ASSESSING THE EFFECTIVENESS OF THE CURRENT DISPUTE RESOLUTION REGIME OF THE AFRICAN CONTINENTAL FREE TRADE AGREEMENT

Jamiu Ridwan Adeniyi[121]

ABSTRACT

Following the enactment of the Agreement Establishing the African Continental Free Trade Agreement (the AfCFTA Agreement or the Agreement), there was the adoption of a new Dispute Resolution Mechanism in addition to the numerous judicial mechanisms that are put in place to settle trade disputes between African States. Modelled after the dispute settlement system of the World Trade Organisation (WTO), the mechanism is established as a central element to provide security and predictability to the newly created regional trading system. Despite the fact that no State Party has brought a complaint under the current dispute resolution regime of the AfCFTA Agreement in any inter-African State dispute, an assessment of the effectiveness of the regime is of the utmost importance. Having in mind the aim of this paper to undertake the task of discussing the assessment, the paper begins by first presenting the key contents of the AfCFTA Agreement and then proceeds to discuss the various mechanisms of dispute settlement under the Agreement. It goes further to treat the assessment of the effectiveness of the current dispute resolution regime of the Agreement including issues that may provoke the underutilization of the regime if not efficiently addressed.

Keywords: Africa, Agreement, Dispute Resolution, Effectiveness, Protocol, Trade

[121] 500 Level Law undergraduate of the Faculty of Law, University of Ilorin, Ilorin, Nigeria and Chief Judge of the Law Students' Society, UNILORIN; email address: ajiboyeridwan80@gmail.com; mobile: +2349039225232

1.0 INTRODUCTION

The African Continental Free Trade Agreement (the AfCFTA Agreement or the Agreement) is regarded as the largest in the world in terms of the number of participating countries since the formation of the World Trade Organisation (WTO) in 1995.[122] It created a free trade area in Africa with the main objective of creating a single market followed by free movement and a single-currency union.[123] It aims to establish a large single African market for goods, services, and movement of persons.

The AfCFTA Agreement, on 30 May 2019, entered into force for states that ratified it after it had been negotiated under the auspices of the African Union (AU). Prior to coming into force, the Agreement was earlier signed by numerous states[124]on 21 March 2018 in Kigali, Rwanda. Nigeria, Africa's largest economy, was until recently signed the Agreement at AU Extraordinary Summit in Niamey, Niger, on 7 July 2019 alongside Benin Republic.[125]

The principal objective of the Agreement is to "*create a single market for goods and service, facilitated by movement of persons in order to deepen the economic*

---

[122] Micheal Asiedu, 'the African Continental Free Trade Agreement (AfCFTA)' (Global Political Trends Centre, 2018) <https://jstor.org/stable/resrep19333> accessed 7 September 2022.
[123] Folashade Alli & Associates, 'Dispute Settlement System under the African Continental Free Trade Area Agreement (AfCFTA)' <www.faa-law.com/dispute-settlement-system-under-the-africa-continental-free-trade-area-agreement-afcfta/> accessed 3 September 2022.
[124] Some of the states that have signed the Agreement include Angola, Algeria, Botswana, Burkina Faso, Cameroon, Djibouti, Egypt, Ethiopia, Gabon, Ghana, Kenya, Liberia, Madagascar, Malawi, Niger, Rwanda, Senegal, Tanzania, Zimbabwe, among others.
[125] Naomi Tarawazi, 'African States Launch the Operational Phase of the African Continental Free Trade Area Agreement, Creating one of the Largest Common Markets in the World' (Lagos Chamber of Commerce International Arbitration Centre's E-Newsletter, 2019) <www.laciac.org> accessed 25 September 2022.

integration of the African continent."[126] The Agreement further aims to "*resolve the challenges of multiple and overlapping trade regimes to achieve policy coherence, including relation with third parties*."[127] The Agreement deals with matters such as trade in goods, trade in services, investment, intellectual property rights, and competition policy.[128]

