

Will Dispute Settlement Proceedings be a feature of the AfCFTA?

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It will be a major advance towards rules-based trade if the AfCFTA Dispute Settlement Protocol will be used by the State Parties. They do not settle disputes about trade and regional integration obligations through adjudication. The result is often lingering legal uncertainty.

The AfCFTA Agreement says the AfCFTA Dispute Settlement Protocol “*shall apply subject to such special and additional rules and procedures on dispute settlement contained in the Agreement*”.¹ A dispute settlement proceeding shall be considered to have been initiated when the Complaining Party requests consultations pursuant to this Protocol.² This opens the door to “*mutually agreed solutions to matters formally raised in accordance with the consultation and dispute settlement provisions of this Protocol*”.³ This Protocol also says the dispute settlement mechanism of the AfCFTA “*is a central element in providing security and predictability to the regional trading system*”.⁴

The AfCFTA Dispute Settlement Protocol (which replicates the WTO dispute settlement system) “*shall apply to disputes arising between State Parties concerning their rights and obligations under the provisions of the Agreement*”⁵. The AfCFTA Agreement means the Agreement establishing the AfCFTA, its Protocols, Annexes and Appendices which shall form an integral part thereof.⁶ Private parties have no standing before the DSB and cannot file disputes. Their states of nationality or domicile will have to litigate or act on their behalf.

¹ Art 3 AfCFTA Dispute Settlement Protocol.

² Ibid.

³ Art 4(3) AfCFTA Dispute Settlement Protocol.

⁴ Art 4(1) AfCFTA Dispute Settlement Protocol.

⁵ Art 3(1) AfCFTA Dispute Settlement Protocol.

⁶ Art 1(b) AfCFTA Agreement. According to Art 8(2) of the AfCFTA Agreement, Protocols, Annexes and Appendices “*shall form part of the single undertaking, subject to entry into force*”.

The AfCFTA Dispute Settlement Protocol provides for different stages in the settlement of disputes among the State Parties, the applicable timeframes, consultations, the adoption of Panel Reports, procedures for appellate review, surveillance of implementation of recommendations and rulings, and compliance. The Dispute Settlement Body (DSB) consists of representatives of the State Parties. It oversees the implementation of the Dispute Settlement Protocol, takes the necessary decisions, and informs the AfCFTA Secretariat of disputes related to the AfCFTA Agreement.⁷

The reverse consensus rule applies to the adoption of DSB decisions about important matters, such as the adoption of Panel reports and AB rulings. These reports must be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt them.⁸

One of the explanations offered for why African Governments do not litigate against each other over trade-related issues is that litigation against another sovereign state in a court of law is considered offensive since it involves an adversarial procedure. Consultations are more likely to bring about amicable settlements. If this is the case, the AfCFTA Dispute Settlement Protocol offers an ideal opportunity to engage in consultations in a structured and time-bound manner in order to secure a binding settlement of a dispute. When consultations fail to do so, the DSB can then establish a Panel to hear the matter and submit a report. Appeals to the Appellate Body is also possible. That guarantees a final and binding outcome. Legal certainty will be restored.

Since the AfCFTA rules for regulating trade in goods and services will often overlap with REC FTA disciplines, the State Parties may have the choice to submit, in appropriate instances, disputes about matters such as customs administration, trade facilitation and NTBs to the DSB for settlement. This will require the development of suitable procedures and case law on overlapping jurisdictional issues. Such a development can contribute to a more unified body of case law and clarify the AfCFTA *acquis*. The sooner this practice starts, the better for advancing the AfCFTA as a continent-wide rules-based regime.

Does it matter whether disputes about compliance with obligations about trade liberalisation and economic integration are decided through adjudication? We believe the answer must be in the affirmative, at least in those instances where it cannot be said that highly sensitive national policies are at stake. In any case, the AfCFTA Protocols contain the standard exception clauses found in trade agree-

⁷ Art 5 AfCFTA Dispute Settlement Protocol.

⁸ Article 10 AfCFTA Dispute Settlement Protocol.

ments such as those of the WTO.⁹ But exceptions are conditional. If an independent judicial forum decides the underlying questions of fact and law, there will be more certainty, predictability, and legitimacy. Private parties (the actual traders and investors) will also be encouraged and protected.

⁹ See Arts 26 – 28 AfCFTA Protocol on Trade in Goods.