

MECHANISMS FOR SETTLEMENT OF DISPUTES UNDER THE AFRICAN CONTINENTAL FREE TRADE AREA AGREEMENT

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by AARON ONYEBUCHI | EFEMENA ILUEZI-OGBAUDU

At the 12th Extraordinary Session of the Assembly of the African Union held today, Sunday, 7th July 2019, President Muhammadu Buhari, on behalf of the Federal Republic of Nigeria signed the African Continental Free Trade Area Agreement (AfCFTA)ⁱ. The AfCFTA is a trade agreement negotiated by African Countries under the auspices of the African Union. The agreement is a product of negotiations commenced in 2015 for the establishment of a Continental Free Trade Area aimed at integrating Africa's marketsⁱⁱ.

Its objectives are to create a single market for goods, services, facilitated by movement of persons in order to deepen the economic integration of the African continent, create a liberalized market for goods and services through successive rounds of negotiation, and lay the foundation for the establishment of a Continental Customs Union at a later stage, amongst othersⁱⁱⁱ.

The agreement entered into force on 30th May 2019, 30 days after the 22nd country deposited its instrument of ratification in accordance with its Article 23 (1). With Nigeria signing the treaty, and pre- sumably depositing (subsequently) its instrument of ratification, it will become a part of the 1.2 billion people single African market.

As with all matters of trade, it is expected that disputes will arise from relations under the agreement. The primary goal of this article is to discuss the dispute resolution mechanism created by the treaty. Ordinarily, African states do not litigate against each other on trade issues. However, this will potentially change since the agreement includes a Protocol on Rules and Procedures on the Settlement of Disputes. The Protocol sets up mechanisms to resolve disputes between State Parties to the agreement. It is imperative to note that the mechanisms are available only to disputes inter states. They are not available to private parties.

DISPUTE RESOLUTION UNDER THE AFCFTA

The agreement reserves all provisions on dispute resolution administration and procedure for the Protocol on Rules and Procedures on the Settlement of Disputes ("Disputes Protocol"); one of the protocols issued under the agreement. The Disputes Protocol establishes a Dispute Settlement Body (DSB) composed of representatives of State Parties, and sets out the framework for the resolution of disputes under the agreement and its other Protocols on Trade in Goods and Trade in Services^{iv}.

The Disputes Protocol broadly provides for four (4) methods of dispute resolution:

(a) Amicable Settlement through Consultation^v:

As a mandatory first step, the Disputes Protocol required parties to, upon declaration of a dispute, attempt amicable settlement of same through consultation. This process is to be activated by a Request for Consultation made by the Complaining Party to the Contravening Party. The Complaining Party is mandated to notify the DSB of this request. State Parties are to ensure good faith participation in process.

i Yomi Kazeem, 'Africa's largest economy is finally backing the continent's plans for a single free trade market' (Quartz Africa, 3 July 2019) <https://qz.com/africa/1657861/nigeria-to-sign-africa-free-trade-agreement-afcfta> accessed 4 July 2019
ii INSERT ABOUT AFCTA
iii Article 3, Africa Continental Free Trade Agreement
iv Article 20, Africa Continental Free Trade Agreement; Article 2 & 5 Protocol on Rules and Procedures on Settlement of Disputes
v Article 6 & 7, Protocol on Rules and Procedures on Settlement of Disputes

These consultations are confidential and are without prejudice to the rights of either party in further proceedings.

The Contravening Party is expected to reply the request within 10 days of receipt and enter into consultation within 30 days. Unless agreed by the disputing parties, consultations will terminate within 60 days of receipt of the request for consultation, after which, the Complaining Party may refer the matter to the DSB and request the establishment of a Panel.

It is important to note that the Protocols allow for sufficiently interested Third-Party States to join in the consultations and that the timelines are abridged where the dispute between parties involves perishable goods.