2.0 Dispute Resolution Regime under AfCFTA

One of the most outstanding of the AfCFTA Protocols is the Protocol on Dispute Settlement which espouses rules and procedures for the settlement of disputes within the AfCFTA. Contrary to the rules and procedures of the majority of the African Regional Economic Communities – Economic Community of West African States (ECOWAS), Community of Sahel-Saharan states (CEN-SAD), Intergovernmental Authority on Development (IGAD), Economic Community of Central African States (ECCAS) among others – which were modelled after the Court of Justice of the European Union, the African Dispute Settlement Mechanism (AfCFTA-DSM) was modelled after the World Trade Organisation Dispute Settlement Understanding.[129] It is not surprising that AfCFTA-DSM is principally modelled after the WTO-style framework given that the latter has performed creditably well over the years,

---

[126] Article 3(a), AfCFTA Agreement.
[127] Preamble, ibid.
[128] Article 6, ibid.
[129] James T. Gathii, 'Evaluating the Dispute Settlement Mechanism of the African Continental Free trade Agreement, (Afronomics Law, 10 April 2019) <www.afronomicslaw.org/2019/04/10/evaluatingthe-dispute-settlement-mechanism-of-the-african-continental-free-trade-agreement/> accessed 10 September 2022; Karen J. Alter, 'The Global Spread of European Style International Courts' (2012) <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article+1006&context+facultyworkingpapers> accessed 13 September 2022.

thereby earning a reputation as the crown jewel of the multilateral trading system.

Article 20 (1) of the AfCFTA Agreement establishes a dispute settlement mechanism for the resolution of disputes arising between State Parties which shall be administered in accordance with the Protocol on Rules and Procedures on the Settlement of Disputes (Dispute Protocol). The Protocol states that dispute settlement will be "*a central element in providing security and predictability to the regional trading system*."[130] One of the prominent outcomes of the Dispute Protocol was the establishment of a Dispute Settlement Body (DSB) and the provision of settlement of dispute in a fair, transplant, accountable, and predictable way that is in consonance with the provisions of the establishing Agreement,[131] applying to disputes between State Parties relating to their right and obligations.

4.0 Structure and Process of the AfCFTA DSM

The dispute resolution system of the AfCFTA involves the participation of several players and bodies. The Agreement envisages five (5) paths of dispute settlement which are discussed as follows:

(1) Consultations

By virtue of *Article 7* of the Dispute Protocol, where there is a dispute between two State Parties, a State Party may request consultations with the other State Party by sending a notification to the DSB in writing. Consultations shall be confidential and without prejudice to the rights of any State Party in any further

[130] Article 4, Dispute Protocol (General Provisions).
[131] Article 2, ibid.

proceedings.[132] The benefit of Consultations lies in the fact that they afford parties the opportunity to discuss the subject matter of the dispute and come to a satisfactory solution. Where the consultations fail to resolve the dispute for one reason or the other, the regime also creates an avenue that makes it possible for the parties to find a mutually agreed solution at any later stage of the proceedings. This avenue provides a unique forum for parties to resolve their differences giving State Parties the opportunity to harness the informality of the Consultation phase despite the legalization of the dispute resolution under the AfCFTA Agreement.[133]

(2) Good offices, Conciliation, and Mediation

Article 8 of the Dispute Protocol establishes the dispute resolution mechanism. This method aims to facilitate the involvement of an outside independent person unrelated to the parties in a dispute to find a mutually agreed solution. The method also enables State Parties to start and terminate the proceedings provided it is made prior to a request for consultations.[134] It is also important to note that unlike the practice under the WTO dispute settlement system, Good Offices, Conciliation and Mediation can start at any time and consultations are not required to take place for it to commence.

[132] Article 7(7), ibid.
[133] Margherita Melillo, 'Informal Dispute Resolution in Preferential Trade Agreements' (World Trade Law, 2019) <www.researchgate.net/publication/349379993_Informal_Dispute_Resolution_in_Preferential_Trade_Agreements> accessed 13 September 2022.
[134] Article 8(2), Dispute Protocol (Good Offices, Conciliation and Mediation).

