INSTITUTE OF INTERNATIONAL ECONOMIC LAW
GEORGETOWN UNIVERSITY LAW CENTER

TradeLab

International Economic Law Practicum

CONTINENTAL FREE TRADE AREA: DISPUTE SETTLEMENT MECHANISM

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Executive Summary

This memorandum provides a practical guide for negotiators, member states, the African Union and other stakeholders during the negotiation and drafting process of the dispute settlement mechanism (DSM) of the Continental Free Trade Area (CFTA). Throughout the process, a keen eye on four key guidelines the client provided was kept in mind. Firstly, we maintained focused attention on the existing Regional Economic Communities (RECs) in Africa. Accordingly, our recommendations are rooted in the concept of variable geometry, utilizing the various RECs in Africa to create a symbiotic relationship in which the RECs and CFTA mutually benefit and strengthen each other to foster deep regional integration amongst the 54 member states of the African Union. Secondly, our recommendations and approaches for the DSM are designed to increase the use of the CFTA and to take into account the informal economy in Africa. Thirdly, when applicable, we recommended approaches that can help foster judicial independence and prevent judicial activism. Lastly, infused in our approach to the projects are mechanisms that minimize cost of the DSM and help to increase the capacity of professionals using the system. In essence, the team used the guidance provided to us by the beneficiary to provide a document that is keenly tailored to meet the diverse needs of the 54 member states and follows the guidelines of the Abuja Treaty. Our approach is geared towards helping to build on the progress that has been made in the trade liberalization programs of RECs and providing negotiators a guide for the negotiation and drafting of the DSM.

Our final recommendation for the CFTA DSM is a quasi-judicial, panel-based WTO-style mechanism but with a closed roster of adjudicators nominated by the African Union Commission based on recommendations by member states. Panel decisions can be appealed on limited grounds to the African Union Court of Justice. Decisions of panels only become binding after approval by the member states. In overlapping matters, the CFTA DSM will prevail over other trade regimes and in order to avoid disparate case law, the CFTA DSM can hear preliminary rulings from lower regional trade courts or tribunals. The remedies offered under the CFTA are compliance and damages. Compliance can be induced by retaliation and, monetary assessment

1 Introduction

In June 2015, the African Union (AU) Assembly launched the negotiations for the creation of a "Continental Free Trade Area" (CFTA). AU member states recognized the crucial role of regional trade integration in promoting continental integration and competiveness of the region in global markets. The CFTA is to benefit from the Tripartite Free Trade Area (TFTA)and other Regional Economic Communities (RECs) such as the Economic Community of West Africa (ECOWAS) and Economic Community of Central African States (ECCAS)as building blocks towards achieving wider integration in a single forum within Africa. The first meeting of the negotiators was held from 22-27 of February 2016. In this meeting, the negotiators established a roadmap for the negotiations so as to conclude the CFTA in 2017.

The purpose of this Memorandum is to analyze various design options and key aspects of a dispute settlement mechanism (DSM) to be included in the CFTA. This Memorandum assesses political and adjudicative options included in most of Africa's RECs such as the Common Market for Eastern Africa (COMESA), the East Africa Community (EAC), the Southern Africa Development Corporation (SADC) and recently the TFTA. The analysis is made in the context of the agreed objectives and guiding principles for negotiating the CFTA as accepted during the first meeting of the negotiators.

In order to achieve this goal, the Memorandum is divided into five parts;

- Section II highlights and explains why dispute settlement mechanisms in RECs are important not only to solve disputes; but also to strengthen the implementation of Free Trade Agreements (FTAs).
- Section III addresses key elements that negotiators must discuss in order to create a dispute settlement mechanism.
- Section IV analyses the main challenges and successes in current African RECs.
- Section V provides details of each key element by assessing the pros and cons of core options in the light of the challenges and successes highlighted in part four.
- Section VI proposes a possible DSM for the CFTA.
- Lastly, Annex A provides model treaty language for the key provisions of the DSM for the CFTA.

2 Importance of dispute settlement mechanism

Regional Trade Agreements (RTAs) create trade forums for closer and deeper integration among member states. The economic benefits linked to RTAs will only be realized if the RTAs are faithfully implemented. In order to ensure optimal implementation, it is important that the RTA includes institutions to facilitate exchange of information, help the parties monitor implementation and gives incentives to comply.[1]

As disputes will inevitably arise regarding the scope, nature and interpretation of the agreement, a DSM is necessary. Dispute settlement mechanisms help to maintain congeniality among member states, and help to avoid unresolved disputes from festering, which can lead to a reduction of the RTA's benefits. Moreover, most of the benefit of a deep integration platform such as the CFTA comes from non-tariff obligations, which need to be backed up, by clarification and enforcement to produce gains. RTAs therefore typically include some mechanism incorporating elements of both compliance enforcement and dispute settlement.[2] Even if no disputes are anticipated, enforcement provisions in a RTA reinforce the commitments of the governments, make their promises more credible, and signal that the RTA is a solid platform for investment that will create jobs and economic growth.[3]

This is even more so in Africa where the low rate of implementation of RTAs has made it more challenging for the continent to fully harness the potential of regional trade for development.[4]

Africa has seventeen regional trade blocs, of which the following eight are recognized by the AU:[5]

i. Maghreb Union;
ii. Common Market for Eastern and Southern Africa (COMESA);
iii. Community of Sahel Saharan States;

