential of the continent in information and financial technology, holds the promise of an unprecedented leveraging of capital and resources that bode well for the future of the single market economy.

In the next section, I analyse the substantive provisions of the AfCFTA-DSM as provided in Article 20 and the draft Protocol on Rules and Procedures on the Settlement of Disputes (Dispute Protocol).

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[15] See Article 4 (a)-(g), *Specific Objectives*.

[16] For different takes on the contentious implication of this principle for African economic integration, see, Elisa Tino, "The Variable Geometry in the Experience of Regional Organizations in Developing Countries", (2013-2014) 18 Spanish Yearbook of International Law, pp. 141-162; Gerald Ajumbo, "Is Variable Geometry Leading to the Fragmentation of Regional Integration in East Africa?", African Development Bank Group, November 7, 2013, Online: https://www.afdb.org/en/blogs/industrialisation-and-trade-corner/post/is-variable-geometry-leading-to-the-fragmentation-of-regional-integration-in-east-africa-12524/; James Thuo Gathii, "African Regional Trade Agreements as Flexible Legal Regimes" (2009) 35 North Carolina Journal of International Law and Commercial Regulation, p. 571;

[17] Article 9. See, Gerhard Erasmus, "The AfCFTA Institutions: Could the Secretariat hold the key to Implementation?", Tralac Working Paper Series, February 6, 2019. Online: https://www.tralac.org/publications/article/13887-the-afcfta-institutions-could-the-secretariat-hold-the-key-to-implementation.html

III. Resolution of Dispute under the AfCFTA

Dispute settlement systems play a key role in international economic integration. An active, independent, efficient and reliable DSM is essential to not only settling disputes between the state parties in upholding a rules-based regime; but also, critical to developing relevant jurisprudence that will guide the single market economy objective of the constituent trade agreement. In the AfCFTA context, the DSM will also be important for the purpose of interpreting areas of overlap or conflict with other former judicial orders in Africa.[18]

Article 20 of the AfCFTA establishes the DSM. The DSM shall be administered in accordance with the Protocol on Rules and Procedures on the Settlement of Disputes ("Dispute Protocol"). The Dispute Protocol establishes a Dispute Settlement Body (DSB) and provides for the settlement of dispute in a transparent, accountable, fair, and predictable way that is consistent with the provisions of the establishing agreement.[19] The DSB that will comprise of the representatives of the AfCFTA State Parties. The DSB shall have a Chairperson to be elected by the State Parties. The DSB has authority to establish Dispute Settlement Panels and an Appellate Body; adopt Panel and Appellate body reports, maintain surveillance of implementation of the rulings and recommendations of the Panels and the Appellate Body; and authorize the suspension of concessions and other obligations under the Agreement. Decisions to be taken by the DSB shall be by consensus. The Chairperson of the DSB shall be elected by the State Parties and will meet as often as necessary to discharge its functions. The procedure for the settlement of disputes under the AfCFTA consists of Consultations; Good Offices, Conciliation or Mediation; Panels; and an Appellate Body. Disputing parties can explore arbitration at first instance as a means to settling their disputes.[20] The Dispute Protocol applies to disputes between State Parties relating to their right and obligations thereunder, subject to such special and additional rules and procedures on dispute settlement contained in the AfCFTA. To guard against forum shopping, where a State Party has initiated a proceeding under the Dispute Protocol regarding a specific matter, the State Party shall not invoke another forum for dispute settlement on the same matter.[21] I will now analyze the steps in an AfCFTA dispute.

Consultations

The first step towards an informal amicable resolution of disputes between State Parties are the Consultations.[22] While the AfCFTA-DSM is under-pinned by a rules-based trading system, the

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[18] According to Gerhard Erasmus, a rules-based trading regime reduces economic and political risk for both state and non-state actors. Gerhard Erasmus, "Dispute Settlement Under the AfCFTA", *TRALAC,* (11 June 2018), online: <https://www.tralac.org/publications/article/13136-dispute-settlement-under-the-afcfta.html>.

[19] Article 2 (*Objective*) of the Dispute Protocol

[20] Art. 27 of the Dispute Protocol

[21] Article 3(4), Ibid. Also see, Olabisi D. Akinkugbe, "What the African Continental Free trade Agreement Protocol on Dispute Settlement says about the culture of African States to Dispute Resolution", Afronomicslaw Blog, April 9, 2019; Online: http://www.afronomicslaw.org/2019/04/09/what-the-african-continental-free-trade-agreement-protocol-on-dispute-settlement-says-about-the-culture-of-african-states-to-dispute-resolution/

[22] Article 6(1), 7, Ibid. In the context of the Consultation process of the WTO in its early days, see, William J. Davey and Amelia Porges, "Performance of the System I: Consultations & Deterrence", (1988) 32:3 The International Lawyer, pp. 695-707