(3) Establishment of Panels

The constitution of a dispute settlement panel is a formal step toward resolution of disputes.[135] The primary duty of a Panel is to assist the DSB in discharging its functions under the Agreement. The primary function of the Panel is to make an objective assessment of the matter submitted to it, assess of the facts of the case, and the applicability of and conformity with the relevant provisions of the Agreement and make findings to assist the DSB in making recommendations and rulings.[136]

In terms of expertise, the individuals, who are panelists, on the indicative list shall have experience in law, international trade, or in other areas covered by the AfCFTA Agreement such as intellectual property, or the resolution of disputes arising under international trade agreements.[137] The Panelists who shall be chosen strictly on the basis of objectivity, reliability and sound judgments shall be impartial, independent of, and not be affiliated to or take instructions from any Party. To avoid conflicts of interest, Panelists, who are nationals of the disputing State Parties, cannot serve on a Panel concerned with that dispute, unless the parties to the dispute agree otherwise.

(4) Establishment of an Appellate Body Process

In the event of an appeal by any of the State Parties involved in the matter, a standing Appellate Body (AB) shall be established by the DSB to hear the appeal from Panel cases which shall compose of seven (7) persons, with three (3)

[135] Article 9, Dispute Protocol (Establishment of Panels).
[136] Folashade (n 10).
[137] Article 10(3), Dispute Protocol.

forming quorum.[138] With respect to locus standi before the AB, only parties to the initial dispute have the right to appeal a Panel report. Similarly, a third party that establishes its substantial interest before the panel may have an opportunity to be heard via its written submissions.

The AB may uphold, modify or reverse the legal findings and conclusions of the Panel. The AB shall produce a single report reflecting the views of the majority of its members. Where the Panel and AB conclude that a measure is inconsistent with the AfCFTA, it shall recommend that the State party concerned bring the measure into conformity with the Agreement.[139]

(5) Arbitration

By virtue of *Article 27(1)* of the Dispute Protocol, parties may resort to arbitration for the resolution of their dispute and are at liberty to agree on the procedures to be used in the arbitration proceedings. Where parties have agreed to submit their dispute to arbitration notification of this agreement will be sent to the DSB. The decision of the arbitral tribunal or arbitrator is binding on the parties and same will be communicated to the DSB for enforcement purposes. It is to be noted that where a State Party has elected arbitration as a method to resolve a dispute it is precluded from subsequently approaching the panel to settle a dispute on the same matter.

In summary, the foregoing represents the paths to formal dispute settlement envisaged under the AfCFTA Agreement. Having discussed the various dispute resolution mechanisms, the next section shall be focusing on the assessment of

[138] Article 20(1 & 2), ibid (Appellate Body).
[139] Article 23, ibid (Panel and Appellate Body Recommendation).

the effectiveness of the current dispute resolution regime of the AfCFTA Agreement.

5.0 Assessing the Effectiveness of the AfCFTA Dispute Resolution Regime

Since its creation, no State Party has instituted a complaint under the AfCFTA-DSM. Therefore, it is difficult to assess the effectiveness of the regime on the basis of the progress that has been made if effectiveness should be contexualised as success in attaining the objectives of the dispute settlement of the AfCFTA Agreement. However, the effectiveness of the regime can be assessed by subjecting it to the test of efficiency in terms of the timeframe for resolving disputes and the enforceability of rulings of the DSB. The variables for assessing the effectiveness of the current dispute resolution regime are discussed as follows:

1. Timeframe for resolution of disputes

One of the variables in assessing the effectiveness of the AfCFTA-DSM is the timeframe provided for resolution of disputes. A careful perusal of the AfCFTA Agreement shows that it encourages prompt settlement of disputes as there is a time duration within which a dispute should be resolved. This arrangement is adopted to make dispute settlements to be efficient. The Panel proceedings are designed to be conducted with strict respect for timelines and terms of reference.[140] As a matter of fact, dispute settlement under the AfCFTA Agreement runs faster, on average, than cases in other regional or international organisations, such as the World Trade Organisation (WTO), the International

[140] Jacob O. Akuo, 'The Dispute Settlement Procedures of the African Continental Free Trade Agreement' <https://dayspringlaw.com/the-dispute-settlement-procedures-of-the-african-continental-free-trade-agreement/#_ftn19> accessed 9 September 2022.