[1] Amelia Porges, *Dispute Settlement*, Preferential Trade Agreement Policies for Development: A Handbook Part 2. **pp. 467–497** (2011), *available at* https://www.wto.org/english/res_e/reser_e/ersd201203_e.pdf
[2] Ibid.
[3] Ibid.
[4] Taffere Tesfachew, Making Regional Trade Work for Africa: Turning Words into Deeds, 34 United Nations Conference on Trade and Development. (July 2015)
[5] The eight trade blocks recognized by the AU are closely integrated with the AU's work and serve as its building blocks. The relationship between the AU and the RECs is mandated by the Abuja Treaty and the AU Constitutive Act, and guided by the: 2008 Protocol on Relations between the RECs and the AU; and the Memorandum of Understanding (MoU) on Cooperation in the Area of Peace and Security between the AU, RECs and the Coordinating Mechanisms of the Regional Standby Brigades of Eastern and Northern Africa. - See more at: http://www.au.int/en/organs/recs#sthash.x01g6SOi.dpuf

iv. East African Community (EAC);
v. Economic Community of Central African States (ECCAS);
vi. Economic Community of West African States (ECOWAS);
vii. Intergovernmental Authority on Development (IGAD); and
viii. Southern African Development Community (SADC).

Although some of these trade blocs have set up free trade areas as envisaged in the Abuja Treaty, others regions have not yet done so and even among trade blocs that have already established free trade areas such as EAC and ECOWAS, low implementation remains a major challenge.[6]

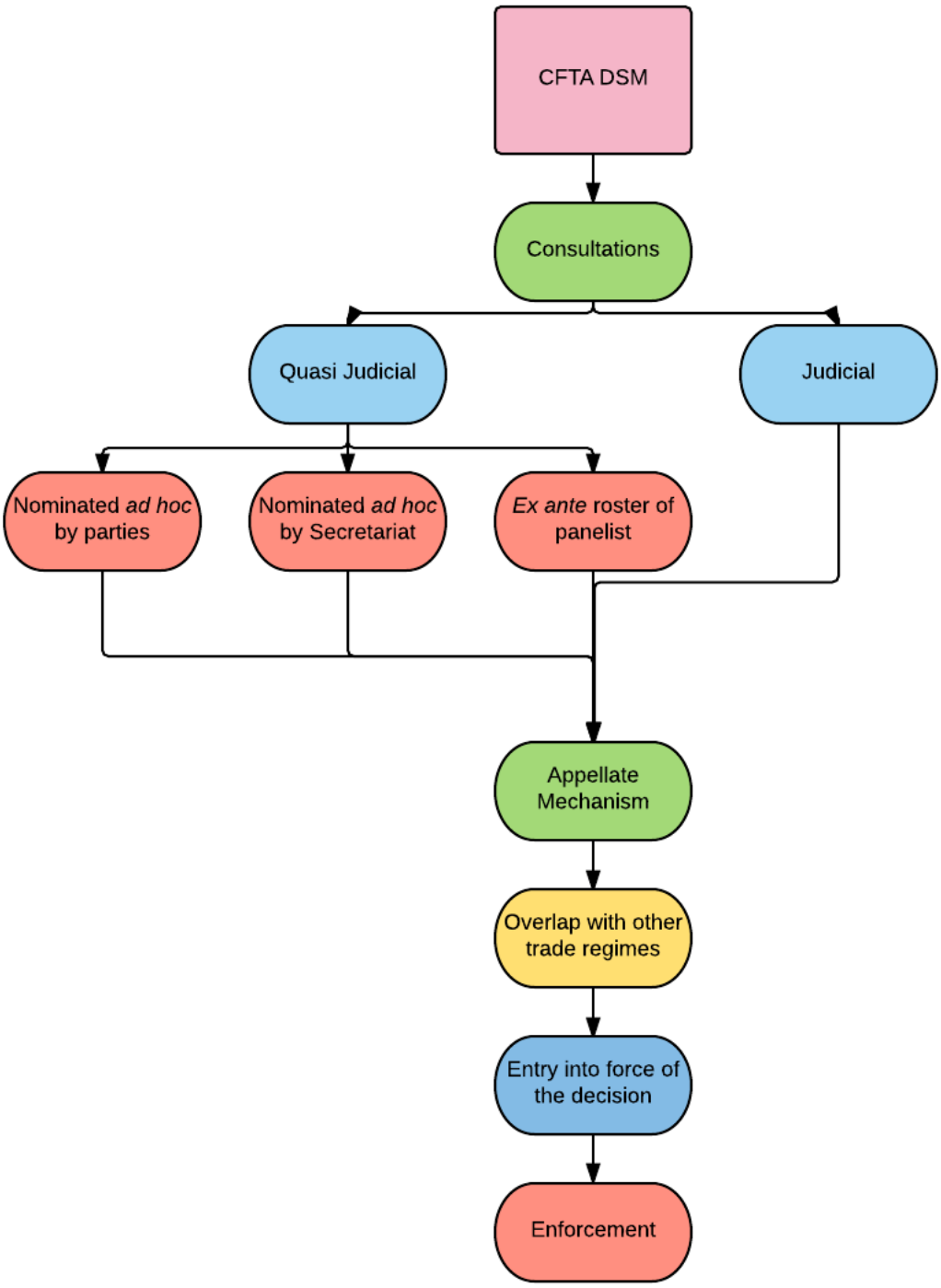
[6]Taffere Tesfachew, Making Regional Trade Work for Africa: Turning Words into Deeds, 34 United Nations Conference on Trade and Development. (July 2015)

3 Overview of a dispute settlement mechanism

3.1 Summary of a dispute settlement mechanism

In this third Section, the key elements of a DSM will be introduced and illustrated with examples from African RECs.

The following chart gives an illustration of what those different key elements are.