State Parties recognize the relational nature of trade and have provided for a preliminary step that aims to reach an agreement without invoking the formal DSM. Consultations will be a vital aspect of the AfCFTA-DSM and could play an important role in the AfCFTA.[23] Consultations shall be confidential and without prejudice to the rights of any State Party in any further proceedings.[24] The State Parties to the AfCFTA undertake to accord consideration to and afford adequate opportunity for consultations. Requests for Consultations shall be notified to the DSB through the Secretariat in writing, giving the reasons for the request, including identification of the issues and an indication of the legal bases for the complaint.[25] Where a request for consultations is made to another State Party, such party has ten (10) days after the receipt to reply and is required to enter into consultations in good faith within a period not exceeding thirty (30) days after the receipt of the request. Where a notified State Party does not respond to the request within ten (10) days and does not enter into consultations within 30 days or a period otherwise mutually agreed, or, where the parties fail to settle a dispute through Consultations within sixty (60) days, the State Party that initiated the Consultations may refer the matter to the DSB requesting for the establishment of a Panel.[26] A State Party with substantial trade interest in Consultations may request to be joined within ten 10 days of the circulation of the request for Consultations.[27] The decision to allow the State Party join is left to the original parties. Where they deny that there is a substantial interest, the interested State Party shall be free to request consultation.

In the context of the AfCFTA, consultations provide a unique forum where parties can explore resolution of their differences. Despite the legalization of the dispute resolution under the AfCFTA, the State Parties can harness the benefit of the informality of the Consultations phase.[28] If properly utilized, it has the potential to significantly augment the other more legalized processes. This is more so in view of the fact that African states have a culture of non-litigation of economic disputes between and among themselves.[29]

The Dispute Protocol also incorporates the use of Good Offices, Conciliation or Mediation. This mechanism provides an example of the flexibility that is incorporated in the AfCFTA-DSM. The State Parties to a dispute may voluntarily undertake good offices, conciliation, or mediation at any time, in a confidential manner, and without prejudice to their rights in any other proceedings. Pursuant to Article 8(3) of the Dispute Protocol, "When good offices, conciliation or mediation are entered into after the date of receipt of a request for consultations, the Complaining Party must allow for a period of sixty (60) days after the date of receipt of the request for consultations before requesting for the establishment of a panel. The Complaining Party may request for the establishment of a Panel during the sixty (60) day period, if the State Parties to the dispute jointly consider that the good offices, conciliation or mediation process has failed to settle the dispute." Subject to the agreement of the disputing State Parties, the procedure can run simultaneously with a Panel process. There are no timelines for initiating and completing this process.

[23] Gary Horlick, "The Consultation Phase of WTO Dispute Resolution: A Private Practitioner's View" (Fall, 1998) 32 Int'l Lawyer 685

[24] Article 7(7)

[25] Article 7(3)

[26] The Dispute Protocol also makes special provision for expedited process where the goods involved are perishable. See, Articles 7(a-d)

[27] On the concept of "substantial trade interest" under the GATT, see, Chi Carmody, "Of Substantial Interest: Third Parties Under GATT", (1997) 18 Michigan Journal of International Law, pp. 615-657

[28] See, Margherita Melillo, "Informal Dispute Resolution in Preferential Trade Agreements" (2019) 53:1 Journal of World Trade Law, pp. 95-128

[29] "While it may be contended that the low record of formal intra-African trade has contributed to the near absent record of economic integration disputes, the elephant in the room remains the embedded non-litigious culture of

Despite the fact that Consultations mesh with the culture of African states towards dispute resolution so far, a drawback of an excessive reliance on Consultations and the confidential nature of the regime is that it may impede the development of a robust jurisprudence on the AfCFTA. The potential popularity of Consultations as a means of settling disputes may therefore endanger the formal regime of the DSM. Nevertheless, the informal and confidential nature of the phase meshes with the behaviour of African States towards formal trade dispute. In other words, the disdain of African States to use the formal, adjudicative, legalistic and rules-based dispute mechanisms for settlement of economic integration disputes can be mitigated by the Consultation phase of the AfCFTA. Put differently, the near none existence of formal economic integration disputes among African states may find a natural home in the Consultations process of the AfCFTA through the promotion of diplomacy.[30] The flexibility that the Consultation process offers also provides an opportunity for the disputing states to not only agree on mutually acceptable outcomes, but also, back it up with voluntary enforcement. In addition, the Consultation process with its aim being amicable settlement should not interpreted as a limitation to exploring the legalistic and more rules-based provisions of the AfCFTA-DSM.[31] In this regard, I agree with James Thuo Gathii that "if nothing else non-litigious approaches to dispute settlement should be understood to be bargains made in the shadow of the law – that is law is not entirely irrelevant – settlement by diplomacy happens in the shadow of these legal commitments."[32]