(b) **Amicable Settlement through Good Offices, Mediation and Conciliation^{vi}**

Article 8 of the Disputes Protocol allows disputing parties to, at any time, voluntarily institute good offices, conciliation and mediation processes. The Protocols provide that these processes may be terminated at any time at the instance of any party to the dispute. Where either of these processes are initiated after a request

for consultations is received, the Complaining Party is mandated to allow a period of 60 days from the receipt before seeking redress at the DSB. However, should both parties agree that this process has failed to settle their dispute, they may refer to the DSB before the 60-day period elapses. Either of these processes may be facilitated by the Head of the Secretariat and if the disputing parties agree, these processes may continue while the DSB process proceeds. The DSB must, however, be notified of either of the foregoing.

(c) **Dispute Settlement Body^{vii}:**

The settlement of disputes the Dispute Resolution Body may involve at least two bodies; the Panel and the Appellate Body. The process involves the delegation of adjudicatory powers to an independent panel of three (3) persons set up by the Body, or where parties are dissatisfied with the Panel's findings, to a further panel of 3 persons selected out of a pool of 7 persons who form the Appellate Body. These bodies are constituted once a dispute arises for consideration at their respective levels. It must be noted that both bodies are mandated to, in executing their functions, interpret the agreement in accordance with the customary rules of interpretation of public international law, including the Vienna Convention on the Law of Treaties, 1969.

These processes can, however, only be activated where parties have failed to settle the dispute during consultations. The following paragraphs will consider the DSB and its role in resolving disputes under the Agreement through its subordinate bodies.

Panel^{viii}

The Panel established by the DSB considers submissions of the respective parties to the dispute and makes its findings. These findings are in relation to the rights and obligations of the disputing parties under the agreement and are to be submitted in a report to the parties and to the DSB for adoption. The findings shall include findings of facts, applicability of the relevant provisions, the basic rationale behind any findings and the recommendations it makes.

It must be noted, however that, prior to the issuance of this report, the Panel is, expected to consult "widely and regularly" with the parties to afford them an adequate opportunity to develop a mutually satisfactory solution.

vi Article 8, Protocol on Rules and Procedures on Settlement of Disputes

vii Article 5, Protocol on Rules and Procedures on Settlement of Disputes

viii Article 9 – 18, Protocol on Rules and Procedures on Settlement of Disputes

It is after the parties have failed to agree on a settlement before the Panel that a report may be issued. Where a settlement is reached, the report shall include only a summary of the case and the agreed settlement terms. The report, in any event, will be presented to the DSB for adoption.

The deliberations of the Panel shall be confidential; however, each party may publish its own positions to the public. Opinions expressed by individual panelists must remain anonymous in all cases.

Appellate Body^{ix}

Decisions by the Appellate Body (“AB”) are final and will be adopted by the DSB after which such decision may be enforced in accordance with the Protocol. Appeals to the AB are limited to issues of law alone and legal interpretations covered by the Panel Report.

DSB & Adoption^x

Upon conclusion of either procedure, a report will be submitted to the DSB. The DSB will consider and will adopt the report. The DSB may, however, by consensus, decide against adopting same. In relation to panel reports, once adopted by the DSB, it becomes its decision and becomes binding on the parties. Prior to this adoption, parties may, however, challenge the findings and appeal to the Appellate Body. The DSB may also be asked to defer adoption on certain limited grounds.

As stated above, reports of the AB will be adopted as a matter of course unless the DSB, by consensus declines to adopt. Once adopted the decision and recommendations made in either case becomes that of the DSB and becomes binding on the parties

(d) Arbitration^{xi}:

The protocols provide that, as an alternative to resolution by the DSB, the disputing parties may opt for arbitration in accordance with any agreements in that regard and procedure thereunder. These agreements to arbitrate must, however, be brought to the notice of the DSB. Any decision rendered by the arbitrator/arbitral tribunal shall be binding on the parties and shall be notified to the DSB for enforcement. These awards shall be enforced in accordance with the provisions of the Protocol.