3.2 Type of dispute settlement

3.2.1 Political

There are three different types of DSM: political, quasi – judicial and judicial. The political or diplomatic dispute settlement approach consists of settling disputes by negotiation and agreement exclusively through a political process. It often does not have procedural rules and regulations and disputes may continue for years without resolution as resolution traditionally requires the agreement of both state parties. It may work for very low levels of integration. The Intergovernmental Authority on Development (IGAD) is an example of a political system as it does not have a court of justice or panels to solve disputes. IGAD has a provision for conflict resolution which requires the member states to act collectively to preserve peace, security and stability as the essential prerequisites for economic development and social progress. It calls on member states to take effective collective measures to eliminate threats to regional co-operation, peace and stability and establish an effective mechanism of consultation and cooperation for the pacific settlement of differences. The Southern African Customs Union (SACU) initially implemented this type of dispute settlement but has since shifted to rules-based third party dispute settlement.

3.2.2 Consultations

Consultations occur when disputing parties get together with the specific objective of discussing and, if possible, solving the dispute. This meeting is normally bilateral and confidential; although in some regimes (such as the WTO) third parties may be authorized to participate. This period also provides the parties with the opportunity to obtain as much information as is needed to understand the nature of the dispute. During the consultation period, the parties can choose to bring in an independent third party to help mediate the dispute. Consultations have had limited success in the WTO. The procedural framework for consultations can vary greatly; a DSM should address key issues ranging from the procedure to request a consultation, to the duration of the consultation period. Thus, consultations provide the disputing parties flexibility and allow the parties to reach a mutually satisfactory solution in politically sensitive cases.

Generally, disputes amongst member states that use an ad hoc panel system start with bilateral consultations. In fact, all RTA-DSMs that follow the political and quasi-judicial models contain

provisions regulating the conduct of consultations. In contrast, a consultation requirement is highly uncommon in respect of RTA-DSMs classified under the judicial model.[7] CARICOM and ECOWAS are the only RECs that have a judicial model and explicitly provide for a formal consultation structure in the agreement.

Direct consultations permit the parties to consult each other directly, whereas consultations with a joint political body provides for a third party intermediary to mediate the consultation process prior to launching the formal dispute resolution process. The process of involving a third party intermediary can either extend the consultation period or run concurrent with the initial consultation period. The process of using a third party intermediary during the consultation process has the potential of increasing the cost of consultations. However, when disputing parties employ the services of a third party intermediary in good faith, the third party intermediary can add value to the negotiation process and increase the likelihood that the disputing parties will resolve the trade dispute without establishing a formal panel.

Advantages:

- Gives parties to the FTA a venue to have focused talks about market access barriers and other issues stemming from the PTA's rights and obligations.[8]
- Cost effective opportunity for the parties to settle their dispute with maximum control over the outcome, by negotiating an agreement.[9]
- Provides an opportunity to clarify the facts. Governments generally do not have detailed information on their trade partner's regulatory or trade regime. [10]

Disadvantages:

- Time-consuming, which can create an issue for matters that require immediate resolution.
- Has the potential of being expensive, unless parties agree to use electronic forms of communication to avoid travel expenditures.

[7] Claude Chase, Alan Yanovich, Jo-Ann Crawford, and Pamela Ugaz, Mapping of Dispute Settlement Mechanisms in Regional Trade Agreements — Innovative or Variations on a Theme?. (June 2013) (unpublished manuscript, on file with the World Trade Organization)
[8] Amelia Porges, Dispute Settlement, Preferential Trade Agreement Policies for Development: A Handbook Part 2. **pp. 467–497** (2011), *available at* https://www.wto.org/english/res_e/reser_e/ersd201203_e.pdf
[9] Ibid.
[10] Ibid.

3.2.3 Quasi-Judicial

3.2.3.1 Advantages and disadvantages

A quasi – judicial mechanism consists of a panel or tribunal being convened for one dispute with terms of reference limited to that dispute and the panelists only in charge of that dispute. The panel hears the written and oral arguments of disputing parties, issues a written decision applying the trade agreement's law to the dispute, and then disbands.[11] The WTO and also the TFTA have adopted this model. Article 30 of the TFTA Agreement establishes a Dispute Settlement Body tasked to administer the rules and procedures of the Treaty and to settle disputes stemming from the Agreement. Similar to the WTO dispute settlement body, the TFTA adjudicative body is empowered to: establish panels and an appellate body; adopt panel and appellate body reports by negative consensus, meaning that all reports are automatically adopted unless there is a consensus not to adopt them.

Advantages:

- Specialized nature where the terms of reference are limited to the particular dispute thus avoiding judicial activism.
- Relatively low cost, by convening panels only when a dispute arises this mechanism avoids the cost of paying full time judges.

Disadvantages:

- Can lead to judicial uncertainty as it can become isolated from the mainstream jurisprudence if there is no appellate mechanism thus depriving the mechanism predictability which is a key aspect in dispute settlement because its members change for each dispute.
- Since each panel is convened for a particular dispute, there needs to be a clear nomination procedure that avoids deadlocks and ensures independence.
- Raises issues of independence and impartiality of the panelists. Indeed, private lawyers acting as panelist may be counsel in one case and judge in another one.[12] Academics may have written articles or expressed views on points of law that they may have to ad-

[11] Amelia Porges, Dispute Settlement, Preferential Trade Agreement Policies for Development: A Handbook Part 2. **pp. 467–497** (2011), available at https://www.wto.org/english/res_e/reser_e/ersd201203_e.pdf

[12] A. Parra, *The Convention and Centre for Settlement of Investment Disputes*, in Collected Courses of the Hague Academy of International Law, Vol. 374, **pp. 40-50** (Brill Nijoff 2014).

judicate upon.[13] Government officials or national judges raise concerns regarding their independence as they are hired or nominated by national government when acting as panelists and may not decide against their national government for fear of repercussions.

