African Continental Free Trade Area: The Practicability of Dispute Settlement Mechanisms in Africa

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Abstract

Regional economic integration is a major strategy for advancing development. Its key element, which is the establishment of free trade areas, requires establishing and implementing protocols, especially dispute settlement mechanisms (DSMs). Since universalist DSM rules can be problematic in different circumstances, context specificity is advised. We examine the practicality of the DSM of the Africa Continental Free Trade Area (AfCFTA) in resolving intra-Africa trade disputes. Drawing from the ideas of the Third World approaches to international law (TWAIL) and qualitative desk review, we raise two arguments. First, the AfCFTA DSM draws from "global integrationist ideologies" that are rooted in global free-trade ideas to universalize the AfCFTA's trade policies, which could promote unsupportive legalistic practices in Africa. This conventional market orientation could render it inadequate in responding to African disputes arising from the AfCFTA. Second, the AfCFTA DSM's practicality, especially in upholding rules-based regimes, suffers contradictory and overlapping clauses, inattention to the private sector, and transplants the World Trade Organization (WTO)-DSM to Africa's context. Therefore, despite the good gesture of consultation as a means to resolving trade disputes, the AfCFTA needs to re-center its focus on strategic Afro-domestication of the DSM through the active involvement of civil society and context-specific adaptation.

Keywords: Regional Economic Integration, DSM, AfCFTA, TWAIL, Africa

Introduction

Regional economic integration is one of the development strategies undertaken by both gGobal North and Global South economies to stimulate development (Solingen, 1998). Nearly all world regions have attempted some form of regional economic integration. Even the troubled northwest Asia has attempted ad hoc, non-institutionalized and shifting cooperation efforts embodied in the Arab League and the Gulf Cooperation Council. It needs to be added that this became more political than economic due to regime insecurities and vested geopolitical interests (Sarto and Lecha, 2024; Abdullah, 2023). The European Economic Community (EEC), precursor to the European Union (EU), the Association of Southeast Asian Nations (ASEAN), and the North American Free Trade Association (NAFTA) all exemplify regional economic integration. The African Economic Community (AEC) was established in a 1991 agreement that built on the 1981 Lagos Plan of Action in which African states agreed to multidimensional and multi-issue cooperation and shared development (OAU, 1981; OAU, 1991). East Africa had transcended free trade status and reached common market and currency union by 1977 (EAC, 1999).

The free trade areas (FTAs) across the globe reflect protocols on rules and procedures, including dispute settlement mechanisms (DSMs) intended to resolve disputes arising from trade interactions. Practical DSMs are not only enforceable within the institutional frameworks of the FTA but also raise some contradictions with other instruments on bilateral, regional and international cooperation. Under the AfCFTA, 54 African Union (AU) member states have signed the FTA agreement and 46 have ratified it. The aim is to establish a single continental market with a population of about 1.3 billion and a combined GDP of approximately US$ 3.4 trillion. This could boost African income to US$ 450 billion by 2035 (Kiiza, 2023). The AfCFTA DSM was put in place to settle intra-Africa trade disputes by regulating the rights and obligations of state parties in a fair, transparent, accountable and predictable manner. Dispute-settlement provisions are enshrined in Article 2 of the AfCFTA and the Protocol on Rules and Procedures on the Settlement of Disputes (hereinafter, Dispute Protocol). The Dispute Protocol prioritizes the rights of each individual state party to the agreement. It also provides interpretations for areas of conflict and overlap with the agreement (Akinkugbe, 2020).

Scholarly interrogation of the Dispute Protocol and its AfCFTA DSMs is inadequate. At best, current efforts are scattered in broad examinations of the general promise of the AfCFTA. Analysts, for instance, underscore the capacity impediments to effective trade liberalization within the AfCFTA, considered the largest free trade area outside the World Trade Organization (WTO) (Nwankwo and Ajibo, 2020). Others stress the critical need for reforms to transcend current fixation with commodity-based trade through functional policies that prioritize value chain development, infrastructure connectivity, and deepen industrial production. These also aim at achieving technical capacity and involve the private sectors in the execution of an African value chain agenda (Ajibo, 2023). The importance of simplified and harmonized cross-border trade procedures that enable smooth intra-Africa movement of goods and services has been underlined (Attia, 2021; Mlambo and Masuku, 2022). Questions of whether AfCFTA mechanisms can meet states' multiple interests at national, regional and continental levels are

lingering and attention to the AfCFTA DSM remains missing. As the Third World approaches to international law (TWAIL) reveals, the gap results from how international law plays a key role in legitimizing and sustaining the unequal global structures and processes that enable the Global North to dominate international trade.

