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Dispute settlement in the Continental Free Trade Area

The utility of the proposed CFTA Agreement ultimately lies in the enforcement of the obligations undertaken by Member States (MS). This raises the question whether a dedicated new dispute settlement arrangement should be adopted as part of the CFTA, with jurisdiction over disputes arising from the application of the CFTA agreements. The legal framework of the African Union (AU) reveals a fragmented body of agreements on dispute settlement adopted at different stages and guiding different activities of the Union. The AU does not have a specialized forum to hear trade related disputes.

The 1963 founding Treaty of the Organisation for African Unity (OAU) mentioned a Commission of mediation, conciliation and arbitration. The 1991 Abuja Treaty (in Article 18 (1)) provided for a Court of Justice of the Community.

At the transition to the AU in 2002, Article 18 of the Constitutive Act of the AU provided for the establishment of a Court of Justice of the African Union. Article 33 (2) of the Constitutive Act provides that "the provisions of [the] Act shall take precedence over and supersede any inconsistent or contrary provisions of the Treaty establishing the African Economic Community". Hence, the adjudicating body for the integration process of the planned AEC would be the Court of Justice of the Union (or the 'African Court of Justice'), which supersedes the Court of Justice of the Community earlier provided for.

This Court has not been established; other judicial bodies have come into existence. The African Court on Human and Peoples Rights (ACHPR) was established through a Protocol to the African Charter on Human and Peoples' Rights (or the 'Banjul Charter'), which was adopted in 1998. It came into force in 2004. Through the Protocol on the Statute of the African Court of Justice and Human Rights adopted in 2008, the ACHPR was merged with the prospective African Court of Justice to form the African Court of Justice and Human Rights; to be the main judicial organ of the AU. As at February 2014, thirty countries had signed the Protocol, but only five had ratified it.

This fragmented state of affairs needs clarification. The creation of a court with jurisdiction over the economic integration process envisaged in the Abuja Treaty is an obvious need.

How this court would relate with other judicial organs at the continental level is important, not least because the areas covered by AU law are inter-related. For example, provisions to regulate trade and investment in the public interest may touch on human rights issues, which can also be handled by the ACHPR. There would also be the question of whether such a court would be one of first instance, with the African Court of Justice (when established) then forming the Appellate Court, or whether both divisions can be established within the same court.

The most immediate issues pertain to the manner of establishment of the dispute settlement arrangement of the CFTA and the identity of the Parties. The CFTA will have its own agreements; which will, once in force, only bind the State Parties. AU Members deciding not to ratify the CFTA Agreements will not be bound by any of the adopted provisions. Disputes as to the application or interpretation of the CFTA Agreements can only arise between the Parties. Should a dedicated CFTA dispute settlement system be adopted or will AU fora be used? The present state of affairs regarding AU dispute settlement seems to favour a new CFTA dispute settlement dispensation.

Additional questions need clarification. How will the CFTA dispute settlement body interact with regional and national courts? Would individuals have standing? What remedies should be provided for?

On the first question, the ACHPR has ruled in some cases that it does not have jurisdiction to entertain references decided by national courts. Regional courts, such as the COMESA and EAC Courts of Justice, have adopted a different approach. In a recent judgment the COMESA Court (in the case of Malawi Mobile Ltd v Malawi Government and Malawi Communications Regulatory Authority (MACRA)) decided it had jurisdiction to hear a matter after exhaustion of local remedies. It also decided that it would have to consider national laws and actions in order to determine the extent to which obligations undertaken under the Treaty are being upheld.[1] This interaction of regional and national laws and institutions is a key component of community law.

The *Malawi Mobile* case is an example of how natural and legal persons can access the COMESA court to seek redress for infringements of the COMESA Treaty. It follows on the heels of a case between Polytol Paints and the Government of Mauritius, decided in 2013, when the Court confirmed the standing of private parties. The EAC Court has also heard a number of cases brought by private individuals. In SADC this was also initially possible. However, the recent suspension of the SADC Tribunal (after it had ruled that a Member State had violated the SADC Treaty) and its reinstatement with jurisdiction limited to disputes between Member States means that private parties can no longer bring cases to it.[2]

A dispute settlement system where continental, regional and national laws are interacting effectively and where private individuals have access to the respective courts, is vital for a rules-based and effective CFTA. Many of the benefits that would flow from a continental trade arrangement are at stake. Many of the benefits that would flow from a continental trade arrangement are at stake.

[1] For further details on this case, see: http://www.tralac.org/discussions/article/8588-steady-progress-of-community-law-in-comesa-malawi-mobile-ltd-v-government-of-malawi-and-macra.html

[2] The new SADC Tribunal, once its Protocol is in force, is unlikely to be very busy. African Governments do not litigate against each other over trade disputes.