- May lead to lack of experience by panelists as they often act as panelists only once.

3.2.3.2 How to nominate panelists

Selection of decision makers is a key issue for international dispute settlement; if governments are to give a third-party decision maker power to make binding decisions that matter, the panel must be composed of people who are perceived as trustworthy, impartial, and knowledgeable/experienced.[14]

3.2.3.3 Nomination by parties

A first method to nominate panelists is to let each party nominate one panelist who then together elect their chair. This model is well known in investment arbitration and has also been used recently in the Trans-Pacific Partnership (TPP).[15]

Advantages:

- Gives confidence to the parties as they can decide who one of the three judges will be.

Disadvantages:

- Can lead to a lack of judicial independence since each party will see one panelist as "its" panelist.
- One party might refuse to nominate its panelist, hence leading to a deadlock of the system.

3.2.3.4 Nomination by secretariat

A second formula to nominate panelists is the WTO method. The WTO Secretariat takes the initiative to nominate panelists to the parties. If a panel has not been completed by agreement with-

[13] Ibid.
[14] Amelia Porges, Dispute Settlement, Preferential Trade Agreement Policies for Development: A Handbook Part 2. **pp. 467–497** (2011), *available at* https://www.wto.org/english/res_e/reser_e/ersd201203_e.pdf
[15] TPP, Article 28.9

in 20 days from the decision by the DSB to establish the panel, then, if either party so requests, the WTO Director- General can and will select the missing panelists, in consultation with the WTO's political leadership.

Advantages:

- Cannot be deadlocked by one of the parties.
- Ensures judicial independence since in case the parties cannot agree on the panelists together, the Secretariat will nominate the panelists for them; since the panelists are either appointed by the parties together or by the Secretariat, no party will feel like they have their "own" judge.

Disadvantages:

- Less ownership by individual parties.
- Might give too much power to Secretariat.

3.2.3.5 Closed roster of panelists

A third mechanism to nominate panelists is a mixed system between a tribunal and a panel such as has been suggested by the European Union for the investment chapter of the CETA and TTIP.[16] In this system, a limited number of panelists (in the CETA investment chapter, 15) who have been chosen by the membership as a whole (in CETA, 5 Canadian, 5 EU and 5 third country nationals) and nominated for a certain number of years has to be available on short notice to rule on a particular dispute.[17]Although this system was thought of in the investment context, transferring it to a trade dispute settlement body could present many advantages.

Advantages:

- Solves the nomination issue as the President of the Panelist Roster (randomly) nominates the three panelists for each dispute. Hence, no party can stop the panel creation process.

[16] Transatlantic Trade and Investment Partnership, Nov. 12, 2015, U.S.-E.U., art. 2.9, E.U.
[17] Ibid.

- Solves the certainty/experience issue since there will be only a limited number of panelists adjudicating dispute.

Disadvantages:

- Since panelists are not employed as full time panelists, deciding on what other activities they may do when they are not acting as panelists is crucial to ensure judicial independence.

3.2.3.6 Duration

Generally, RTAs using the quasi-judicial model specify in the DSM the length of time the adjudication process should take. The timeframe within which a quasi-judicial adjudicative body has to deliver its final report once a panel is composed ranges from 60 days to 150 days in the various RTA-DSM.[18] As a marker to compare different DSMs, the average duration for a WTO dispute settlement procedure ranges from 8 months to 3 years from the creation of the panel to the adoption of the decision.[19] Many studies have found that the length of time and cost associated to adjudicate a complaint pursuant to an RTA can be a prohibitive barrier to developing countries to use DSMs.

3.2.4 Judicial

The term judicial refers to the discharge of duties exercisable by a judge or by justices in court. [20] The judicial approach implies a permanent tribunal or court of nominated judges to resolve disputes. African RECs are replete with DSMs that are akin to judicial mechanisms. The dispute resolution systems of COMESA, EAC and SADC are structured this way. COMESA and EAC have in place a standing tribunal where the judges are appointed by the Authority and Summit respectively. EAC Treaty establishes a Court of Justice with a stated jurisdiction. The court's de-

[18] Amelia Porges, Dispute Settlement, Preferential Trade Agreement Policies for Development: A Handbook Part 2. **pp. 467–497** (2011), *available at* https://www.wto.org/english/res_e/reser_e/ersd201203_e.pdf
[19] Ibid.
[20] Lopes LJ, Royal Aquarium and Summer and Winter Garden Society Ltd v. Parkinson, U.S. (1892)

cision is final and cannot be appealed; the court's decision is also binding on member states and organs of the Community.

Advantages:

- Safeguards independence of the judicial body
- Ensures certainty in the process because there is a limited number of judges which avoids disparate case law.
- Time efficient as there is no time spent nominating the judges per dispute and no appeal mechanism is required.
- Promotes integration and lays a strong foundation for future expansion since it can be expanded by creating additional chambers or instances.

Disadvantages:

- Costly to both the litigants as well as the member states. To the litigants, accessing the court of justice often inevitably requires legal representation whereas to the member states, it is costly to establish and maintain the formal structures (premises, salaries, benefits etc.) necessary to give it effect.

The main question to be answered is how the judges are nominated. For example, ECOWAS has in place a Community Court of Justice established under the revised Treaty. The Court comprises of 7 judges appointed by the heads of state of member parties to the treaty.