Panels

The formal step towards the resolution of disputes is initiated by the constitution of a dispute settlement Panel. Where Consultation fails, upon the request of a Complaining State Party, a Panel shall be established by the DSB.[33] The primary function of a Panel is to assist the DSB in discharging its responsibilities under the AfCFTA.[34] The deliberations of the Panel shall be confidential, and the opinions expressed in the Panel report by individual panelists shall be

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African states towards regional trade disputes between and among themselves. This fact is further evident in previous WTO-like DSMs in Africa where the Member States have simply not engaged with the dispute settlement regime." See, Olabisi D. Akinkugbe, "What the African Continental Free Trade Agreement Protocol on Dispute Settlement says about the culture of African States to Dispute Resolution" Afronomicslaw Blog, April 9, 2019. Online: http://www.afronomicslaw.org/2019/04/09/what-the-african-continental-free-trade-agreement-protocol-on-dispute-settlement-says-about-the-culture-of-african-states-to-dispute-resolution/

V. Mosoti, "Africa in the first decade of WTO dispute settlement" (2006) 9 Journal of International Economic Law, 427.

[30] See generally, R. Hudec, *The GATT Legal System and World Trade Diplomacy*, (New York: Praeger, 1975); Tevor Lawson, "WTO Dispute Resolution: The Promotion of Diplomacy within an Adjudicative Model", (*) Dalhousie Journal of Legal Studies, pp. 321-346, p. 321. (arguing that the "traditional concepts of negotiation, consultation and compromise in fact flourish under a properly developed adjudication-based system of dispute resolution.")

[31] Gary N. Horlick, "The Consultation Phase of WTO Dispute Resolution: A Private Practitioner's View", (1998) 32 The International Lawyer, pp. 685-693.

[32] James Thuo Gathii, "Evaluating the Dispute Settlement Mechanism of the African Continental Free Trade Agreement", Afronomicslaw Blog, April 10, 2019. Online: http://www.afronomicslaw.org/2019/04/10/evaluating-the-dispute-settlement-mechanism-of-the-african-continental-free-trade-agreement/

[33] Article 9 (*Establishment of Panels*)

[34] Article 12(1-3)

anonymous.[35] Panels are empowered to examine, based on the relevant provisions of the AfCFTA, the matter referred to the DSB by the Complaining Party; and to make such findings as will assist the DSB in making recommendations or in giving the rulings provided for in the Agreement.[36] In making its findings, a Panel shall consult widely and regularly with the parties while also affording the parties an adequate opportunity to develop a mutually satisfactory solution. A Third Party shall be joined to a Panel after notification of its substantial interests to the Panel through the DSB and agreement of the original disputing parties.

The request for the establishment of a Panel shall indicate whether Consultations were held, identify the specific measures at issue and provide a summary of the legal basis of the complaint in a clear and succinct form.[37] Thereafter, the DSB shall convene within fifteen (15) days of the request and the Panel shall be constituted within ten (10) days thereafter. The Panelists shall be selected from an indicative list or roaster of individuals that shall be established and maintained by the Secretariat when the AfCFTA enters into force. Where after thirty (30) days, an agreement on the composition of a Panel is not reached, upon the request of either Party, the Head of the Secretariat, in consultation with the Chairperson of the DSB and with the consent of the disputing State Parties is empowered to determine the composition of the Panel. With respect to quorum of the Panels, where there are two (2) disputing State Parties, the Panel shall consist of three (3) members and where there are more than two (2), the Panel shall comprise of five (5) members.[38] In terms of expertise, the individuals on the indicative list shall have experience in law, international trade, or in other areas covered by the AfCFTA such as intellectual property, or the resolution of disputes arising under international trade agreements.[39] The Panelists who shall be chosen strictly on the basis of objectivity, reliability and sound judgments shall be impartial, independent of, and not be affiliated to or take instructions from any Party. To avoid conflicts of interest, Panelists, who are nationals of the disputing State Parties cannot serve on a Panel concerned with that dispute, unless the parties to the dispute agree otherwise.

The procedures of the Panel[40] shall provide sufficient flexibility to ensure an effective and timely resolution of disputes in a mutually satisfactory manner by the parties.[41] Once the Panel has been successfully constituted, the Panelists shall within seven (7) days determine its terms of reference and fix the timetable for its proceedings, including the schedule for the written submissions of the Disputing Parties. The Panel has a total of five (5) months for general matters, and one and a half months for perishable goods to issue a final report. Where the timeline cannot be met, the Panel shall inform the DSB in writing stating reasons for the delay together with an estimation of the period within which the Panel Report shall be ready, such period not to exceed nine (9)

[35] Article 17, (*Confidentiality*). A party to the dispute is at liberty to disclose statements of its own positions to the public

[36] Article 11(1). See Adrian T. Chua, "Precedent and Principles of WTO Panel Jurisprudence" (1998) 16:2 Berkeley Journal of International Law, 171-196

[37] Article 9(2). Articles 13 and 14 respectively provide for the procedures where *Third Parties* or *Multiple Complaints* are received.

