Distributive Justice, SDT Provisions and the African Continental Free Trade Agreement

By:

Abdul Hasib Suenu

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“The countries of the South are not purveyors of some new and superior morality… They are behaving the way states have always behaved; they are trying to maximize their power—their ability to control their own destinies… The implications of this analysis for maintaining universal principles and norms are not sanguine.” - Stephen Krasner.

Since the commencement of the modern economic multilateralism, the loudest criticisms against the management, structure and policies of the international economic institutions (IEI) have predominantly emanated from developing countries, with African nations representing a considerable bloc in this movement. There are countless complaints regarding the asymmetric policies of the IEI, which have been subject of abundant academic inquiry. The complaints include issues such as unfair subsidy regulations; unjustifiable and discriminatory application of the Sanitary and Phytosanitary Measures; the

inadequate enforcement mechanisms of the WTO dispute settlement system, and so forth.

The consciousness about these imbalances, therefore, led to the emergence of social, academic and political movements. While political leaders of developing countries, on the one hand, strived to push for declarations such as the New International Economic Order, the Right to Development, and other beneficial terms within the IEI with the aim of achieving an equitable playing field; on the other hand, approaches such as Third World Approaches to International Law, (TWAIL), justice theories and other developmental ideas were developed in academia to offer new perspectives to how the International Economic Order, (IEO), should be managed for the equitable benefit of all.

While so much success has not been achieved at the global level, the purpose of this background is so that the present can be properly guided by the struggles of the past, and to bring Africa's attention to how two-faced it would appear if the continent fails to implement at its continental level, the principles of fairness it has always agitated for under the global/ multilateral economic order. Anything short would only give credence to statements from the likes of Krasner as quoted above – and the implementation of AfCFTA would be an appropriate test.

As an institution that arguably engages in the distribution of benefits and burdens that fundamentally affect people's lives and properties, AfCFTA presents an opportunity for distributive justice to be adopted as guiding political/legal theory for the continent's economic policies. The justice theory is generally concerned with the allotment of goods, duties and privileges, in consonance with the merits or peculiarities of individuals and in the best interest of society at large. Considering the wide economic differences among the AfricanStates who are parties to the pact, there is the need to ensure that policies are made with theconsciousnessof parties comparative differences and ultimately, for the varying developmental benefits of State Parties of different statuses.

The Difference Principle formulated by John Rawls is a relevant starting point in reaching the appropriate distributive justice theory that fits the continental economic system. The principle permits deviation from strict equality so long as

the inequalities in question would make the least advantaged in a society materially better off than they would be under strict equality. Even though Rawls later held the view that the principle only applies domestically to what he described as “well-ordered societies” with “basic structure”, extensive scholarly works have been written to rebut this nationalist view and in support of how the modern international economic relations and the institutions conform with those criteria set by Rawls himself.

This article also takes the position that it runs afoul moral universalism, which Rawls also proclaims, to hold that distributive justice cannot be applicable beyond national boundaries. Following the statement of Rawls himself “justice is the first virtue of social institutions” which does not exclude continental institutions.Therefore, in relation to AfCFTA, policy-makers need to be thoughtful in administering AfCFTA’s “progressive” liberalisation objective, by ensuring that appropriate exemptions are made for State Parties who would be worse off, in terms of development, if subjected to the same obligations as others.

This article recognises that some provisions of the AfCFTA already acknowledgethe unequal economic status of parties to the Agreement, such as Article 5 of the Agreement Establishing AfCFTA, which affirms flexibility and special and differential treatment (SDT) as part of its governing principles. However, it is opined that just like most of the controversial SDT provisions in the WTO Agreements, a considerable number of the AfCFTA provisions making reference to SDT also appear to be vague and lack the necessary specificity legally required to impose obligations on parties to comply with the provisions. For instance, Article 6 of the Agreement’s Protocol on Trade in Goods provides that***“State Parties shall, provide flexibilities to other State Parties at different levels of economic development or that have individual specificities as recognised by other State Parties...”*** Notwithstanding the usage of the mandatory word “shall”, provisions like the above have been held by the WTO Dispute Settlement Body (DSB), which the AfCFTA’s DSB is substantially modelled after, as imposing no actual obligation.

In the *EC-Biotech* dispute for instance, Argentina’s claim that the European Commission had failed to apply its legislation in a manner which takes account of developing country Members’ needs, in contravention of Article 10.1 of the

WTO-SPS Agreement, was dismissed by the DSB on the ground that the SDT provision does not prescribe any specific result to be achieved. This is notwithstanding the usage of a mandatory word like the above AfCFTA provision.

In essence, the contention of this piece is that the adoption of imprecise and relaxed SDT provisions that can easily provide leeway for countries to evade SDT obligations will only work contrary to the stated objective of the Agreement to promote and attain sustainable and inclusive socio-economic development among State Parties. Just as Amartya Sen correctly puts it, “the central issue of contention is not globalization itself, nor is it the use of the market as an institution, but the inequity in the overall balance of institutional arrangements—which produces very unequal sharing of the benefits of globalization”.

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