3.2.5 Appellate mechanism

A possible component of a dispute resolution system is the process of appeal of first instance panel or tribunal decisions. Appellate provisions can play an integral part to prevent or correct judicial errors of first impression. A transparent and effective review system can also be an instrument to help secure domestic acceptance of legal findings. For example, the SADC tribunal has an appellate jurisdiction. The appellate function of the tribunal was established in 2007 and allows the appellate body to review legal findings by first instance panels. Where a trade agreement relies on ad hoc panels to settle disputes, the PTA parties may seek greater assurance that

the decisions of successive panels will be consistent and legally sound. Such assurance may be essential to secure domestic acceptance of panel decisions. Tribunal systems such as the WTO or ECJ respond to the same concerns with appellate review, or provisions for revision or interpretation of past judgments.

Advantages:

- Enhances certainty and uniformity.

Disadvantages:

- Costly to the parties and the organization.
- Makes the proceedings lengthier.

The main question when implementing an appellate mechanism is the standard of review exercised by this mechanism. Standard of review refers to the extent to which the appellate body can review the decision of the first instance. There are broadly three options. Firstly, the appellate body can exercise a *de novo* review meaning that it will readjudicate the entire case. Secondly, the appellate body can look only at questions of law. The latter is the approach adopted in the WTO where the Appellate Body is limited to issues of law covered in the panel report and legal interpretations developed by the panel.[21] Thirdly, the appellate mechanism can be closer to an annulment proceeding in arbitration where only manifest and largely procedural errors can be ground for appeal.

3.3 Funding

Funding and administrative support is necessary for the establishment of a DSM and to ensure that it meets set objectives. Dispute settlement expenses often include costs of panellists or judges, translation and interpretation services, court premises, administrative functions, research and drafting services, documents production and exchange. Various options exist to support administrative and funding needs of a DSM.

[21] Article 17.6, Dispute Settlement Understanding, World Trade Organization.

With regard to administrative concerns, an existing secretariat may be used to provide support such as staff and premises. Alternatively, a separate administrative infrastructure with its own premises and staff could be established. The latter proposal is expensive and would take time to put in place.

Funding options with regard to use of an existing secretariat entail incorporating the budgeting needs of a DSM within the existing funding mechanism of a secretariat. In the case of CFTA, AU member states will have to decide whether the AU Commission takes up the role by providing necessary infrastructural and administrative support as well as meeting CFTA DSM expenses from the existing funding arrangements. This would allow the CFTA DSM to budget funding from member states contributions and any other sources of funds currently in place for the AU. The advantage that comes with this option is that there is no additional financial burden placed on member states involved in an actual dispute (other than their own legal expenses, as is the case in the WTO).

An alternative funding option is to create a separate DSM fund established for the purpose. Member states would then be required to make additional contributions to the separate DSM fund. This scenario is much like the Association of Southeast Asian Nations (ASEAN) DSM Fund where member states of ASEAN make separate contributions to pay for panellist expenses and administrative costs.[22] Arguably, this option offers predictability in the sense that it is possible to forecast likely available funds from members' contribution that is specifically assigned for DSM.

Another option is to have the parties in a specific dispute pay for not only their own legal expenses but also to share costs of tribunal and secretariat support.

[22]Amelia Porges, Dispute Settlement, Preferential Trade Agreement Policies for Development: A Handbook Part 2. **pp. 467–497** (2011), *available at* https://www.wto.org/english/res_e/reser_e/ersd201203_e.pdf

3.4 Standing

Standing is the legal right to initiate a lawsuit, it refers to who can bring a case in the dispute settlement system. As the CFTA will mostly impose obligations on states, it is clear that states will be the only possible respondent. Regarding who can bring a complaint, there are broadly three options in international law.

First, states always have standing in international trade disputes. States are often the only ones allowed to bring disputes. For example, in the WTO or under the TFTA only states party to the agreement can bring a dispute. This is so because member states want to keep the DSM diplomatic and avoid to open the floodgates to litigation.

Secondly, non-state actors such as citizens or companies can be granted standing. This is for example the case in the EAC, the ECJ or in investor-state arbitration. The main advantage of opening standing to non-state actors is that it significantly increases the number of cases brought to the DSM and therefore ensures better compliance by states of their obligations.

Finally, bodies of the international organization hosting the trade agreement can also be granted standing. This is for example the case in the European Union where the European Commission brings most cases against states for non-compliance with the European Treaties.

3.5 Scope of application & target of complaint

Grounds for complaint may be varied. Many RTAs simply state that dispute settlement will be available in cases of violation of the RTA obligations or for failure to implement the RTA. This is when a member state considers that another member state violated its obligations under the treaty.

A second option is the non-violation complaint where a member state can sue another member state for an action that did not violate any obligation but nullified an expected benefit. The non-violation complaint has had a tumultuous history in the WTO (and has, in recent years, not been

used at all) where it has often been criticized by developing countries and in particular regarding intellectual property, where to this date it is not allowed for TRIPS disputes.[23]

A third possibility is to give the power to the CFTA dispute settlement body to render advisory opinions on the interpretation of the CFTA agreement. Such as the International Court of Justice (ICJ) can do on request of the United Nations.

A final possibility is to give the mechanism jurisdiction to hear preliminary rulings from lower regional or national courts. The need for a preliminary ruling may arise when a lower court (say, a REC or national court in the AU) is tasked to apply or interpret CFTA rules and the lower court refers the question of CFTA interpretation to the CFTA dispute settlement system for a "preliminary ruling" by the higher CFTA mechanism. A preliminary ruling is a decision of a higher court on the interpretation of international law, made at the request of a lower court or tribunal. Preliminary rulings are final determinations of law. The final decision on the dispute at hand remains with the referring court to be decided after it received the preliminary ruling. Such mechanism exists for example in the European Union, where national courts encountering questions of European law must refer this question to the European Court of Justice.[24] It is also widely used in Africa by the COMESA, EAC, ECOWAS and SADC

Another question is whether certain subject matters must be excluded. For example, many PTAs exclude trade remedies from their scope.[25]

[23] Christophe Larouer, *WTO Non-Violation Complaints: a Misunderstood Remedy in the WTO Dispute Settlment System*, 53, Netherlands International Law Review, **pp. 97-127** (2006).