[38] Article 9(9)

[39] Article 9(3); (4) "The Panelists shall be selected with a view to ensuring their independence and integrity and shall have a sufficiently diverse background and a wide spectrum of experience in the subject matter of the dispute, unless the Parties to the dispute agree otherwise."

[40] Article 15 (*Procedures for the Panel*)

[41] Article 15 (5) & (6).

months from the date of the Panel composition. Once the initial Panel Report is ready and has been circulated to the parties, they have the opportunity to raise their objections in writing.[42] Except a party decides to appeal, or the DSB by consensus decides not to adopt the report, the final Panel Report must be considered, adopted and signed at a meeting of the DSB convened for that purpose within sixty (60) days from when it was circulated. Where an appeal has been notified, the DSB cannot consider the report for adoption until after the completion of the appeal. The decision of the DSB is final.

Appellate Body

A standing Appellate Body (AB) composed of seven (7) persons, with three (3) forming quorum on any case shall be established by the DSB to hear appeals from panel cases.[43] Appointed by the DSB, each AB judge will serve a four-year term with the possibility of reappointment. Like the Panel, the AB shall "comprise of persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter" of the AfCFTA in general.[44] With respect to locus standi before the AB, only parties to the initial dispute have the right to appeal a Panel report. Similarly, a Third Party that established its substantial interest before the panel may have an opportunity to be heard via its written submissions. The proceedings of the AB shall not exceed sixty (60) days calculated from the date a party to the dispute formally notifies its decision to appeal to the date the AB circulates its report. However, where it experiences delay, the AB can extend its proceedings for no longer than ninety (90) days. The AB may uphold, modify or reverse the legal findings and conclusions of the Panel. The AB shall produce a single report reflecting the views of the majority of its members. Where the Panel and AB concludes that a measure is inconsistent with the AfCFTA, it shall recommend that the State party concerned bring the measure into conformity with the Agreement.[45] The Dispute Protocol also contains provision on surveillance of implementation of recommendations and rulings; compensation and the suspension of concessions or any other Obligations; and arbitration.

In summary, the foregoing represents the steps that will be followed for the formal settlement of dispute under the AfCFTA. The DSM will however be nestled in a complex matrix of regional, and national attitudes towards dispute settlement. In section III, I situate the AfCFTA-DSM in the context of the discontent by Member States and failure of previous similarly WTO-styled DSM at the regional level, international arbitration and measures taken at the national level with a view to teasing out the challenges that are associated with the dispute settlement system under the AfCFTA.

IV. **Analyzing the AfCFTA-DSM in Context**

Unlike the regional courts regime that are mostly modelled after the European Union, the AfCFTA-DSM is modelled after the WTO-DSM. The AfCFTA-DSM is not the first time that African states have adopted a WTO-styled dispute system. At the regional level, African States

[42] Article 19 (*Adoption of Report of a Panel*)
[43] Article 20 (*Appellate Body*)
[44] Article 20(7).
[45] Article 23 (*Panel and Appellate Body Recommendations*)

have drawn inspiration from the WTO dispute settlement system. Some examples include, the Southern African Development Community (SADC), the Common Market for Eastern Africa and Southern Africa (COMESA) and the Tripartite Free Trade Area (TFTA) Agreements. According to the AfCFTA's principles, State Parties commit not only to using the Regional Economic Communities (RECs) as the building blocs for the AfCFTA but also to draw on their best practices while simultaneously addressing the perennial challenge of overlapping membership. The first arena for potential challenge with the similarly styled DSM at the regional level relates to overlapping and conflicting provisions. Article 19 which relates to "Conflict and Inconsistency with regional agreements" directly addresses this issue. In the event of any conflict or inconsistency between the provisions of the AfCFTA and any regional agreement, the provisions of the AfCFTA shall prevail in respect of the specific inconsistency. However, where a REC, customs unions or regional trade arrangement has achieved a higher level of integration that under the AfCFTA, the higher levels shall prevail among themselves.[46] While this is an important provision for a seamless co-existence of the AfCFTA-DSM with other similar mechanisms, a major lacuna remains the wholesome reliance of the AfCFTA-DSM on the WTO without capitalizing on any of the burgeoning experience at the regional levels.