The starting point to cover the scholarly gap is the recognition that DSMs in free trade agreements provide a means to settle disagreements on interpretation or compliance with treaty obligations (Mansfield, 2003; Shany, 2003). Moreover, DSMs help trading-party states to reduce tensions and sustain healthy relationships, thereby facilitating organized business in international trade. This argument is based on the assumption that there are always disputes that can harm international trade. A DSM is seen as an important mechanism for preventing the spillover of trade-related conflicts by providing an authoritative interpretation of the rules and norms of a treaty (Simmons, 2005). This enhances the commitments of the parties and legitimacy of the FTAs. Needless to say, the inclusion of a DSM in FTAs is necessary in the process of economic integration because it enables a deeper and a wider integration through an institutional framework of jurisprudence. This is equally important for developing and increasing access to justice among member states of FTA agreements.

The foregoing scholarly viewpoints would imply that the DSM is important for the smooth running of the AfCFTA. But a number of gaps, uncertainties, and contradictions have been identified with the AfCFTA DSM. These challenges generate various potential threats to trading communities within the African continent. This article examines the practicability of the DSM in the AfCFTA (hereinafter, AfCFTA DSM), which was adapted on March 21, 2018 and came into force on May 30, 2019 (Akinkugbe, 2020). Analytical emphasis is on the practicality and challenges of DSMs in the AfCFTA DSM. The purpose is to supplement current analyses and practices under the AfCFTA in order to offer a more nuanced understanding of the changing free-trade landscape in Africa. To do so, the following two questions are investigated: (1) What dimensions of the AfCFTA DSM would render it effective for achieving the goals of the AfCFTA? (2) What challenges could hamstring its effectiveness in promoting a Pan-African trade regime? Before delving into answering these questions, a presentation of the research methodology, the structure of the article, and the theoretical anchorage are presented.

Through qualitative desk review, various documentary sources were interrogated. These included journal articles, books, official reports on the AfCFTA and DSM documents. These were analyzed and interpreted to answer the raised questions. The rest of the paper was thematically organized in five major subsections: understandings the theoretical anchorage of AfCFTA DSMs, procedures for DSMs, the efficacy of the AfCFTA DSMs, challenges for AfCFTA DSMs, and conclusion and the way forward. The study is situated at the intersection between scholarship and policy-practice. We however attempt to relate policy practice with the theoretical perspective for better understanding of DSMs. We do not compare the efficacy of DSMs across different FTAs or regions but only focus on the AfCFTA DSM.

Theoretical Framework: Third World Approach to International Law

Basically, AfCFTA DSMs are trade-related conflict-resolution measures within the framework of the AfCFTA. African Union (AU) member states signed the AfCFTA Agreement in 2018 and have enforced it since May 30, 2019. The goal is to facilitate intra-African trade, promote industrialization and innovation, and encourage competitiveness among African member states. Pro-AfCFTA analysts argue that the FTA is also aimed at establishing a regional value-chain that would stimulate African economic integration and uplift African agency in the international political economy (Cofelie, 2018). The AfCFTA was started as a means to enable Africa reposition its economic order in the contemporary international political economy. Said differently, the aim was to establish a single continental market to enable the marketing of goods and services and facilitate free movement of people within Africa. Moreover, the target was that African economies would achieve industrial efficiency through large markets that would permit the exploitation of economies of scale, enhancing mobility across borders, improving access to markets, exploiting comparative advantages of different African states, and attracting foreign direct investments (FDIs). These advantages would facilitate greater investment and employment opportunities for Africa and raise its global agency. For these goals to be effective, right laws and procedures have to be followed. We therefore argue that AfCFTA needs to adapt the ideas of the Third World approaches to international law (TWAIL) in order to gain meaningfully from the dispute settlement measures.

The TWAIL reveals how international law plays a key role in legitimizing and sustaining the unequal global structures and processes manifested in the growing North-South dichotomy. In other words, international law is being used to sustain Western domination and economic hegemony (Thompson, 1994). It does so through displacing national legal systems and/or dominating them through the process of 'global interventionist ideologies.' For example, the powers of global financial and trade institutions to enforce the neoliberal policies are derived from international law. This implies that the economic and political independence of the Third World is being undermined by policies and laws dictated by the Global North and the international institutions there under.

The TWAIL emerges to question the legitimacy of the international law regime. It considers international law as an illegitimate endeavor underpinned by "a predatory system that legitimizes, reproduces and sustains the plunder and subordination of the Third World by the West" (Mutua, 2000; Anghie, 2005). To that effect, TWAIL stems from a lack of satisfaction with mainstream international law. Mutua (2000) broaches the meaning of TWAIL as an approach that describes a response to a condition, which is both "reactive" and "proactive." He notes that it is "reactive" because it responds to international law as an imperial project, and it is "proactive" because it seeks the internal transformation of conditions in the Third World.