[24] Article 267, Treaty on the Functioning of the European Union.

[25] Examples include intellectual property cooperation provisions in the Japan–Philippines and Japan–Thailand PTAs and the competition policy cooperation obligations of the Australia–Chile, Australia– Thailand, ASEAN–Australia–New Zealand, Australia–U.S., Peru–U.S., and SACU–EFTA PTAs

3.6 Overlap

Overlap in obligations between two legal regimes occurs when the same parties take part in two separate regimes and both regimes regulate the matter in dispute at the same time. Overlap can happen between the WTO Agreements and an RTA or between different RTAs.

Litigating a case in several forums can raise issues. First, for developing countries, relitigation poses a financial burden.[26] Secondly, overlap also presents the possibility for conflicting decisions or case law since a dispute between the same parties can be adjudicated by different bodies.[27]

To solve this issue in the CFTA, three possibilities are available. First, preference can be given to the WTO and/or other RTAs. Secondly, the CFTA could be given preference over other trade regimes. Finally, the choice can be left to the claimant to decide which forum is preferred, after which alternative fora are excluded.

3.6.1 Giving preference to the CFTA

An RTA may require that all disputes between RTA parties related to trade be settled exclusively within the RTA (and not the WTO). This is what the EU treaties do in respect of the ECJ.

Advantages:

- Avoids uncertainty as trade cases regarding obligations found in both the WTO and the CFTA within Africa will be solved by the same body, hence, avoiding discrepancies in obligations.[28]
- Bring capacity building to Africa as the expertise will be local and the places of the hearings will be in Africa. Moreover, member states will be highly familiar with the obliga-

[26] Amelia Porges, Dispute Settlement, Preferential Trade Agreement Policies for Development: A Handbook Part 2. **pp. 467–497** (2011), *available at* https://www.wto.org/english/res_e/reser_e/ersd201203_e.pdf

[27] Pauwelyn, Joost. 2004. "Going Global, Regional, or Both? Dispute Settlement in the Southern African Development Community (SADC) and Overlaps with the WTO and Other Jurisdictions." *Minnesota Journal of World Trade* 13: 231–304.

[28] Edna Ramirez-Robles & Stefano Inama, TradeMark Southern Africa, Training Module on Dispute Settlement Mechanisms for Trade Agreements (2012)

tions included, and this is an opportunity to start following the case law at a regional level.[29]

- Cost will be reduced; as local expertise will hopefully be used.[30]

Disadvantages

- There is no established case law. This creates uncertainty as to the extent of the obligations. A solution to this issue is to make the WTO case law applicable to the CFTA when obligations overlap.
- Going to the WTO, to the extent WTO rules cover a trade dispute between CFTA parties, brings the dispute to the attention of third parties and may enlist those third parties (e.g. the EU or the US) in putting pressure on the violating country to comply. 20-25% of all WTO disputes are between states that also have an RTA in force between them; yet, they opted to filed their dispute before the WTO and not, for example, NAFTA.
-

3.6.2 Giving preference to the WTO

The other solution is that if a dispute concerns a breach of an RTA obligation that is equivalent in substance to a WTO obligation, it must be brought in the WTO.
Disputes over CFTA provisions that are WTO-plus and could therefore not be pursued before the WTO would then however still go to the CFTA DSM.

Advantages:

- The WTO has a well-established case law which leads to less uncertainty as to the extent of obligations.[31]
- The WTO is equipped with an efficient Secretariat and it is already funded, hence, reducing costs for the organization.[32]

[29] Ibid.
[30] Ibid.
[31] Piérola, Fernando, and Gary Horlick. 2007. "WTO Dispute Settlement and Dispute Settlement in the 'North-South' Agreements of the Americas: Considerations for Choice of Forum." *Journal of World Trade* 41 (5): 885–908.
[32] Ibid.

- For disputes before the WTO, the Advisory Center on WTO Law provides free or subsidized assistance to developing states.[33]

Disadvantages

- Cost of litigating before the WTO is high and requires technical knowledge.
- Certain CFTA members are not part of the WTO which could lead to different forums available depending on the parties at hand.
- Create the risk of lack of usage of CFTA dispute settlement.
- It would not bring any capacity building to Africa.

3.6.3 Party's election of forum

This model allows disputes arising under both the CFTA and the WTO, or both the CFTA and an African REC, to be settled in either forum at the discretion of the complaining party but provides that, after the "initiation" of dispute settlement, the procedure employed must be used to the exclusion of any other. The complaining party thus has the option to choose the strongest substantive and procedural rules, while duplicative proceedings are excluded.[34]

This approach offers similar advantages and disadvantages as giving preference to the WTO while allowing for more flexibility for the complainant and can also be applied in respect of RECs in Africa.

3.7 Entry into force of the decision

Once a decision has been rendered, it must be decided how it will enter into force and become legally binding. There are two broad options: firstly, decisions can become binding automatically such as decisions of the COMESA Court of Justice; secondly, decisions can become binding after approval by the member states such as in the WTO or the TFTA. The different possibilities available under this second option range from a veto right for each member state to block adop-

[33] Edna Ramirez-Robles & Stefano Inama, TradeMark Southern Africa, Training Module on Dispute Settlement Mechanisms for Trade Agreements (2012)

[34] Amelia Porges, Dispute Settlement, Preferential Trade Agreement Policies for Development: A Handbook Part 2. **pp. 467–497** (2011), *available at* https://www.wto.org/english/res_e/reser_e/ersd201203_e.pdf

tion, to adoption by negative consensus which means that decisions are adopted unless all parties agree not to adopt it (as in the WTO).

