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## The Efficiency of the AfCFTA Dispute Resolution Mechanism: An In-Depth Analysis

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On March 21, 2018, the Agreement Establishing the African Continental Free Trade Area (“AfCFTA”) was adopted. It came into force on 30 May 2019. 54 African Union (“AU”) Member States have signed it, and 46 have ratified it. The AfCFTA aims to create a single continental market with a population of about 1.3 billion and a combined GDP of approximately US\$ 3.4 trillion and boost income to US\$ 450 billion by 2035.

Under Article 20 of the AfCFTA, a Protocol on Rules and Procedures for the Settlement of Disputes was also created to ensure transparency, accountability, fairness, and predictability in AfCFTA dispute settlement processes. This post analyses the core principles of the Protocol, their effectiveness in resolving disputes arising from the AfCFTA, and their weaknesses. It concludes with some recommendations on how to make the Protocol more effective.

### Core Principles Reflected in the Protocol

Article 3 of the Protocol applies to disputes between State Parties to the AfCFTA regarding the interpretation and application of their rights and obligations under the AfCFTA. The core principles of the Protocol for addressing disputes arising from the interpretation and application of rights and obligations under the AfCFTA are as follows:

**Party Autonomy.** The Protocol empowers the parties involved in a dispute to have control over the dispute resolution process and outcome. Within the AfCFTA framework, the parties can decide how to resolve their dispute. The Protocol provides them with various options, including consultations, mediation, adjudication through a Dispute Settlement Panel (“DSP”), or independent arbitration. This flexibility allows the parties to choose the most suitable method.

When exercising this autonomy, the party initiating the dispute must notify the other party and indicate a dispute settlement mechanism of its preference. The parties can opt for alternative methods, such as mediation or arbitration, as long as they have attempted to settle the dispute amicably through consultation and – for arbitration – provided that both parties have consented to arbitration and the arbitration rules (Art. 27).

The principle of party autonomy empowers the parties to participate in the dispute resolution process actively and provides a cooperative and consensual approach for the parties in resolving

disputes. Allowing the parties to tailor the process to their needs, preferences, and priorities fosters a sense of ownership and fairness in the dispute resolution process, enhancing the parties' confidence in the outcome and thereby, contributing to the effectiveness and efficiency of the overall dispute resolution system within the AfCFTA framework.

***The Neutrality of the Forum.*** The AfCFTA's dispute settlement forum ("the forum") is designed to ensure neutrality, impartiality, and fairness in dispute resolution. One of the fundamental aspects of this forum is its commitment to providing a self-contained and independent dispute resolution system.

The proceedings under the Protocol are delocalised from domestic procedures to maintain neutrality. National courts do not have jurisdiction to intervene in disputes subject to the AfCFTA. By removing national courts' influence, the forum can operate independently and make decisions based on the provisions and principles outlined in the AfCFTA.

Overall, the neutrality of the forum is crucial in fostering a robust and reliable trade environment among State Parties. It ensures that disputes are resolved in a fair, unbiased, and independent manner, contributing to the effective implementation and enforcement of the AfCFTA.

***Efficiency and Finality of the Process:*** Unlike in domestic courts, where a dispute may be decided by a judge who may not have expertise in the subject matter, here, the State Parties nominate only qualified individuals with expertise and experience in international law, international trade, and dispute resolution to join the list of active neutrals maintained by the AfCFTA Secretariat. The Dispute Settlement Body ("DSB") selects individuals from this list to constitute the DSP to adjudicate disputes under the AfCFTA (Arts. 9 & 10). The DSP has a continuous obligation to remain impartial and independent. Members of the DSP are also barred from participating in another dispute resolution proceeding that would create a direct or indirect conflict of interests, which is crucial for ensuring quality awards.

If a party feels aggrieved by the DSP's decision, the party may (as of right) appeal it to the Appellate Body ("AB") (Art. 20). The Protocol imposes limitations related to the scope of the appeal, i.e., the issues covered in the panel report and legal interpretation. Only the disputing parties have the right to appeal (a third party with substantial interest may also be joined if the disputing parties agree that the claim of significant interest is well founded). The AB's decision is final, binding, and subject to no appeal.

***Confidentiality.*** The secrecy of the dispute resolution process is also a vital component of the Protocol, binding on the parties, DSB, DSP, and AB (Art. 17). They must keep confidential all information, documents, submissions, and discussions related to the dispute. Confidentiality fosters an environment conducive to open and frank discussions between the parties involved. It allows and encourages them to freely exchange information, including sensitive information, present their arguments, and explore potential solutions without concerns about public disclosure which helps ensure a more effective and efficient process.