Viewing TWAIL as "proactive" and "reactive," we argue in this essay that it is a theoretical framework that guides the understanding of AfCFTA DSMs because of its inherent ideas that align with those of AfCFTA goal to advance African interests. The TWAIL ideas that resonates the objectives of AfCFTA are worth mentioning. First is the call for the recognition of a right to development. The proponents of this idea argue that laws need to exist in order to promote development and reduce human hardships, especially in Third World countries. The role

of the state is crucial in this regard as it should be given the responsibility to guide the process of development. In this respect, TWAIL does not agree with the international law that universalizes development with limited input from Third World people. This explains why Mutua proffers that international law is rooted in an "arrogant Eurocentric rhetoric and corpus" (2000, 37). What this means is that for AfCFTA DSMs to be efficacious, they have to identify and give voice to the marginalized people that wish to engage in AfCFTA. These include women, youths and the general informal sector that dominate trade in Africa. This is because at the moment, AfCFTA DSMs have generally excluded these actors because of the focus mainly on global market ideas masterminded by international law.

Second, TWAIL demonstrates how interconnectedness and history are critical issues that international law should consider. Mickelson (1997) broaches how interconnectedness of subject areas and looking at any problem as a historical issue are very important aspects in solving local problems. In other words, international law should not attempt to separate the law from the historical context within which it developed simply because it is promoting the universalization of laws. To say it differently, AfCFTA DSMs need to focus on African history and context in order to understand the challenges that affect intra-African trade.

Third, TWAIL reveals the contradictions within international law and how they affect Third World countries in international trade. In the first instance, there are internal contradictions embedded within international law. These include the perpetuation of trade injustice against the Third World because of asymmetrical power relations in the global financial and trade institutions. These are brought by what we call 'global interventionist ideas.' Through these ideas, international law purports to support the promotion of human rights on one side, while little attention is paid to the other side when the practice of international trade and economic law consistently violates human rights. To be sure, deregulation in labor market is hurting the living conditions of labor in Third World countries. The role of TWAIL in this perspective is to guide scholars and policy practitioners on how to manipulate international law in order to respond to the trade interests of people in Third World economies.

Finally, TWAIL analysis brings to the fore how the internationalization of international trade law is a violation of human rights in the Third World states. In this respect, TWAIL helps one to develop a critical research agenda which questions the "global interventionist mission" of universalizing the law in order to promote justice and equity. To put it differently, the perspective raises individual consciousness of the oppressive potential of universality of international trade laws and their attendant global institutions. It argues that transplanting Western global institutions and ideologies in the African context without critical evaluation of the impact do more harm than good. In short, the TWAIL perspective helps one to question the often unquestioned assumption that international trade law as entirely perceived in the West should be promoted universally without paying attention to the Third World's inputs and context.

Needless to mention, the AfCFTA framework for dispute settlement does not entirely resonate with ideas of TWAIL. Instead, AfCFTA DSM are guided by the principles of World Trade Organization Dispute Settlement Mechanisms (WTO DSM). First, the AfCFTA agreement (Article 5) points to the intergovernmental trade governance system through which the dispute settlement body (DSB), panels, and appellate body (AB) are anchored (African Union, 2018a). These bodies are key elements in providing security, predictability, certainty and rule of law in the intra-African trade (Luke, 2021). Supporters of the WTO model argue that Africa's DSM adapted this model to be effective in, and consistent with, the global trading system (Gathii,

2019). Nonetheless, WTO pessimists argue that since the AfCFTA is a bold step for economically weak Africa, following too much principles of WTO may incline them too much into the ideological orientation of orthodox market principles that may end up hurting Africa's social and economic fabrics. Thus, WTO pessimists insist that it would not have been problematic if the universalization of the global trading system was not imposed upon the AfCFTA DSM. Thus, it becomes problematic when the main principles of TWAIL are ignored. If TWAIL principles such as (a) consideration of diverse and inclusive laws, (b) listening and considering the voices of the marginalized people, and (c) consideration of power dynamics in international laws were at the center of the enforcement, there would be possibilities of achieving AfCFTA goals. Said differently, Africa's socioeconomic and political context needs to be considered when instituting AfCFTA DSMs. This would promote responsive legal practices to trade needs of African people and thereby enhance justice, equity and human rights in international trade. In the next section, we broach the procedures for DSM in AfCFTA.

Procedures of the AfCFTA DSM

An analysis of AfCFTA DSM procedures starts with the understanding of the anchorage of DSM in the AfCFTA. The DSM is anchored in Article 20 of the AfCFTA. It is to be administered in accordance with the Protocol on Rules and Procedures on the Settlement of Disputes, also known as the Dispute Protocol (AU, Dispute Protocol, 2018b). Accordingly, Akinkugbe (2020) explains that the "Dispute Protocol" establishes a DSB that is responsible for ensuring that dispute settlement is done in a transparent, accountable, fair and predictable way, and is consistent with the provisions of the AfCFTA Agreement. The DSB supports FTA efficiency in the adjudicating process and ensures that there is rule-based and transparency in the adjudication process.

