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What protection for Women under the AfCFTA Dispute Settlement Protocol?

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The rights of women traders should be recognised and be protected to secure and improve their position under the African Continental Free Trade Area (AfCFTA). The proposed AfCFTA Protocol on Women and the Youth offers an opportunity to do so. How could women ensure that this new legal instrument will be respected? After all, when rights are granted there should be remedies for when they are violated.

This Blog contains a brief discussion of the AfCFTA Dispute Settlement Protocol. Other tralac publications will talk about other forms of dispute settlement (in the Regional Economic Community Courts and in national courts) which may be available to women traders.

It is unlikely that women traders they will be granted directly enforceable rights; cooperation arrangements among the State Parties are the more likely outcome of the negotiations on the Protocol on Women and the Youth. In any case, individuals (natural or legal persons) are not able to enforce provisions in AfCFTA legal instruments in terms of the AfCFTA Dispute Settlement Protocol.

The AfCFTA Protocol on Women and the Youth will also, in all probability, follow the established pattern and contain best endeavour provisions, as well as certain rights and obligations for the State Parties. It will be an integral part of the AfCFTA Agreement.[1] Only the State Parties have standing under the AfCFTA Dispute Settlement Protocol and only they can file disputes when violations of AfCFTA obligations occur.

[1] Article 1 of the AfCFTA Agreement defines the AfCFTA Agreement to mean "*this Agreement Establishing the African Continental Free Trade Area and its Protocols, Annexes and Appendices which shall form an integral part thereof*".

The dispute settlement mechanism of the AfCFTA is described as

> 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.[2]

What is noteworthy about this important clause in the AfCFTA Dispute Settlement Protocol is the extent to which it repeats the relevant provision in the World Trade Organisation (WTO) Dispute Settlement Understanding (DSU). This provision also indicates the intention that the AfCFTA should function as a rules-based system, like the WTO regime. However, this will only be the case if the State Parties in fact litigate against each other when infringements occur, as has happened under the WTO.

The AfCFTA Dispute Settlement Protocol and its Annexes "*shall apply to disputes arising between State Parties concerning their rights and obligations under the provisions of the Agreement*". Only State Parties have standing to file disputes. There is no institution within the AfCFTA system with the power to declare disputes against State Parties about compliance with AfCFTA obligations.

The Dispute Settlement Body (DSB) of the AfCFTA is established in accordance with Article 20 of the AfCFTA Agreement to administer the provisions of the Dispute Settlement Protocol. The DSB is, like its WTO counterpart, a mixture of a political as well as judicial forum. It is composed of representatives of the State Parties and has the authority to establish Dispute Settlement Panels and an Appellate Body, 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. The DSB shall meet as often as necessary to discharge its functions. It shall inform the Secretariat of any dispute related to the provisions of the Agreement.[3]

AfCFTA disputes must be formally initiated, and only the State Parties to the AfCFTA Agreement can do so. A dispute settlement proceeding will be considered to have been initiated in accordance with the Dispute Settlement Protocol when the 'complaining party'[4] requests consultations pursuant to Article

[2] Art 4(1) AfCFTA Dispute Settlement Protocol.
[3] Art 5 AfCFTA Dispute Settlement Protocol.
[4] Defined in Art 1(b) of the AfCFTA Dispute Settlement Protocol as the State Party that has initiated a dispute settlement procedure under the AfCFTA Dispute Settlement Protocol.

7 of the Protocol. A dispute can be settled through consultations.[5] If this does not happen, the complaining party can proceed to the next level and request that a Panel be appointed.

Private parties can, in principle, bring applications for the enforcement of their trade-related rights in domestic courts when state measures such as quotas or import restrictions infringe upon administrative justice or constitutional rights. They have done so in Namibia.[6] In such instance private litigators invoke provisions in national constitutions dealing with human rights against discrimination and administrative justice (due process) clauses. Even foreigners resident or incorporated in countries with rule of law governance, will have standing before the local courts. And it might be possible to argue that the domestic courts should take note of applicable international trade agreements when deciding trade related issues. The national constitution and legal precedents will provide guidance about the extent to which this might be possible in a particular country.

The state-centered design of the AfCFTA does not mean that the AfCFTA dispute settlement arrangement will be irrelevant for the purpose of promoting the rights of individuals. Private parties can invoke all binding legal instruments as part of their campaigning. However, formal litigation in the AfCFTA about compliance with provisions affecting their rights can only happen if their cases are taken up by the governments representing them as nationals or residents. Unfortunately, the established trend is that African governments do not litigate against each other over violations of provisions in their trade agreements.

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[5] In the WTO, by January 2008, only about 136 of the nearly 369 cases had reached the full panel process. Most of the rest have either been notified as settled "out of court" or remain in a prolonged consultation phase: https://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm.

[6] *Minister of Trade and Industry and Others v Matador Enterprises (Pty) Ltd and Others (SA 44 of 2014) [2020] NASC 2* (19 March 2020).

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