In the context of dispute settlement, the discrepancy in the pace of establishing regional economic community courts with no economic integration enhancing disputes to settle begs the question – why do African states implement dispute settlement systems that they (for the most part) do not use for trade disputes?[47]

Marc D Froese has argued that African states include DSMs in their regional trade agreements primarily as a means of expressing commitment to the REC agreement and "reinsuring" against the breakdown of multilateral DSMs, namely the WTO Dispute Settlement Body (DSB).[48] It is doubtful how much this argument holds, in the face of the already referenced behaviour of African States towards formal dispute settlement and, in particular, their discontent towards legalized trade regimes. More so, the WTO is embroiled in a current struggle to save itself.[49] Hence, while the WTO-DSB has been successful as a forum for dispute resolution for an entrenched and centralized multilateral governance institution,[50] a wholesale transplantation without regard to the socio-economic, historical, political, and heterogeneity of the African society does not capture the entire picture. A more realistic view is that of James Thuo Gathii who argues that the adoption of the AfCFTA-DSM "reflects the preferences of a small set of African states and technical experts, favouring a strong system of dispute settlement as a

[46] Article 19 (1-2)

[47] Marc D. Froese, "Regional Trade Agreements and the Paradox of Dispute Settlement" (2014) 11 Manchester J. Int'l Econ. L. 367 at 367 (HeinOnline).

[48] *Ibid* at 384-85.

[49] See, Ujal Singh Bhatia, Chairman of the Appellate Body, "The Problems of Plenty: Challenging times for the WTO's Dispute Settlement System", 8 June 2017, Release of the Appellate Body Annual Report 2016. Online: https://www.wto.org/english/news_e/news17_e/ab_08jun17_e.pdf

[50] See, Joel P. Trachtman, "Functionalism, Fragmentation, and the future of International (Trade) Law", Paper delivered at the 2018 Society of International Economic Law Robert E. Hudec lecture in International Economic Law, Sept 20, 2018. Online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3252637; also see, William J. Davey, "Compliance Problems in WTO Dispute Settlement", (2009) 42:1 Cornell International Law Journal, pp. 119-128.

guarantee of ensuring compliance with the commitments embodies in the AfCFTA."[51] To illustrate the discontent of African states with similar WTO-styled dispute settlement system at the regional level, I will draw on the dispute settlement systems in Southern African Development Community (SADC) and the Tripartite Free Trade Area (TFTA) agreements.[52]

The SADC Protocol on Trade Tribunal transplants the WTO rules and dispute settlement procedures.[53] In particular, Annex VI outlines the procedure for the settlement of disputes between member states of the SADC.[54] The SADC was established in 1992 and it replaced the previous Southern African Development Co-ordination Conference. The principal objective of the SADC Treaty was to achieve development and economic growth, alleviate poverty and support the socially disadvantaged through regional integration.[55] Despite the long existence of the Tribunal, the SADC Members have not utilized the mechanism. A major factor for this woeful record is that Member States have the option to pursue dispute settlement before different forums.[56]

Like the AfCFTA, the SADC trade tribunal has significant overlap with many dispute settlement institutions at the regional and international levels. Joost Pauwelyn analysed the "large overlap between the [original] SADC Protocol on Trade and WTO agreements" noting that many trade disputes between SADC members can provide a forum shopping problem because of the fact that the dispute could be brought before the SADC or the WTO.[57] In this regard, Clement Ng'ong'ola notes, quite appropriately that the replication of the WTO DSM can be "criticized as a quixotic experiment, attempted without a profound appreciation of the special needs of a fledgling institution and of the different environment obtaining in the WTO."[58] Nevertheless, Ng'ong'ola supports the WTO styled DSM as it provides the SADC with a "more secure platform for the implementation of decisions likely to be politically unpopular."[59] SADC Member States have shown a significant discontent with the WTO-styled dispute settlement system. The successful backlash that arose from the decision in *Campbell v. Republic of Zimbabwe* leading to the suspension of the SADC Tribunal illustrates this discontent in broader context.[60] But, more

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[51] James Thuo Gathii, "Evaluating the Dispute Settlement Mechanism of the African Continental Free Trade Agreement", AfronomicsLaw Blog, April 10, 2019. Online: http://www.afronomicslaw.org/2019/04/10/evaluating-the-dispute-settlement-mechanism-of-the-african-continental-free-trade-agreement/

[52] The dispute settlement regime under the SADC-EU EPA is also modelled after the WTO-DSM. For a discussion of this, see, Gerhard Erasmus, "The Settlement of Disputes under the SADC EPA", TRALAC, 13 July 2018, Online: https://www.tralac.org/blog/article/13312-the-settlement-of-disputes-under-the-sadc-epa.html

[53] Clement Ng'ong'ola, "Replication of WTO Dispute Settlement processes in SADC", (2011)1 SADC Law Journal, pp. 35-62.

[54] SADC Protocol on Trade (Annex VI), available online: http://www.lra.org.ls/sites/default/files/2017-05/Annex-VI%20-%20Settlement%20Of%20Disputes%20Between%20The%20Member%20States.pdf

[55] Muna Ndulo, "African Integration Schemes: A Case Study of the Southern African Development Community", (1999) 7 African Yearbook of International Law 6.