In addition, as Akinkugbe (2020) avers, the AfCFTA DSB comprises of representatives of AfCFTA state parties headed by the chairperson. The AfCFTA report shows that state parties will elect the chairperson and the DSB will be entrusted with power and authority to establish dispute settlement panels (DSPs) and an AB. Also, Akinkugbe (2020) explains how the DSB will be responsible for adopting panel and AB reports, and for maintaining surveillance on implementation of the rulings and recommendations of the panels and AB. The DSB is also authorized to suspend concessions and other obligations under the agreement as it may deem necessary. Based on this state of affairs, it is important to analyze the procedures of AfCFTA DSM in order to lay conceptual ground for understanding its practicality. These procedures include consultations in various forms: namely, the use of good offices; conciliation and mediation; and more formal procedures such as arbitration, panels and AB processes.

To start with consultations, state parties understand how the relational nature of intra- and inter-state trade requires informal ways of resolving conflicts. Accordingly, state parties consider consultation as a preliminary mechanism through which those in conflicts may settle their disagreements. This consultative and informal dispute settlement mechanism is essential for AfCFTA DSM and can minimize the escalation of disputes if well administered (Akinkugbe, 2020). Consultations need to be done by following the principle of confidentiality and

impartiality. In this arrangements state parties to the AfCFTA have equal rights and adequate opportunities for consultations. Requests for consultations are notified to the DSB through the secretariat in writing. Learning from Article 7(3) of the AfCFTA agreement, the complainants must provide the reasons for the request, identify the concern, and indicate the legal basis for the complaint. The dispute has to be settled within 30 days. In case it fails within 60 days, complainants may refer the matter to the DSB requesting it to establish a panel. In these consultations, we consider good offices, mediation, conciliation and arbitration as key components that facilitate peaceful resolution of disputes within the AfCFTA.

The first, consideration of good offices in the process of DSM in AfCFTA in Africa, denotes a third party. This is usually a person of considerable stature by either his/her long-term experience in DSM or holding a high-level official position in a reputable multinational agency. The main objective is to solve a dispute among disputing state parties that may have reached an impasse in their negotiations. Potemkin, Miashiro and Klerk (2022) argue that such a person must be a skilled individual to ensure that s/he provides the good offices to assist the parties in reducing the escalation of the dispute and facilitate a peaceful settlement. Indeed, the United Nations (1992) explains how an offer of good offices may be "made both at the initiative of the holder of good offices or in response to a request of one or more parties to the dispute." The United Nations avers that either way, all parties to a dispute must accept an offer of good offices. It is important for the disputing parties to confide in a third party exercising good offices if they are to achieve good results. Also, it is noted that the provider of good offices has to practice confidentiality and show respect to the conflicting parties.

Potemkin, Miashiro and Klerk (2022) maintain that the initial role and responsibilities of a third party exercising good offices is not to make proposals on how to resolve the dispute. Instead, s/he must actively listen to adequately understand the respective positions and interests of the disputing parties. This process enables the good offices holder to develop a relationship of trust over time with the disputing parties. This trust makes the disputing parties to seek the holder of good offices to suggest possible elements to aid in resolving a dispute. While this approach is equally important in resolving disputes in the AfCFTA, the United Nations (1992) stipulates that the outcome of the procedure by the good offices holder can never take the form of legally binding decisions. After all, as Potemkin, Miashiro and Klerk remind us, the use of good offices appears equivalent to the use of a village chief or a paramount chief to resolve disputes among members. This informality is as important as the formal processes through which disputes may be resolved because it may help prevent most of the disputes from taking on the formal elements of adjudication.

The second element of consultation processes is mediation. As an essential procedure for the AfCFTA DSM, it is detailed in Article 8 of the AfCFTA's Dispute Protocol. The protocol considers mediation as an alternative means of settling intra-AfCFTA disputes because of its flexibility in the process of resolving conflicts and the level of power entrusted to the conflicting parties in making their own choices. In other words, mediation thrives on the principle of self-determination, voluntary participation of conflicting parties, confidentiality, and neutrality of the mediator. These doctrines partly explain why mediation has been widely conceived as

"facilitated negotiation" (Lee, 2025).

Accordingly, the role of the mediator in the mediation process is to guide the negotiating parties to reach an agreement. The mediator starts by understanding the broad interests of the disputing parties and guide them to go beyond their narrow historical interests. Once the broader interests have been identified, the mediator helps parties explore different options for mutual interests that are essential for settlement. Nonetheless, mediators do not suggest options or proffer their views on what might be the 'best' solution for the parties. But, the disputing parties may ask the mediator to make a proposal once the trust has been built. In addition, this is possible because the aim of mediation is to arrive at 'win-win' resolution for all the disputing parties. In other words, the mediator's trust is as important as reaching a solution (Bercovitch, 1991).