3.7.1 No adoption: decisions are binding automatically

The first option is that the decision once rendered is automatically binding. In this approach, once the dispute settlement body has rendered a decision, the decision is final and must be implemented. This is for example the case in the European Union where judgments rendered by the European Court of Justice are final and must be implemented without political review.[35]

3.7.2 Consensus

The second option requires the political organ to adopt the decisions of an adjudicative body on a consensus basis. In this sense, it means that any member state can veto the adoption of the decision even the responding state. This mechanism was used in the GATT and led to blockage as the responding state could simply block the adoption of the panel report.[36]

3.7.3 Negative consensus

The third option requires the political organ to adopt the decisions of an adjudicative body on a negative consensus basis in order to make this decision legally binding. In this sense, it means that all member states must agree to block the decisions. This mechanism has been adopted in the WTO.[37]

3.7.4 Vote

A fourth option, which is a hybrid of consensus and negative consensus, subjects the adoption of the decisions of an adjudicative body to a majority vote. This can be done in two ways. Firstly, a

[35] Article 380, Treaty on the Functioning of the European Union
[36] Mary E. Footer, The Role of Consensus in GATT/WTO Decision-making, 17 Nw. J. Int'l L. & Bus. 653 (1996-1997)
[37] Ibid.

positive vote which requires a certain majority to adopt the decision. Effectively, the decision will not be adopted unless a majority votes in favor of the decision. Secondly, a negative vote which requires a certain majority to block a decision. In effect, the decision of an adjudicative body will be adopted unless a majority of member states votes against the decision.

3.8 Enforcement

Once a decision has been rendered and made binding, it is important for member states to have mechanisms to force the responding state to abide by the decision.

3.8.1 Compliance

In an optimal world, CFTA member states should comply with decisions made against them. In most disputes at the WTO, parties do so.[38] However, compliance should be coupled with a stronger enforcement mechanism to induce compliance. Another issue is that compliance does not deter member states from taking inconsistent measures. This is so because they will not be held accountable until a decision is rendered stating that their measure is illegal as once a decision is rendered they can simply withdraw it.

3.8.2 Compensation

The first mechanism which could also be used is compensation. Compensation is usually defined as a "mutually satisfactory" agreement between the winner and the loser and must be consistent with the Agreement at hand.

This usually takes two forms. First, "trade compensations" whereby a defendant that did not want to comply with a decision offers the other party increased market access in another sector. The main issue with this first form is that it takes place on a non-discriminatory basis, this is not a very attractive remedy for either side: for the defendant because it would be opening up market access for all exporters and for the complainant because it would gain market access, but in

[38] Bruce Wilson, Compliance by WTO Members with Adverse WTO Dispute Settlement Rulings: The Record to Date, 10 Journal of International Economic Law 397 (2007)

competition with other exporters, it does not provide a solution at all. However, compensation is still arguably better than retaliation in case retaliation does not lead to compliance. The second form of compensation is prospective monetary compensation. The main issue with monetary compensation is that it does not end the breach of the treaty in most cases because it is often an alternative to compliance and therefore does not enhance implementation of the treaty.

3.8.3 Retaliation

A second mechanism that can be used independently or in combination is retaliation. Retaliation is used in the WTO and TFTA. Retaliation is the suspension of concessions or other obligations by one party to induce compliance by the responding state in the same sector as that in which the retaliating party has suffered damage.[39] The main question is how to quantify retaliation.

A first option was adopted for the WTO where the level of retaliation is equivalent to the level of nullification or impairment in trade flows caused by the original violation.[40] The main issue on this point is that countermeasures proportionate to the trade harm suffered may not be effective in inducing compliance as the responding state may not be better off complying with the decision.[41]

A second option is found under customary international law where economic effect of the response can be much greater than the economic effect of the breach in order to ensure compliance.[42] This second option has the advantage to be more effective in ensuring compliance. However, its main drawback is determining exactly how much more than the trade harm might be allowed in retaliation.

Retaliation also has general disadvantages. First, it may hurt the retaliating party as much as the violating party because goods from the violating party will become more expensive in the retaliating party. Secondly, retaliation is more likely to induce compliance when the retaliating party has a larger trade volume with the responding state as retaliation will affect the responding

[39] Articles on State Responsibility, annexed to UNGA res 56/83, UN Doc A/RES/56/83, 12 December 2001.
[40] Article 22.4, Dispute Settlement Understanding, World Trade Organization.
[41] Lorand Bartels, *Making WTO Dispute Settlement Work for African Countries: An Evaluation of Current Proposals for Reforming DSU*, 6.2, The Law and Development Review, (2013).
[42] Arbitration, Case Concerning the Air Services Agreement of 27 March 1946 (US/France), XVIII RIAA 417, 9 December 1978, para 83.

state's economy more. On the other hand, retaliation by a country which does not have an important trade volume will most likely not induce compliance by the responding state as retaliation will barely have an impact. Third, retaliation is only forward looking and, as such, does not compensate for past harm. Finally, retaliation is itself a trade restriction, something that the CFTA aims at avoiding. Having too much of it may undermine the objective and underlying rationale of the CFTA. In the EU, for example, retaliation is not provided for.