[56] Amos Saurombe, "An Analysis and Exposition of Dispute Settlement Forum Shopping for SADC Member States in the Light of the Suspension of the SADC Tribunal", (2011) 23 African Mercantile Law Journal, pp. 392 – 406.

[57] Joost Pauwelyn, "Going Global, Regional, or Both? Dispute Settlement in the Southern African Development Community (SADC) and Overlaps with the WTO and other Jurisdictions", (2004) 13 Minn. J. Global Trade, pp. 231-304, p. 240

[58] Ng'ong'ola, "Replication of WTO Dispute Settlement processes in SADC", p. 60

[59] Ibid.

[60] Karen J. Alter, Laurence Helfer, and James Thuo Gathii, "Backlash against International Courts in West, East and Southern Africa: Causes and Consequences", (2016), European Journal of International Law, Vol. 27 No. 2, 293–

specifically, the SADC Trade Tribunal has not been utilized for the purpose of disputes arising from economic integration efforts. The non-utilization of the trade tribunal is symptomatic of a broader problem with the judicialization of disputes in formal regimes by African States.[61] Given the pervasiveness of this culture on the continent, the AfCFTA will face a similar challenge.

Even in the face of irrelevance of such dispute frameworks, and experiences such as the SADC experience, African States have not been discouraged from adopting WTO-styled dispute systems. The dispute settlement mechanism of the Tripartite Free Trade Area Agreement (TFTA) between three regional economic communities in Africa – COMESA, EAC and SADC – provides the latest example.[62] Part IX, Article 30 relates to Dispute Settlement. It establishes a Dispute Settlement Body with power to establish Panels, and an Appellate Body, adopt Panel and Appellate Body reports; maintain surveillance of implementation of rulings and recommendations of panels and Appellate Body; and authorize suspension of concessions under the Agreement.[63] In short, the TFTA dispute settlement system, which is a precursor to the AfCFTA-DSM is also modeled after the WTO. The bigger challenge with the TFTA is that it has moved at a ridiculously slow pace that the AfCFTA is likely to enter into force before it.[64] As a collective, the TFTA represents an important cluster of states and regional groupings that are will be important in shaping the AfCFTA. If as it seems the TFTA will come into force after the requisite ratification, it will add another dimension to the overlap of WTO-Style courts on the continent.

At the national level[65], many African states have taken perceptible step away from international arbitration in apparent display of the on-going discontent with formal dispute settlement systems. For example, in 2015, South African enacted the *Promotion of Investment Act*, 2015. Section 15(5) provides that "The government may consent to international arbitration in respect of investments covered by th[e] Act, subject to the exhaustion of domestic remedies. [...]. Such arbitration will be conducted between the Republic and the home state of the applicable investor." In 2016, Namibia enacted the *Namibia Investment Promotion Act*, 2016. Section 28(4)

328; Precious N. Ndlovu, "Campbell v. Republic of Zimbabwe: A moment of truth for the SADC Tribunal", (2011) 1 SADC Law Journal, pp. 63-79.

[61] On the suspension of the SADC Tribunal, see generally, Frederick Cowell, "The Death of the Southern African Development Community Tribunal's Human Rights Jurisdiction", (2013) 13:1 Human Rights Law Review, pp. 153-165; Mia Swart, "A house of justice for Africa: Resurrecting the SADC Tribunal", Brookings – Africa in Focus, April 2, 2018. Online: https://www.brookings.edu/blog/africa-in-focus/2018/04/02/a-house-of-justice-for-africa-resurrecting-the-sadc-tribunal/

[62] The Tripartite Free Trade Area Agreement, available online: https://www.thedti.gov.za/parliament/2018/TFTA%20_COMESA_EAC_SADC.pdf; Calestous Juma and Francis Mangeni, "The benefits of Africa's New Free Trade Area", Belfer Center for Science and International Affairs, June 11, 2015. Online: https://www.belfercenter.org/publication/benefits-africas-new-free-trade-area-0

[63] Article 30 (1) & (2) (a-d).

[64] "So far only four countries in the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC) and Southern African Development Community (SADC) tripartite bloc have both signed and ratified the agreement. These are Kenya, Egypt, South Africa and Uganda. A total of 22 out of 26 countries have signed the agreement." See, TRALAC News, "Fresh push for states to ratify the Tripartite FTA as deadline draws near", Tralac, April 5, 2019. Online: https://www.tralac.org/news/article/13999-fresh-push-for-states-to-ratify-the-tripartite-fta-as-deadline-draws-near.html

[65] Outside Africa, the March 2018 Court of Justice of the European Union decision in *Slovakia v Achmea BV* (Case C-284/16) marks a significant roll-back on the use of arbitration to settle intra-EU disputes under bilateral investment treaties.