The third element is conciliation—a diplomatic means of settling disputes peacefully as provided in Article 8 of AfCFTA agreement and specified in the dispute protocol. Conciliation is a process of evaluating the factual and legal elements of a dispute in order to get a solution. It involves the elements of both inquiry and mediation with two basic functions: (1) to investigate and clarify the dispute-related facts, and (2), to encourage the disputing parties to come together to reach an agreement (Potemkin, Miashiro and Klerk, 2022). This is possible through the conciliators' assessment of the legal rights and obligations of the disputing parties. Consequently, the objective is to assist the disputing parties to negotiate a mutually agreeable solution to the dispute. The solution must have the key aspect of mutual consent, especially if it involves formal actors like nation-states and international organizations which have to consent to the implementation of processes of dispute resolution and specific mechanism in which to be engaged in doing so (Reif, 1990).

The conciliation process in state-to-state disputes involves the establishment of a conciliation commission aimed at managing the dispute. Commissions' role in managing a dispute has to be in tandem with the applicable bilateral and multilateral treaties. Each party must appoint members to the commission. The conciliators are usually appointed from the list of conciliators that is maintained based on treaty provisions. In some situations, however, the conciliation commission may adopt its rules of procedure. In the conciliation processes, a number of methods for handling a matter may be raised. A commission has the right to summon and hear witnesses and experts. Disputing parties have the right to be represented by their agents, counsels, and experts. Furthermore, conciliation procedures and outcomes of a process must remain confidential. The outcome of the conciliation is non-binding, but a successful conciliation clarifies the legal positions of the disputing parties.

Finally, the AfCFTA has a consultation-based mechanism, i.e. arbitration, which takes place on a voluntary basis but constitutes a 'compulsory' means of dispute settlement. The implication for this is that arbitrators, and not the contesting parties, offer binding decisions. For this to happen successfully, however, mutual consent of disputing parties becomes paramount. Arbitration is therefore characterized by the legal force of its results. The outcome of an arbitration—an arbitral award—is usually binding upon the parties to a dispute. Needless to say, the adoption of an arbitral award entails its execution supported by the arbitration agreement that

contains the provisions on steps needed to execute the award. This is contrary to other alternative dispute resolution (ADR) mechanisms whose decisions are not binding. Like in a conciliation process, arbitral tribunals are constituted by the individuals chosen by the parties. These may, in some cases, come from a permanent list of arbitrators. This approach has some merits: there is a possibility to agree on the law that the tribunal will apply; agents, also known as counsels, usually represent the disputing parties; and the procedure involves typical judicial actions such as submitting written memorials and counter-memorials, examining the oral testimonies of witnesses and experts, as well as practicing cross-examination.

The foregoing explanation illustrates how the peaceful settlement of disputes is the right of the members of the AfCFTA. It shows how peaceful settlement is a natural duty that is universally recognized in international law, embodied in the United Nations Charter, and adopted under the AfCFTA. Since all AfCFTA members are also United Nations member states, it follows that the good offices, conciliation, mediation, and arbitration, which are listed in the AfCFTA Dispute Protocol, stem from customary international law. Based on their ideological reflections, however, these provisions in AfCFTA seem to have been modelled after Articles 5 and 25 of Dispute Settlement Understanding (DSU) of Article 5 of WTO DSU which provides for good offices, conciliation, and mediation. It stipulates how these dispute mechanisms may be engaged on a voluntary basis if disputing parties so agree. Simultaneously, Article 25 provides for arbitration as "an alternative means of dispute settlement that can facilitate the solution of disputes that concern issues that are clearly defined by both parties" (WTO, 1994, 1).

Surprisingly, however, Park and Chung (2016) reveal that until 2016, these specific provisions have not been used since the WTO's inception. These provisions related to resolving WTO disputes have been characterized as 'rarely used' or 'mostly forgotten' (WTO, 2001; Malkawi, 20007). The worry, therefore, is that while these procedures may resonate to the principles of TWAIL, the AfCFTA may also forget or be encouraged to ignore the application of these procedures in peaceful resolution of disputes. This may be due to the preference of the so-called formal procedures such as the settlement dispute panel that is highly preferred in international trade. It may also be possible considering the fact that they are ideologically underpinned by the WTO where they have not been utilized, notwithstanding the several WTO-related conflicts. Considering the inbuilt natural role of these mechanisms of dispute settlement in the AfCFTA, the framers of the AfCFTA may need to articulate mechanisms for operationalizing or give them a stronger force of law and political acceptance to ensure that they are utilized given their relatively cheaper and longer-lasting impact than formal adjudication.