ENFORCEMENT OF SETTLEMENTS

The Disputes Protocol provides for enforcement of decisions of the DSB and an arbitral tribunal by compensation and the suspension of concessions/other obligations^{xii}. The Protocol, however, notes these to be temporary measures available where the decisions of the DSB/arbitral tribunal are not implemented timeously. The Protocol provides that compliance with the decisions are mandatory and that such recommendations must be fully implemented. The use of either of these temporary enforcement mechanisms must however be consistent with the spirit of the agreement.

CONCLUSION

In light of the above, a State Party to a dispute under the agreement ought to pay attention to a number of considerations. Firstly, it must consider the cost-implication, speed, as well as the finality associated with each process. While the panel process under the DSB allows an appeal, only on points of law, an arbitral tribunal’s decision is final. Also, while an arbitration eliminates room for a dispute to linger, the DSB procedure’s strict timelines may be better for a more expeditious disposal of the dispute.

^{ix} Article 20, Protocol on Rules and Procedures on Settlement of Disputes

^x Article 19, Protocol on Rules and Procedures on Settlement of Disputes

^{xi} Article 27, Protocol on Rules and Procedures on Settlement of Disputes

^{xii} Article 25, Protocol on Rules and Procedures on Settlement of Disputes

Second, as is customary, the Protocol requires disputing parties to enter into an arbitration agreement prior to commencement of arbitral proceedings. This raises the question of the form of agreements contemplated under the Protocol. Will parties adopt submission agreements in the face of an existing dispute to take advantage of the finality and guaranteed party-autonomy arbitration it affords? Or will parties, in contemplation of future disputes, enter into Bilateral Arbitration Treaties (BAT)? A multilateral treaty will certainly not be compatible with the agreement as it will eliminate the possibility of the DSB being utilized. We recommend the adoption of BATs as experience suggests that once a dispute arises, parties rarely look towards an efficient process but rather are preoccupied with the dispute in itself.

On the adequacy of the agreement in relation to settlement of disputes, it is commendable that, like most international treaties, the agreement makes significant efforts towards ensuring efficient and expeditious settlement of disputes under it. Worthy of commendation in particular are the timelines imposed for each mechanism under the Protocol and those specifically introduced for disputes involving perishable goods. With the exception of arbitration which is driven by party autonomy, the Protocol seeks to guarantee that disputes are speedily considered.

Another worthy feat is the restriction on appeals to the AB being limited to issues of law alone. This eliminates, to a large degree, the possibility of frivolous appeals. While the framework proposed presents a workable structure, its efficiency will be tested, especially once the provisions of the Trade in Goods Protocol become implemented.

Be that as it may, it is a bit unpleasant that private parties are restricted from benefiting from the settlement mechanisms under the agreement and Disputes Protocol. It would appear that where there is a dispute under the agreement between a private party and a state party, the only option available to the private party would be to make a request to its home state to declare a dispute. As negotiations on the agreement enter into Phase II; in the area of intellectual property rights, investment and competition policy, it is expected that private parties will be given the standing to take advantage of the settlement mechanisms by themselves.



Aaron Onyebuchi is a Managing Associate in the firm and he heads the Dispute Resolution team. He is primarily involved in civil litigation and has participated in various court cases of significant importance in the High Courts and Appellate Courts in Nigeria. He is interested in international conflict resolution and has completed courses with the United States Institute of Peace on Conflict Analysis and Negotiation and Conflict Management.



Efemena Iluezi-Ogbaudu is a member of the firm's Dispute Resolution Practice Group. He is primarily involved in Commercial Litigation and Arbitration. He also assists the firm's Corporate/Commercial Practice Group occasionally. He has keen interest in passing on knowledge and currently teaches Corporate Law at the Nigerian Law School, Lagos Campus.

xi Article 27, Protocol on Rules and Procedures on Settlement of Disputes

xii Article 25, Protocol on Rules and Procedures on Settlement of Disputes