By maintaining the confidentiality of the proceedings, parties can avoid potential harm to their reputation or commercial interests or keep any other sensitive information from being disclosed to the public. As such, it enhances the parties' confidence in the system and encourages them to participate actively.

By upholding confidentiality, the forum maintains its credibility and preserves its role as a trusted mechanism for resolving disputes under the AfCFTA. Additionally, it safeguards the integrity and effectiveness of the forum and prevents any unauthorised disclosure of information that could undermine the impartiality and fairness of the process.

## Shortcomings

The Protocol encompasses vital principles for free and fair resolution of disputes. Still, it leaves out crucial elements that, if unaddressed, could hinder the achievement of its desired purposes of promoting intra-African trade, enhancing economic growth and development, facilitating industrialisation and structural transformation, promoting regional integration, enhancing Africa's global competitiveness, and promoting sustainable development and inclusive growth. Some of these shortcomings are as follows:

***Limited Participation of Non-State Actors.*** The Protocol only applies to disputes between State Parties, restricting the participation of non-State actors such as private enterprises, civil society organisations, or individuals. The exclusion of these actors limits their ability to address trade-related grievances or concerns. Greater inclusion of non-State actors could contribute to a more comprehensive and balanced dispute resolution framework.

***Ambiguity and Unpredictability.*** The Protocol empowers the DSB and AB to make their own rules. In doing so, they are not obligated to consult or comply with other standards. These bodies lack democratic legitimacy, and granting them such vast power may lead to a lack of accountability, limited transparency, risk of bias, and inconsistency. All of which undermines trust and confidence in the dispute settlement process.

***Lack of Transparency.*** The Protocol does not sufficiently address transparency concerns within the dispute resolution process. While confidentiality provisions are in place to protect sensitive information, there is a need for greater transparency in providing access to information related to ongoing disputes, the selection and appointment of adjudicating panel, and the overall functioning of the dispute settlement mechanism. Enhanced transparency would promote trust, accountability, and understanding among stakeholders.

***Capacity Building Challenges.*** The successful implementation of the Protocol relies on the availability of skilled personnel and effective institutions to handle dispute-resolution processes. However, many African countries face capacity-building challenges, including limited expertise in trade law and dispute settlement procedures. Insufficient resources and training programs for judges, lawyers, and other stakeholders involved in the dispute-resolution process can hamper the efficiency and effectiveness of the system.

***Insufficient Clarity on Mediation Procedures.*** While the Protocol includes provisions for mediation as an alternative dispute resolution mechanism (Art. 8), it lacks clear guidelines and procedures for conducting mediation. This ambiguity may make it challenging for parties to effectively engage in mediation or understand how to initiate the process. Clear guidelines would enhance the utilisation of mediation and provide parties with an additional option for resolving disputes.

***Limited Access to Justice for Small and Medium-Sized Enterprises (SMEs).*** The Protocol may

pose challenges for SMEs in accessing the dispute resolution mechanism. SMEs, which play a significant role in many African economies, may face difficulties navigating the complex procedures and costs associated with the dispute settlement process. It could create an imbalance in access to justice, working more favourably to larger and more resourceful entities.

## Way Forward

The following can be done to address the shortcomings mentioned above: (1) extend the scope of the Protocol to allow non-State actors, e.g., private investors to lodge their complaints directly under the AfCFTA; (2) provide more explicit guidance on the scope and limitations of confidentiality obligations within the Protocol which could include outlining the types of information that should be kept confidential, specifying exceptions to confidentiality, and ensuring a proper balance between transparency and protecting sensitive information; (3) developing mechanisms within the Protocol to address SMEs' specific needs and challenges in accessing the dispute resolution mechanism which could involve providing simplified procedures, reduced costs, and technical assistance to facilitate their participation; and (4) amending the Protocol to provide clearer guidelines and procedures for mediation within the Protocol, including details on initiating mediation, the role of mediators, and the time frame for completion.

In conclusion, engaging all relevant stakeholders, including State Parties, businesses, legal experts, and civil society organisations, is crucial in considering and implementing the above recommendations. By taking these steps, the AfCFTA can strengthen its Protocol on Dispute Resolution, foster confidence in the system, and promote a fair and efficient resolution of disputes among its State Parties.

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