Court of Justice (ICJ), the European Court of Justice (ECJ), the North American Free Trade Agreement (NAFTA), among others.

From the perusal of relevant provisions of the Agreement, it could be stated that it encourages prompt resolution of inter-state trade disputes with no intention to prolong proceedings unnecessarily. Thereby, in general, the current regime of dispute resolution mechanism of the AfCFTA Agreement can be considered an effective system in terms of timeframe for dispute resolution. This is similar to the promptness with which dispute proceedings are conducted under the WTO dispute system.[141]

Enforceability of Rulings and Recommendations

The Agreement also provides detailed rules for the enforceability of the recommendations and rulings ensuing from a dispute settlement process. In fact, the Agreement mandates the DSB to monitor and ensure the implementation of the ensuing decisions. Under *Article 23* of the Dispute Protocol, it stipulates the remedies that are available where the Panel or Appellate Body comes to the conclusion that a measure taken by a State Party is inconsistent with the AfCFTA Agreement and it mentions that it shall make recommendations that the State Parties concerned bring the said measure in conformity with the Agreement. State Parties are obliged to fully implement the recommendations of the DSB. Interestingly, *Article 25* of the Dispute Protocol states that where a concerned State Party fails to implement the accepted recommendations and

[141] Abdurrahman Alfaqiih, 'Effectiveness of the World Trade Organisation's Dispute Settlement Mechanism' (2013) <www.researchgate.net/publication/323759547_Effectiveness_of_the_World_Trade_Organization's_Dispute_Settlement_Mechanism> accessed 21 September 2022.

rulings of the DSB within a reasonable time, such a State Party may be ordered to pay compensation, or be suspended of concessions and other obligations which are temporary in nature.

The Secretariat of the AfCFTA is charged with the responsibility of assisting the panels and keeping the DSB informed of the status of the implementations of the decisions made under the DS Protocol. Without any doubt, it can be safely said that the commitment of the Agreement on enforceability speaks to the effectiveness of its dispute resolution regime. This will ensure a stable market while the rights and obligations of State Parties under the Agreement are preserved.[142]

6.0 Issues to be Addressed for a more Robust AfCFTA Dispute Resolution Regime

The current dispute resolution regime of the AfCFTA has some challenges that have limited its effectiveness. The following issues have to be addressed for the regime to be more effective:

1. Jurisdiction Challenge for non-state parties

Since dispute is defined as a disagreement between parties under *Article 1* of the Agreement it means, by way of interpretation, the Agreement envisages that only states can institute actions before the DSB for the resolution of any disputes that arise under the AfCFTA. This goes to show that the Dispute Settlement Mechanism (DSM) of the AfCFTA Agreement leans towards a system of state

[142] Lom N. Ahlijah & Deborah Okwan-Duodu, 'Dispute Resolution Mechanisms Under the AfCFTA', (11 February 2022) <http://integrisa.com/f/dispute-resolution-mechanisms-under-the-afcfta> accessed 15 September 2022.

to state dispute settlement and thereby eliminating private entities from the equation.[143]The Agreement followed the WTO model that responded to traditional international law, that did not recognise the standing of non-State actors, and whose objective is the promotion of cross-border trade over the more recent European Community Treaty that recognises non-State actors, and whose objective is identical to AfCFTA's– integration of a single continental market.[144]