With respect to the formal aspects of AfCFTA DSMs, the first of these measures is the dispute settlement panel that is established by the DSB. This panel is established when the complaining state party requests for it and with evidence that the aforesaid consultation mechanisms failed. Accordingly, the DSB establishes a panel to discharge legal responsibilities on behalf of the DSB. The powers of panels to adjudicate are based on the relevant provisions of the AfCFTA Agreement and the matter referred to the DSB by the complaining party. The Panel is therefore responsible for working on the findings that are essential to support the DSB in making its recommendations. These findings are also helpful in ensuring that the DSB makes the

rulings as provided for in the agreement. In order to have a valid and authentic finding, a panel is required to consult widely and regularly with conflicting parties. It should also offer an opportunity to the complaining parties to develop a mutually satisfactory solution. Principally, the deliberations are supposed to be confidential. The opinions expressed in a panel report are supposed to be anonymous. This presupposes that a panel is both cushioned from conflicting parties' possible infiltration and exercises utmost caution.

Assessing the Efficacy of the AfCFTA DSMs

The usefulness of the AfCFTA DSM in resolving disputes among AfCFTA member states is articulated herein. First, the DSM encourages stability in intra-African trade and the AfCFTA. The dispute protocol on DSM establishes a legal foundation for which AfCFTA goals and objectives are laid. The DSM becomes essential for promoting stability and compliance in business standards among member states. Once respected and implemented, a strong and sound DSM with appropriate remedies is the keystone for encouraging the appropriate operationalization of AfCFTA. Chayes (1995) recognizes the inevitability of disputes in global trade and argues that adequate DSM provisions and operationalization are essential for ensuring compliance and avoiding trade-related struggles. In other words, the DSM provisions in free trade agreements encourage member states to commit to international trade law. The DSMS, therefore, reinforce commitments among state parties and assure that investors have a solid legal ground for investment in Africa.

Following the articulation of AfCFTA DSM procedures, the principle of meritocracy and good governance is potentially established in the AfCFTA DSM because only qualified individuals with expertise and experience in specific disciplines are nominated by state parties to participate in different AfCFTA DSMs. For example, individuals with competent knowledge in international law, international trade, and dispute resolution experts are considered in all DSMs such as consultations, dispute settlement panels, and the AP. The aforementioned qualifications which the DSB considers to select individuals to constitute the DSP to arbitrate the disputes (Article 9 and 10 of AfCFTA, 2018) make it promising in terms of competence. While institutional politics may interfere with the performance of international institutions, dispute bodies such as DSP and AB have a role to remain impartial and independent. They have to resist political interference and vested-interest influence, and to safeguard the reputation of the AfCFTA DSMs. They have to be transparent and accountable in their decisions and actions. These principles are essential for the promotion of good governance in the AfCFTA. For instance, members of the DSP or AB are not allowed to participate in another proceeding for dispute resolution which would lead to conflict of interests. Upholding these good governance principles is paramount for the effectiveness of AfCFTA.

The AfCFTA DSM may be applauded for encouraging consultation processes. Specifically, the AfCFTA agreement provides for a procedural requirement related to the consultation request (African Union, 2018, 2021). This provides the state parties with specific measures to deal with their conflicts. As part of consultation processes, other important measures

have been established to support the adjudication processes. In the office of the Secretary General, there are good offices, conciliation, mediation, and arbitration, all of which serve to speed up the process of dispute resolution.

In addition, consultation through mediation and conciliation encourages flexibility in AfCFTA DSMs. To be sure, while principally the proposal of the mediator and conciliator for the settlement of a dispute do not bind the parties, in reality, the successful outcome of these procedures can be formalized in an agreement or protocol. As the United Nations (1992) foresees, parties to a mediation may agree that their settlement agreement be drafted at the end of successful mediation in order to become a binding force and be enforceable in courts of law. This is clarified in the provisions of the United Nations Convention on International Settlement Agreements resulting from mediation (Singapore Convention, 2018; UN, 2018). These mediation remedies of state-to-state trade disputes may rest comfortably with members of the AfCFTA, considering the fact that historically African states have more trust in mediation and conciliation processes than formal adjudication.

Furthermore, the AfCFTA DSM encourages autonomy and independence in the adjudication process. To start with, the AfCFTA is technically 'independent' of the AU. This explains why the AfCFTA Agreement established AfCFTA's own DSMs. To be sure, Article 3(4) of the AfCFTA DSP prevents state parties from invoking any other forum on the same matter that had already been raised under the AfCFTA DSM. This is a safeguard against forum shopping. It guarantees that no other court or body can review or interpret the AfCFTA protocols (Simo, 2023). The DSP empowers the disputing parties to have autonomy and control over the dispute resolution process and outcome. In the AfCFTA framework, for example, disputing parties can decide how to resolve their dispute. They can reach informal agreement on various options available, such as consultations, mediation, and the DSP. They may also opt for independent arbitration if they wish.