provides that "the jurisdiction over disputes relating to this Act lies exclusively with the courts of Namibia, but the Minister and investor or investment, as required by the circumstances of the alleged breach of rights or obligations, may, by written agreement, agree to arbitration in accordance with the Arbitration Act, 1965 (Act No. 42 of 1965) in Namibia." In 2017, Tanzania enacted, the *Natural Wealth and Resources (Permanent Sovereignty) Act*, 2017. Section 11(2) provides that "disputes arising from extraction, exploitation or acquisition and use of natural wealth and resources shall be adjudicated by judicial bodies or other organs established in the United Republic and in accordance with laws of Tanzania." They "shall not be a subject of proceedings in any foreign court or tribunal." More recently, Tanzania terminated its bilateral investment treaty with the Netherlands.[66]

The point from the foregoing analysis is that the actions at the regional and national levels demonstrate an ongoing discontent which African states continue to demonstrate with judicial dispute mechanisms that they perceive are either significantly rules-based, legalistic, or in the least are perceived as unfair to them. It is more interesting that the African states are not alone in this discontent. The struggle for survival at the level of the WTO-DSM as well as the March 2018 Court of Justice of the European Union decision in *Slovakia v Achmea BV* (Case C-284/16) marks a significant roll-back on the use of arbitration to settle intra-EU disputes under bilateral investment treaties.

In the next section which concludes this paper, I highlight some factors which if addressed will strengthen the AfCFTA-DSM.

V. Conclusion: Towards an Active and Relevant AfCFTA-DSM

That the drafters of the AfCFTA transplants the WTO DSM should not be equated with failure. There is a window of opportunity that can be utilized to amend the dispute protocol in order to reflect the judicial attitude of African states towards trade dispute settlement, while also expanding the pool of actors to include private businesses who are the primary users of the system. In this regard, I agree with James Thuo Gathii's position that "the AfCFTA can learn both from the experience of the WTO's dispute settlement system as much as from the non-litigious settlement of disputes from Africa's sub-regional systems. In addition, the experience and expertise of the sub-regional courts in Africa should inform how the AfCFTA's dispute settlement system develops and evolves."[67] Aside the foregoing, other critical factors that must be addressed by drafter of the AfCFTA-DSM are addressed below.

First, the AfCFTA Member States will have to demonstrate an unfettered political willingness to support the system whether it favours them or not. In other words, instances of backlash as was the case with some of the regional community courts must be avoided. And while it sounds like cliché, it is worth emphasizing that the measure of the success of the AfCFTA and its DSM is

[66] James Thuo Gathii, "Understanding Tanzania's Termination of its BIT with the Netherlands in Context", Afronomicslaw blog, April 1, 2019. Online: http://www.afronomicslaw.org/2019/04/01/understanding-tanzanias-termination-of-its-bit-with-the-netherlands-in-context/

[67] James Thuo Gathii, "Evaluating the Dispute Settlement Mechanism of the African Continental Free Trade Agreement"; Afronomicslaw Blog, April 10, 2019. Online: http://www.afronomicslaw.org/2019/04/10/evaluating-the-dispute-settlement-mechanism-of-the-african-continental-free-trade-agreement/

dependent of the political will that backs its implementation. Suffice to say therefore, that, the momentum that has led to the ratification of the AfCFTA must be kept going even more so in the early days.

Second, the Member States to the AfCFTA should amend the AfCFTA and its DSM in order to allow the private sector as actors. The AfCFTA-DSM applies to disputes arising between State Parties concerning their rights and obligations under the provisions of the Agreement.[68] The majority of the cross-border transactions that occur in Africa have been by private parties and corporations. The rise in the relevance of the regional community courts is based on active use by private parties. The AFCFTA and its DSM has significant utility for private businesses.[69] Consequently, with Phase II negotiations on-going, the opportunity should be harnessed in order to enhance the overall access to the dispute settlement regime under the AfCFTA.[70] By so doing, the AfCFTA-DSM will transcend the limitation in relation to economic integration disputes that do not currently vest locus in private persons to sue over trade disputes. Further, such expansion will nip in the bud the under-utilization critique that has been the case with regional economic communities in economic integration matters.

Third, the AfCFTA-DSM must also be operationalized in a manner that does not constitute it as an alternative dispute settlement system.[71] Its originality, uniqueness and separateness vis-à-vis the existing similar regional dispute mechanisms in the TFTA and SADC for example, must be clearly articulated in its practice directions in order to discourage forum shopping by the state parties.[72] The text of the AfCFTA does little to discourage forum shopping. For example, Article 3, paragraph 4 of the AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes, provides that State Parties may not "invoke another forum" on an issue if they have already requested consultation under the AfCFTA.[73] While this provision addresses the issue of duplicate proceedings for disputes already brought before the AfCFTA-DSM, it does not go far enough in prohibiting the inverse, that is, State Parties bringing an issue before the AfCFTA after it has already been brought before a regional DSM. In seeking to develop a unified or cohesive body of African international economic law based on the AfCFTA, it is critical to anticipate and effectively address forum shopping issues given its potential to undermine a regime.

