

## Will there be disputes under the AfCFTA? Where and how will they be decided?

International trade agreements typically provide for dispute settlement arrangements. The African Continental Free Trade Area (AfCFTA) Agreement does the same. It has a detailed Dispute Settlement Protocol which was adopted during Phase I of the AfCFTA negotiations. (Its official description is *Protocol on Rules and Procedures on the Settlement of Disputes*.<sup>1</sup>) Since the AfCFTA Agreement is in force,<sup>2</sup> this Protocol can actually be used. However, trade under the AfCFTA rules has not yet started and therefore this Protocol has not yet been invoked by any of the State Parties.<sup>3</sup>

The AfCFTA dispute settlement regime replicates that of the World Trade Organisation (WTO). Only the State Parties have standing to bring applications for the settlement of disputes against other State Parties. There must first be consultations to settle such disputes. If the consultations fail, a Panel can be appointed to hear the matter and to submit a report to the Dispute Settlement Body, which is composed of all the State Parties. Such Reports are adopted unless there is consensus not to adopt them. The same applies to decisions of the Appellate Body, whose rulings are final. There are provisions on how to ensure compliance. The Parties to a dispute may agree to submit the matter to arbitration in accordance with the provisions of Article 27 of the AfCFTA Dispute Settlement Protocol.

What will happen to disputes involving parties and firms, who are the real traders, importers, exporters, and investors? Private parties, even if they are affected by measures taken by

<sup>1</sup> <https://www.tralac.org/documents/resources/cfta/1998-afcfta-agreement-legally-scrubbed-signed-16-may-2018/file.html#page=56>

<sup>2</sup> It entered into force on 30 May 2019 after the 22<sup>nd</sup> instrument had been deposited under Art 23 of the AfCFTA Agreement.

<sup>3</sup> Forty-three instruments of ratification have already been deposited.



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officials or executive organs in State Parties, do not have standing under this Protocol. Neither is there a supranational body within the AfCFTA system with the power to declare disputes against State Parties when they violate their obligations. The State Parties can declare disputes in instances where their nationals or private parties/firms within their jurisdiction are affected by measures taken by other State Parties and the lawfulness of which is contested. They will file such applications as disputes “*regarding the interpretation and/or implementation of the AfCFTA Agreement in relation to their rights and obligations*”.<sup>4</sup>

Is it likely that the AfCFTA State Parties will declare formal disputes against each other? They have never done so before. Most State Parties are members of other trade arrangements such as the WTO and the Regional Economic Community (REC) Free Trade Areas (FTAs). Some of these RECs have their own Courts. Examples are the East African Community (EAC), the Common Market for Eastern and Southern Africa (COMESA), and the Economic Community of West African States (ECOWAS). The SADC Tribunal was abolished in 2011 after a ruling against Zimbabwe when private land was expropriated without compensation. The Governments of the Member/Partner States of these RECs do not litigate against each other in the respective regional Courts.

The REC Courts have extensive jurisdictional powers and private parties have standing before them. There have been instances where these Courts have ruled on disputes about trade-related measures taken against private parties by Governments of Member/Partner States.<sup>5</sup>

The REC Courts do not have jurisdiction over the legal instruments of the AfCFTA but, depending on the facts, there might be instances where measures (e.g. on trade facilitation issues connected to the AfCFTA), taken by government institutions, may also fall under REC instruments. We will have to wait and see what case law may be developed in respect of this connection. The relationship between the RECs and the AfCFTA is, in any case, an area where further clarification about the functioning of the AfCFTA is needed.

Private parties can also bring applications for the enforcement of their rights in domestic courts when state measures involving trade regulation (such as quotas or import restrictions) infringe upon their rights to administrative justice or their constitutional rights. The same applies to the regulation of trade in services, which normally happens via national regulators. Their measures and decisions will be justiciable in terms of the law of the land, under REC instruments, and the AfCFTA Protocol on Trade in Services. This will also be the case in respect of competition and intellectual property rights. The AfCFTA will eventually have dedicated Protocols for these disciplines.

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<sup>4</sup> Art 1 AfCFTA Dispute Settlement Agreement.

<sup>5</sup> *Republic of Mauritius v Polytol Co Ltd* (Application No 1 of 2012 COMESACJ 13; (6 December 2012)).

What kind of cases can be expected once the AfCFTA is operational? The AfCFTA Agreement covers a wide range of disciplines and includes several Protocols, Annexes and Appendices. They form an integral part of the AfCFTA Agreement.<sup>6</sup> Different areas of expertise and timeframes may be required to hear and decide the different disputes. Article 7(9) of the AfCFTA Dispute Settlement Protocol says that in cases of urgency, including cases of perishable goods, shorter timeframes for consultations apply. Pursuant to the provisions of Annex 5 on Non-Tariff Barriers, where a State Party fails to resolve an NTB after a mutually agreed solution was reached and after issuing the factual report, the requesting State Party shall resort to the dispute settlement panel stage.

There may also be disputes about national measures in the form of trade remedies and safeguards.<sup>7</sup> However, most State Parties still lack the required national legislation and investigating authorities to process applications for anti-dumping, countervailing and safeguard measures. Investment-related disputes is another specialised area and the AfCFTA Protocol on Investment (which is still to be adopted) will provide for the settlement of disputes involving private investors and when investor-State dispute settlement procedures could apply.

Obligations under more than one trade agreement may be at stake in future. Most African States belong to the WTO and to RECs. They may also opt for multilateral or REC dispute settlement procedures when applicable. The Economic Partnership Agreements (EPAs) with the European Union have their own dispute settlement procedures. The first dispute involving the EU-SADC EPA has recently been decided on the basis of arbitration. It involved safeguard measures imposed by the Southern African Customs Union (SACU) on poultry products imported into from EU member states.

The AfCFTA legal instruments do not regulate disputes between private parties. If a firm in State Party A concludes a contract with a client in State Party B to export goods or to provide services, that contract will provide for the law governing substantive matters and how disputes under it will be settled. Private parties usually opt for arbitration.

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<sup>6</sup> 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*”.

<sup>7</sup> See Annex 9 to the AfCFTA Protocol on Trade in Goods.

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