The preceding implies that disputing parties have the right to choose the most suitable DSM without recourse to other AU conflict-resolution mechanisms that may suffer political interference and complicated bureaucratic red tape. What is necessary in this case is that the party initiating the dispute must notify the other party and indicate a DSM of its preference. They both have to consent to the DSM selected and the arbitration rules. Indeed, the principle of autonomy empowers disputing parties to participate actively. It also provides a cooperative and consensual approach for the parties in resolving disputes. This also enables the parties to tailor the process to their needs, preferences, and priorities, thereby promoting a sense of ownership and fairness in the dispute resolution process and enhancing confidence in the outcome.

Challenges in Operationalizing the AfCFTA DSM

In this section, different challenges to operationalizing the AfCETA DSM are identified and analyzed. These challenges relate to the institutional design of the AfCFTA DSM, specifically its statist worldview, as well as the contradictions among the rules of the game. The possible misalignment with the international trade regimes, while reflecting of Africa-unique element,

may affect dispute settlement. The apparent relegation of domestic political economy dynamics that affect intra-Africa investment and trade may render the AfCFTA DSM less efficacious in addressing intra-Africa disputes over the AfCFTA.

The state-only focus is the first issue of concern. The AfCFTA DSM focuses only on settling disputes among state parties. There is minimal consideration of private, non-state parties. This is observed in the DSB and its implementation mechanisms. Akinkugbe (2020) shows that state parties to the AfCFTA did not consider private parties to benefit from the DSB for dispute settlement under the agreement. In the dispute protocol, there is a direct reference to state disputants. This automatically removes private parties from the consideration of DSMs. In other words, the AfCFTA deals with public law actors in the FTAs. As Erasmus (2018) explains, this aims at eliminating trade barriers in the African continent. The failure of the AfCFTA DSM to consider private parties has a serious legal implication because most intra-trade and international transactions involve members of the private sector whose rights require protection for certainty and predictability in relation to international trade agreements.

As presented elsewhere in this paper, this challenge originates from the ideological orientation of the WTO. In this entity, the similar approach was adopted and it establishes that private parties can only be protected when a claim is brought against it by a state party on the grounds that its right has been violated (Erasmus, 2018). Not surprising, however, Erasmus (2018) reveals how this approach is hardly adopted by state parties that are members of the WTO. The question here is the following: If the same approach is not utilized in the WTO, what guarantee is there that it will be adopted by African states that follow the same business ideological model of the WTO? Expectedly, private individuals, like state parties, may soon demand to be granted recognition in AfCFTA in order for their rights to be enforced.

Next are the contradictory provisions in the adjudication process. To start with, technically, the AfCFTA is "independent" of the AU. This explains why the AfCFTA has its own DSMs that are well enshrined in Article 3(4) of the AfCFTA DSP. This prevents state parties from beseeching any other forum on the same matter that had already been raised under the AfCFTA DSM. While this provision guards against forum shopping and may guarantee that no other court can review or interpret its protocols (Simo, 2023), it has a serious contradiction: i.e. an aspect on trade and the legal and regulatory provisions of the AfCFTA that supports the movement of people to provide jobs and other services cannot be shielded from state operations. For instance, the Protocol on Free Movement of Persons states that "any dispute arising out of its interpretation, application and implementation may be referred to the ACJHR" (African Court of Justice and Human Rights). This court is more statist that the AfCFTA. This state of affairs generates confusion as to whether the AfCFTA will continue being independent of the ACJHR's jurisdiction, especially where non-state actors affected by the pragmatics of the AfCFTA are concerned. The same concern is raised about its independence from the WTO and the International Court of Justice (ICJ) where most of its legal and regulatory provisions are inclined. This is unlikely because international law tends to be biased toward the powerful actors, which may undermine the people-centeredness of the AfCFTA.

Relatedly, conflicting and overlapping provisions of the DSP pose weighty challenges to

the settlement of trade disputes among African nations. Akinkugbe (2022) states that the AfCFTA protocol is not an exclusive dispute resolution system. This is contrary to major international trading agreements such as the WTO system. Specifically, Article 3(2) of the AfCFTA dispute protocol states that "any special additional rules and procedures set out in other parts of the Agreement in relation to the settlement of disputes would prevail over the rules contained in the Protocol" (African Union, 2021, 1). This provision is different from the WTO systems in which there are no competing mechanisms with respect to dispute settlements (Gathii, 2019). Therefore, additional mechanisms for dispute resolution under the AfCFTA show that the non-judicial system is not likely to be the only mechanism for the settlement of most disputes in relation to trade.