Finally, another factor that has contributed to the derailment of regional economic integration aspirations in Africa is geo-political challenges and power dynamics. On the one hand, colonialism and the manifestations of post-colonial legacies has consistently put the trust

[68] Art 3 of the DSM Protocol

[69] See, James Thuo Gathii, "The East African Court of Justice: Human Rights and Business Actors Compared" in Karen J. Alter, Laurence R. Helfer, & Mikael Rask Madsen, *International Court Authority*, (Oxford, 2018), pp. 59-81 (arguing that regional trade rules and dispute settlement mechanisms that have been transplanted from Europe has had little salience for business actors.); Okechukwu C Iheduru, "Organized Business and Regional Integration in Africa" (2015) 22 Review of International Political Economy 910

[70] See, Mihreteab Tsighe, "Can the Dispute Settlement Mechanism be a Crown Jewel of the African Continental Free Trade Area?, Afronomicslaw blog, April 8, 2019; Online: http://www.afronomicslaw.org/2019/04/08/can-the-dispute-settlement-mechanism-be-a-crown-jewel-of-the-african-continental-free-trade-area/

[71] John Ruhgangisa, "Parallel Jurisdiction of Courts: The View from the EACJ" (2010) 36 Commw. L. Bull. 575 at 576-78

[72] Amos Saurombe, "An Analysis and Exposition of Dispute Settlement Forum Shopping for SADC Member States" (2011) 23 S. Afr. Mercantile LJ 392

[73] *Protocol (of the AfCFTA) on Rules and Procedures on the Settlement of Disputes,* 21 March 2018, Art 3(4).

between and among Francophone, Anglophone and Lusophone African Sates to test. The tension and distrust between these regions remain potent and is a factor to the slow pace of economic integration.[74] In this regard, the norm of pan-African solidarity plays a significant role in regulating and constraining interstate behavior amongst African states.[75] Luwam Dirar argues that the norm of pan-African solidarity originates from the shared historical experience of African states with colonialism and domination.[76] Although colonialism ended several years ago, questions about the continued influence of the norms of solidarity in the struggle for independence of African States continue to be relevant today. For example, African states' individualized approach to the Economic Partnerships Agreement (EPA) negotiations with the European Union have led to increasingly fragmented economic policies amongst African states.[77] In this regard, the colonial and post-colonial histories of African states can also be a source of contention that weighs on the socio-economic and political relations of African states that may impact the AfCFTA. Apart from the linguistic barrier and colonial histories that plague economic relations, the plight of small and/or land-locked African States must also be addressed in the distributional effects of the AfCFTA. On the other hand, regional economic aspirations are consistently pitched against the national economic policy of the states. Unsurprisingly, in this battle, the national economy has emerged as the key priority for the member states. In addition, even where the smaller African states have demonstrated their willingness for trade and integration, the bigger economies within the network have not always followed with similar mindset. The AfCFTA and its DSM will be embedded in this historical and extant contentions and discontent among the state parties.[78] The DSM therefore adds a new layer to the existing geo-political and power dynamics.[79] Thus, when assessing the prospects for the AfCFTA's new Dispute Settlement Mechanism, it is critical to understand some of the pre-existing dynamics of African state-to-state relations. And in this process, there must be a balance of the national, regional and continental policy spaces if the anticipated new economic and legal order of the AfCFTA and its DSM must live up to their potentials.[80]

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[74] See generally, Akinkugbe, Olabisi D., "Revisiting the Economic Community of West African States: A Socio-Legal Analysis" (December 20, 2017). Forthcoming as, *Law, Economics and Regionalism in Africa: A Socio-Legal Analysis of the Economic Community of West African States* (2020) ('Routledge Research in International Economic Law' series). Available at SSRN: https://ssrn.com/abstract=3354070 or http://dx.doi.org/10.2139/ssrn.3354070

[75] Luwam Dirar, "Norms of Solidarity and Regionalism: Theorizing State Behavior among Southern African States" (2016) 24 Mich St Int'l L Rev 667 at 668-69.

[76] *Ibid* at 687.

[77] *Ibid.*

[78] K. O. Kufuor, "The Collapse of the Organization of African Unity: Lessons from Economics and History". (2005) 49 Journal of African Law, p. 132.

[79] For an empirical study in the context of the WTO, see, Andrew T Guzman and Beth A. Simmons, "Power Plays and Capacity Constraints: The Selection of Defendants in World Trade Organization Disputes" (2005) 34 J Legal Stud 557

[80] Gregory Shaffer, "How Do We Get Along? International Economic Law and The Nation-State", (2019) 117 Michigan Law Review (Forthcoming)