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NEWSLETTER

DISPUTE RESOLUTION UNDER THE AFRICAN CONTINENTAL FREE TRADE AREA (AFCTA) AGREEMENT

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Nigeria has ratified the African Continental Free Trade Area (AfCFTA) Agreement which will come into effect on 1st January 2021 following the approval of the Federal Executive Council. This is after more than a year Nigeria became a signatory to the Agreement on 7th July 2019. The reason for the cold feet shown by Nigeria towards the ratification of the Agreement is to ensure the protection of Nigerian Industries.[1] There was much deliberations and consultations with trade and industry stakeholders on the threats the operation of the Agreement may present such as the rise in smuggling, import surge arising from trade liberalisation without corresponding growth in export of Nigerian products and the fear of Nigeria turning into a "dumping ground" for non-African goods.[2]

The AfCFTA Agreement portend a good omen for Africa because of its objectives which include the creation of a single market for goods and services, facilitation of investments, enhancing competitiveness of the economies of State Parties etc.[3] The Agreement seeks a progressive elimination of tariffs and non-tariff barriers to trade in goods, liberalisation of trade in services, cooperation on investment, intellectual property rights, competition policy, trade-related areas, custom matters, establishment of a dispute settlement mechanism amongst others.[4]

An assessment conducted by the Economic Commission for Africa[5] reports that AfCFTA will be a game changer for stimulating intra-African trade which is projected to increase by between 15% and 25% depending on liberalization efforts in 2040 compared to a situation with no AfCFTA in place The more ambitious the liberalisation of trade, the greater the expansion. This expansion will be most pronounced in industrial sectors thereby providing great opportunities to industrialize through trade.[6]

However, there exist some challenges to the new Trade Agreement. One major obstacle is infrastructural challenge with transportation at the forefront.[7] If the cost of moving goods from one point to the other is on a high side, the removal of tariffs and non-tariffs barriers will have no effect. Other obstacles include, insufficient or non-existing communication networks, the existence of the multiplicity of non-convertible currencies, ethnic, cultural and linguistic diversity and very high political instability.[8] The need to have supportive policies that will protect SMEs from being caught up in the potential increase in competitive pressure cannot be overemphasized. There is also a strong argument to review our intellectual property law and competitive law to ensure that we are standing on a favourable pedestal.[9]

Thus, as we look forward to many African countries approving the ratification of the AfCFTA Agreement and depositing their instruments of ratification with the depository office at the African Union (AU), the issues of legal rights and obligations of parties will obviously raise a discussion on the mechanism put in place for the settlement of disputes that may arise under the AfCFTA Agreement. The AfCFTA Agreement established a Dispute Settlement Mechanism (DSM) to

be administered in line with the Protocol on Rules and Procedures for Settlement of Disputes.[10]

The Protocol applies to disputes arising between State Parties concerning their rights and obligations under the Agreement.[11] It defines dispute to mean a disagreement between State Parties regarding the interpretation and/or application of the Agreement in relation to their rights and obligations. The Protocol established the Dispute Settlement Body (DSB) composed of representatives of the State Parties with the authority to establish Dispute Settlement Panels and an Appellate Body. The DSB has power to adopt Panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations of the Panels and Appellate Body, and authorise the suspension of concessions and other obligations under the Agreement.[12]

A dispute settlement proceeding is initiated under the Protocol when a State Party referred to as the Complaining Party requests for consultations with the aim of seeking the amicable settlement of the dispute.[13] The consultations refer to any representation made by another State Party concerning measures affecting the operation of the Agreement. Notice of the request for consultations must be given to the DSB through the Secretariat in writing stating the reasons for the request, identification of issues and the legal basis for the complaint.[14] Consultations must be done in good faith and deemed concluded within 60 days after the receipt of the request for consultations unless State Parties to a dispute agree to continue or suspend consultations. At any time during the 60 days period for consultations, parties may undertake good offices, conciliation or mediation for the purpose of settling the dispute amicably. When amicable settlement of the dispute fails, any party to the dispute shall refer the matter to the DSB requesting for the establishment of a Dispute Settlement Panel for the purpose of settling the dispute.[15] The purpose of the Panel is to make findings to assist the DSB in making recommendations and rulings.[16] The Panel, after a consideration of the facts and arguments placed before it, will issue a final report which must include discussions on the arguments made. Within 60 days from the date the final Panel report is circulated to the State Parties, the report shall be considered, adopted and signed at a meeting of the DSB convened for that purpose, unless a party to the dispute formally notifies the DSB of its decision to appeal to the Appellant Body or the DSB decides by consensus not to adopt the report. Where a party decides to appeal against the report, it must do so within 30 days of communicating such intention to the DSB.

Upon the determination of the appeal, the Appellant Body will issue a report which will be adopted by the DSB and unconditionally accepted by the Parties to the dispute unless the DSB decides by consensus not to adopt the report within 30 days following its circulation to the State Parties.[17] The decision of the DSB is final and binding on all parties.[18]

The Protocol also provides for recourse to Arbitration in the first instance in which case the rules of arbitration shall apply.[19] Where parties have resorted

to arbitration, notification must be given to the DSB and the award must be taken to the DSB for enforcement. Where a party refuses to cooperate, a complaining party shall refer the matter to the DSB for determination.

The Dispute Settlement Mechanism provided in the AfCFTA Agreement applies only to settlement of disputes arising between State Parties concerning their rights and obligations under the Agreement. This limitation invariably excludes disputes between private actors (physical and legal persons) who are undeniably the primary facilitators of the trade in goods and services.[20] This is however, comprehensible given that just like any other Free Trade Agreement, the AfCFTA deals with public law actors (states) and public law issues (for example, tariffs). Thus, the Agreement engages with acts that are within the remit of the State and its regulatory and fiscal powers excluding the engagement of private actors who execute the trade in goods and services and make the necessary investments.[21] It is therefore, apparent that the private actors will have no locus standi before the DSM. The question becomes whether it is desirable for a State Party to take on the case of an aggrieved citizen using the DSM under the Agreement. Some Commentators have argued that in some situations, it may be preferable for States Parties to pursue redress for their citizens through the DSM but in majority of cases, the dispute will fall within the commercial contract between the transacting parties.[22] Actors in the commercial spaces across the African Continent ranges from large business entities that may have formal presence in more than one African Country and have access to business support services (legal, financial and insurance services) to small business entities that do not have such formalised presences nor access to relevant business support services. The accessibility to these business support services impacts on the type of dispute resolution mechanism resorted to when commercial disputes arise which could be litigation, mediation, or arbitration.[23] Thus, there is need for an appropriate dispute resolution mechanism that will support the growth of intra-African trade thereby ensuring that the objectives of the AfCFTA Agreement are achieved.

In conclusion, the AfCFTA Agreement is a good development which actors (physical and legal persons) in the African commercial space should take advantage of. It is therefore good news when Nigeria announced on 6th December 2020 that it has deposited its instrument of ratification of the Agreement at the depository office at the AU, the legal depository of all instruments of ratification, thus, paving the way for Nigeria and indeed other African parties to the Agreement to take maximum advantage of the great opportunities under Agreement come 1st January 2021 the effective date for the Agreement to come into force.

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