Thereafter are the difficulties in execution and enforcement of AfCFTA DSM provisions. In Africa, generally, the problem is not the lack of good legal and regulatory frameworks. The greatest hurdle has always been political goodwill and commitment to enforce existing frameworks diligently. Thanks to trepidations against political and technical accountability and responsiveness, the reason behind this challenge is that some African leaders tend to get interested in 'deal-making' rather than 'rule-making' and enforcement. This state of affairs resonates well with Akinkugbe's observation. He expresses the concern that like other international tribunals, the AfCFTA DSM is faced with the problem of enforcing the decisions laid down by the tribunal. He notes that this is attributed to state parties that may refuse to abide by the rules laid down by a panel or tribunal. The failure to enforce such decisions makes compliance very difficult at the state level, which is likely to affect AfCFTA DSM because of inadequate enforcement measures at domestic and regional levels.

Finally, but most important is context versus formalized legal procedures for resolving dispute in Africa. This is likely to affect the AfCFTA DSM that has been modelled from the WTO DSB with an entrenched and centralized multilateral governance institution. This design ignores the contextual factors that determine the success of multilateral trade rules. While it is reasonable to benchmark and learn from experienced actors, institutional transplanting without considering socio-economic, political, historical and complexity of the African continent renders the whole process inefficacious. As Gathii (2019) explains, the adoption of the AfCFTA DSM reflects the preference of some small set of African states and technical experts who favor a strong system of dispute settlement to be applied universally. This practice of institutional mono-cropping cannot work in specific African contexts.

To be sure of the preceding observation, Leonardi (2010) documents how a study on disputes in South Sudan revealed that disputing parties preferred an organic mechanism for the court members to advise one another and improve their capacity to handle changing and interethnic cases. This was contrary to the choice of producing binding agreements or fixed definitions of law. Moreover, Ntuli (2018) shows how 90 percent of disputes in South Sudan are resolved through traditional justice processes. In Kenya, 51% of Kenyans prefer referring problems to community leaders instead of the police, while 60% of Kenyans do not use courts to resolve disputes. Loschky (2016) posits that only 36% of the total population in rural Africa considers referring matters to a court as opposed to a village elder. Therefore, it is important for

the AfCFTA to adequately establish why formal protocols are not favored by Africans in order to adapt its rules and procedures adequately. The AfCFTA designers and reviewers may also need to commit extra energy to informal dispute settlement mechanisms as opposed to modeling those principles on WTO rules that are externally generated with no contextual grasp of African problems.

Conclusion

The practicality of the AfCFTA is examined in this paper with a focus on the promise and challenges of implementing DSMs under in the AfCFTA. The AfCFTA is a bold step to enable intra-African trade and investments as well as the free movement of persons, goods and services which can be achieved once dispute settlement mechanisms that are provided for in the AfCFTA rules of the game are made functional. The DSMS, including consultations through good offices, mediations and conciliations, and the establishment of dispute settlement panel and the AB, present a promise of encouraging good governance, predictability, and accountability.

Nonetheless, these measures are based on the ideological conceptions of the conventional Western market ideologies that animate contemporary Western-dominated international trade regimes. This may, in practice, contradict the pragmatic and strategic measures that would enable AfCFTA DSM to be responsive to the intricacies of resolving disputes among state parties to the AfCFTA. Specifically, the AfCFTA DSM draws heavily from the 'global integrationist ideologies' that are routed in global, universalist, and free-trade-regulating influences of the WTO. Using these rules to influence the AfCFTA could promote unsupportive legal practices in Africa. The practicality of the AfCFTA DSM, especially on issues of upholding a rules-based regime in the AfCFTA, is likely to be hamstrung by contradictory and overlapping clauses and the failure to consider non-state actors, whose interest in promoting intra-Africa investment and trade may sometimes contradict the vested domestic political economy interests of state parties to the AfCFTA. These interests may include domestic collusions between powerful individuals and groups seeking monopoly of oligopolistic advantages, political elites seeking to close out competing groups from accessing regional and continental markets, and confessionalist-nationalist coalitions that may altogether be antithetical to regional and continental economic integration (Solingen, 1998).

From an Africanist perspective, despite the good gesture of the consultative approach to resolving trade disputes, the AfCFTA needs to re-center its focus on the strategic operationalization of the DSM and the active involvement of other stakeholders such as civil society and the private sector. Implementation needs to avoid an overemphasis on conventional market ideologies that may contradict pragmatic measures that would make the AfCFTA DSM more responsive to African disputes and realities. The 'global integrationist ideologies' animating the AfCFTA DSM, which are rooted in global free-trade regulations that universalize the hegemonic WTO agenda, could promote unsupportive legal practices in Africa. The AfCFTA DSM's practicality, specifically upholding rules-based regimes, will remain beholden to contradictory and overlapping clauses, inattention to the private sector, and the universalization

of the WTO DSM to the African context. All of these aspects necessitate political goodwill and bureaucratic commitment within African states and AfCFTA structures to overcome formalistic impediments to the free flow of investments, trade in goods and services, and movement of people within the continent. The strategic Afro-domestication of the DSM through active involvement of civil society and private sector stakeholders and context-specific adaptation would go a long way in addressing these inadequacies.

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