

## Dispute Settlement in and about the AfCFTA: What to expect?

Gerhard Erasmus

African Governments do not settle their disputes about compliance with obligations in intra-African trade and economic integration agreements through adjudication. Adjudication is the legal process by which an arbiter or judge reviews evidence and arguments about the applicable law, to come to a binding decision about the rights and obligations of the parties involved, and decides what remedy is required in respect of the matter which caused the dispute.

The avoidance of formal dispute settlement should be seen against the background of the fact that most African countries are members of the World Trade Organization (WTO), where compulsory dispute settlement is part of its single undertaking. Courts with jurisdiction over trade issues have also been established in the African Regional Economic Communities (RECs) that have accepted trade liberalisation and economic integration obligations.<sup>1</sup> Private parties have standing before these Courts and can file applications against the relevant Governments. (The exception is the Southern African Development Community (SADC). The SADC Summit abolished the SADC Tribunal in 2010, after it had ruled against Zimbabwe for confiscating private land without compensation. The SADC Member States took a unanimous decision to do so. They drafted a new Protocol on dispute settlement but excluded private parties from bringing applications. This new Protocol is not in force.)

Since the establishment of the World Trade Organisation (WTO) multilateral trade is conducted in a *rules-based* manner. So are deeply integrated regional trade arrangements such as Customs Union (CUs) and Common Markets. What are the benefits when trade is rules-based? It gives a voice to all members and is very important for smaller member states. Rules-based trading arrangements provide for trade without discrimina-

---

<sup>1</sup> COMESA, the EAC and ECOWAS have Courts of Justice.

tion, freer trade through negotiations, predictability, transparency, and promoting fair competition. Domestic trade measures should comply with treaty obligations. If they do not, a dispute can be declared against the wrongdoer. In Inter-state disputes about trade issues the remedy would typically be an order to withdraw the measure found to be unlawful.

Why do African Governments not litigate on multilateral nor regional levels? It has been said that this would be offensive to other governments, that there is a lack of technical capacity to use dispute settlement systems, and that intra-African trade related disputes are settled through direct discussions. The real reasons run deeper and involve the protection of national policy space in highly divergent RECs. Regional integration among Parties at different levels of development, and consensus decision-making, is difficult and not always compatible with strict legal obligations.

There is nothing wrong with the design of the AfCFTA as a Free Trade Area based on a comprehensive legal foundation. Its Preamble recognises the need *“to establish clear, transparent, predictable and mutually advantageous rules to govern Trade in Goods and Services, Competition Policy, Investment and Intellectual Property among State Parties....”* The dispute settlement mechanism of the AfCFTA:

*“is a central element in providing security and predictability to the regional trading system. The dispute settlement mechanism shall preserve the rights and obligations of State Parties under the Agreement and clarify the existing provisions of the Agreement In accordance with customary rules of interpretation of public international law”.*<sup>2</sup>

However, there is a problem with practical issues around the AfCFTA and the entry into force of the Annexes on Rules of Origin and the Tariff Schedules. It has proven very difficult to conclude these negotiations and to implement the AFCFTA as one continental regime.

There must be finality in respect of the agreed modalities in order to liberalise substantially all trade. If this does not happen, there will be different and separate *ad hoc* deals. That will make dispute settlement an unattractive option; because of the interim nature of the “rules” to be applied and about inherent uncertainties.

---

<sup>2</sup> Art 4(1) AfCFTA Dispute Settlement Protocol.

In the case of the AfCFTA, trade liberalisation will apparently happen in phases. Comprehensive AfCFTA trade will presumably be announced at a later stage when all outstanding matters will be concluded. Exactly when this will be possible, remains uncertain. The most recent announcement about starting trade in goods under the AfCFTA was released late July 2022. Seven countries have been selected to *pilot the continental free trade area* that seeks to unlock the movement of goods and services in Africa. They are Kenya, Tanzania, Tunisia, Cameroon, Egypt, Mauritius, and Ghana. South Africa and Nigeria (major continental economies) are not on this list. Two of the selected countries are members of the EAC Common Market, where a common external tariff applies for trade in goods. Others belong to other RECs with similar features. Additional technical issues need to be addressed when some members of a Customs Union are excluded from a new preferential trade deal.

The announcement by the Council of Ministers says this *“initiative seeks to demonstrate that AfCFTA is functioning and send a political message to countries that are yet to submit their provisional schedules of tariff concessions in accordance with agreed modalities.”*<sup>3</sup>

It is far too early to speculate about whether the AfCFTA State Parties will use the AfCFTA dispute settlement mechanism. The conditions are not right, and an appropriate legal framework does not yet exist. The AfCFTA seems to be in a new exploratory phase, with the original negotiations scheduled to continue. It is highly unlikely that formal dispute settlement will be invoked for the purposes of enforcing the pilot deal just announced. For now, the emphasis should be on getting the AfCFTA up and running as a comprehensive deal. It has proven more difficult than expected.

- - -

---

<sup>3</sup> <https://www.businessdailyafrica.com/bd/economy/kenya-among-7-countries-picked-pilot-free-continental-trade-3894084>