This arrangement is a great challenge because, in reality, majority of the trading in goods and services, as well as other economic activities in the AfCFTA Agreement, are not done by states but by private persons. Therefore, aggrieved private persons or companies are left to resort to petitioning their participating home states to take action on their behalf. [145]

For instance, the USA and European Community both have models of communication with private sector industries and public-private in this regard.[146]This ensures the safeguarding of their trade interests as the private sector plays a critical role by providing human and financial resources and independent investigations of the violation, thereby taking part in the pre-

[143] Tribune Online, 'AfCFTA: NICArb Organises Roundtable on Trade, Dispute Resolution' the Nigerian Tribune (10 August, 2021) <http://tribuneonlineng.com/afcfta-nicarb-organises-roundatable-on-trade-dispute-resolution/> accessed 8 September 2022.

[144] Bayo Adaralegbe, 'AfCFTA and its Dispute Settlement Regime: A Faulty Design?' (Nigeria, 2022) <www.thisdaylive.com/index.php/2022/03/21/afcfta-and-its-dispute-settlement-regime-a-faulty-design/amp/> accessed 26 September 2022.

[145] ibid; the comments were made by Jonathan Aremu, a Professor of International Economic Relations at Covenant University, while speaking at the virtue conference organised by the Nigeria Institute of Chartered Arbitrators (NICArb) on the theme: 'AfCFTA and Non-State Parties: Implications for Trade and Dispute Resolution.'

[146] K. Bohl, 'Problems of Developing Country Access to WTO Dispute Settlement' Chi-Kent Journal of International & Comparative Law [2009] (9) 131 cited in Olabisi D. Akinkugbe, 'Dispute Settlement under the African Continental Free Trade Area Agreement: A Preliminary Assessment' <http://ssrn.com/abstract=3403745> accessed 3 September 2022.

litigation costs. The EU model can be found under *Article 133* of *the European Union Treaty and the Trade Barrier Regulation***.** The regulation provides a petition mechanism for the private sector which can urge the European Community to investigate foreign trade barriers and initiate claims before the WTO.[147]

Since the AfCFTA Agreement and its DSM have significant utility for private persons and corporations, the Members States to the AfCFTA should amend the position of the Agreement on its DSM to vest locus in the private sector as actors to sue over trade disputes in order for the AfCFTA-DSM to overcome the impediment of economic integration disputes in this regard.[148]

2. Addressing the issues of Forum Shopping

There is a need for the AfCFTA-DSM to be operationalised to ensure that it does not become compartmentalised as an Alternative Dispute Resolution (ADR) system.[149] A careful perusal of the text of the AfCFTA Agreement reveals that it does little to discourage forum shopping[150] by the State Parties.[151] For instance,

---

[147] ibid.

[148] Olabisi D. Akinkugbe, 'Dispute Settlement under the African Continental Free Trade Area Agreement: A Preliminary Assessment' <http://ssrn.com/abstract=3403745> accessed 3 September 2022.

[149] J. Ruhgangisa, 'Parallel Jurisdiction of Courts: The View from the EACJ' [2010] (36) Commw. L. Bull. 575.

[150] Forum shopping refers to the practice of choosing the dispute settlement mechanism, court or jurisdiction for the position being advocated. A party may forum shop when more than one court has jurisdiction over the dispute, choosing the court that gives it an advantage over the opposing party. The forum most favourable to the party's case is not always the forum that is most relevant to the dispute. See; John-Peter Ewert & David Weslow, 'Forum Shopping in Europe and the United States' (1 May, 2011) INTA Bulletin, Vol. 66, No. 9 <www.wiley.law/media/publication/116_Weslow--INTABulletin--05_01_11.pdf> accessed 25 September 2022

[151] Amos Saurombe, 'An Analysis and Exposition of Dispute Settlement Forum Shopping for SADC Member States' South African Mercantile Law Journal [2011] (23) 392.

Article 3 (4) of the AfCFTA Agreement *Protocol on Rules and Procedures on the Settlement of Disputes* provides that State Parties may not "*invoke another forum"* if they have already requested Consultation under the AfCFTA Agreement on an issue. Even though the provision addresses the issue of duplicate proceedings for disputes already brought before the AfCFTA-DSM, it does not go far enough in prohibiting the inverse, i.e State Parties bringing an issue before the AfCFTA-DSM after it has already been brought before a regional DSM.[152]

Therefore, the uniqueness, separateness, and originality vis-à-vis the existing similar regional dispute mechanisms, in the Tripartite Free Trade Area Agreement (TFTA) and Southern African Development Community (SADC) for example, have to be articulated clearly in its practice directions in order to discourage forum shopping by the State Parties.[153] In seeking to develop a unified or cohesive body of African international economic law based on the AfCFTA Agreement, it is critical to anticipate and effectively address forum shopping issues given its potential to undermine the effectiveness of the regime. One of the stark reasons for this is the lack of political will by African countries to adjudicate in a rules-based system. This culture will definitely hinder the effectiveness of the current regime. It is evident from experience that there is apathy and a strong discontent towards a highly legalized and formal trade dispute settlement in Africa, whether the dispute settlement model was transposed from the European Union (EU) or the WTO.[154]

---

[152] Olabisi (n 58).
[153] Amos (n 61).
[154] Olabisi (n 58).

3. Lack of Political Will to Utilize the Regime

Despite the fact that African countries are not subject to the power dynamics of preferential trade arrangements under the AfCFTA Agreement with developed countries, it is expected that the dispute resolution mechanism will be underutilized. The truism of this assertion reflects in the abrupt death of the SADC Tribunal, where SADC member states frustrated the DSM by not appointing new judges or reviewing their terms of office in 2010 after the Tribunal gave an unfavourable ruling against Zimbabwe for its policy of evicting white settlers, in the case of ***Mike Campbell (Pvt) Ltd & Ors. v Republic of Zimbabwe.***[155] In this case, the actions of the SADC member states is an indication of the reluctance of African countries to concede their sovereignty to tribunals in claims brought by individuals.[156] The problem of the culture of apathy to adjudicate in a rules-based system between African countries will seriously affect the effectiveness of the AfCFTA-DSM and this can only be solved at the domestic level, where accountability measures and policies are available to ensure governments safeguard the interests of their investors within the free trade area.[157]

7.0 CONCLUSION

Drawing from the WTO experience, it has been manifested that a legalised dispute settlement mechanism is not an effective system for settling trade disputes from African countries due to the fact that African countries have

[155] [2008] SADCT 2.
[156] Gichane W. Patricia, 'The Effectiveness of the World Trade Organisation Dispute Settlement System for Developing Countries: Lessons for the African Continental Free Trade Area' (2020) <http://erepository.uonbi.ac.ke/11295/157313> accessed 10 September 2022
[157] ibid.

apathy for utilizing a rules-based dispute settlement mechanism. This raises the possibility that the dispute resolution regime of the AfCFTA Agreement will hardly be utilised. This popular attitude of the State Parties will affect the effectiveness or limit the utilization of the AfCFTA-DSM. Nevertheless, for the purpose of protecting AfCFTA-DSM from being ineffective or underutilized the challenges of the regime, as pointed out in this paper, must be addressed. On the scale of the timeframe for dispute resolution and detailed rules on enforceability of rulings, the regime can be said to be effective, to some extent. However, African countries must demonstrate serious political will in recognising and utilising the dispute settlement mechanism for proper trade governance and they must eschew any form of self-help when they perceive any breach of trade deals for AfCFTA Agreement to succeed. In bringing this paper to an end, it is apt to emphasize on James Thuo Gathii's position that:

> *The AfCFTA [Agreement] can learn both from the experience of the WTO's dispute settlement system as much as from the non-litigious settlement of disputes from Africa's sub-regional systems. In addition, the experience and expertise of the sub-regional courts in Africa should inform how the AfCFTA's dispute settlement system develops and evolves*.[158]

[158] James (n 8)