An alternative to retaliation which solves some of its drawbacks is cross retaliation. Cross retaliation is the suspension of concessions or other obligations in any sector under the trade agreement. For example, a member that does not have a large trade volume with the responding state may target in its retaliation a sector or issue (such as IP) which is more sensitive to the responding state in order to ensure compliance. However, this enforcement mechanism is mostly useful between developing and developed countries where a developing country can, for example, retaliate by targeting intellectual property rights. In Africa, where trade is mostly in goods except for certain countries, this mechanism may not be as efficient because cross retaliation is mainly useful against countries which are IP wealthy.[43]

Another possible improvement to retaliation is collective retaliation. The idea is that other member states might support the injured member by retaliating "on behalf" or together with that member.[44] However, one of the problems with retaliation is that it harms the retaliating party, so it is not clear why another member would voluntarily assume this burden.[45]

3.8.4 Damages

A third mechanism is to allow the DSM to grant damages for past harm to the injured party. This approach is followed for example in investor state arbitrations where the main remedy that the tribunal can order is damages for past harm. The major advantage of damages is that it is backward looking. Therefore, it is more likely to prevent violation of the rules as member states will

[43] Economy Watch, *Africa Trade, Export and Imports,* March 30th 2010: http://www.economywatch.com/world_economy/africa/export-import.html

[44] Reto Malacrida, Towards Sounder and Fairer WTO Retaliation: Suggestions for Possible Additional Procedural Rules Governing Members' Preparation and Adoption of Retaliatory Measures, 42 Journal of World Trade 3 (2008).

[45] Lorand Bartels, *Making WTO Dispute Settlement Work for African Countries: An Evaluation of Current Proposals for Reforming DSU,* 6.2, The Law and Development Review, (2013).

be considered liable from the moment they enact the measure. However, damages alone may not help rectify the situation so they may have to be combined, prospectively, with retaliation and/or trade compensation. Another issue of damages is that if the violation has been ongoing for a long time on an unsettled point of law, damages can reach astronomical amounts and become quite burdensome for the responding state. High damages awards, especially when awarded to private operators, in the context of resource-strapped African countries may also be politically difficult to comply with, and in the long run, undermine respect for CFTA decisions or even force countries to leave the CFTA DSM.

3.8.5 Monetary assessments or fines

A fourth enforcement mechanism is the use of monetary assessment or fines in order to ensure compliance. This mechanism is used in the European Union under the name of infringement procedure where the European Court of Justice can impose a fine on a member state until the judgment is implemented.[46] The TPP adopted a different option where the responding state can opt to pay a monetary assessment to a fund instead of suffering retaliation.[47] This mechanism has several advantages. First, it can be more efficient to ensure compliance as it does not depend on the trade volume between the parties. Secondly, it is is meant to induce compliance rather than limit the trade damages suffered by the complainant. Third, the funds received from the monetary assessment would be paid to a fund managed by the African Union and can be used to cover the costs of litigations or capacity building such as in the TPP.[48]

[46] Article 258, Treaty on the Functioning of the European Union.
[47] Article 28-20, Trans-Pacific Partnership.
[48] Ibid.

3.8.6 Compliance review

A fifth enforcement mechanism is a political peer review mechanism. This mechanism is for example used in the Council of Europe as a follow up on decision from the European Court of Human Rights where the political organ names and shames countries that have not implemented judgments.[49] This is also used in the United Nations by the General Assembly for ICJ cases.

3.9 How to involve non-state actors?

Several mechanisms are used around the globe in order to involve non-state actors in state to state disputes. First, states can have a petition system in place. Secondly, third parties can be allowed to submit amicus briefs. Third, the proceedings can be open to the public. Finally, lower courts can ask preliminary rulings.

3.9.1 Petition

A petition system is a system under which a firm or an industry can file a complaint to their own state in order to have the state bring a trade case on their behalf. This is for example used by the United States under Section 301 of the U.S. Trade Act of 1974[50] which allows private parties to request the United States Trade Representative to bring a WTO case on their behalf. To bring or not to bring the case remains, however, largely discretionary and may be subject to political considerations.

[49] See Annual Reports of the Council of Europe, Committee of Ministers on its supervision of execution of judgments and decisions of the European Court of Human Rights.
[50] Trade Act of 1974, 2101, U.S.C. (1975)

3.9.2 Amicus brief

Amicus curiae briefs are submissions by non-parties to the dispute to give their opinions on specific disputes. There are three possible ways to deal with them. First, they can be banned altogether. Secondly, they can be authorized but the dispute settlement body can decide to disregard them. Third, they can be authorized and the dispute settlement body must take them into consideration when meeting certain conditions.

Advantages:

- Amici curiae have a knowledge, experience or expertise that the parties cannot or do not want to present because they either do not have sufficient knowledge or they think that related facts would not be good for their case. Therefore, amici curiae can improve the quality of the decision making process.[51]
- Amicus briefs contributes to improve public image especially through NGOs.[52] Therefore, it increases the legitimacy and accountability of the dispute settlement body.
- Enhances capacity building as more people would be working on trade related issues.

Disadvantages:

- May increase the costs of the dispute for the disputing parties who need to read/respond to the briefs and may trigger delays.[53]
- Undermines the character of the dispute settlement mechanism as a forum for confidential discussion between governments and may bring politicization to the process.[54]

3.9.3 Open proceedings

[51] Interdisciplinary.net (Official site), A Global Network for Dynamic Research and Publishing, Ishikawa, T., *NGO Participation in Investment Treaty Arbitration*, *available at* http://www.inter-disciplinary.net/wp-content/uploads/2010/02/EJGC7ver2050210.pdf#page=112

[52] Tienhaara, K., *Third Party Participation in Investment-Environment Disputes:Recent Developments*, Review of European Community and International Environmental Law, 16 (2) 2007

[53] University of California (Official Site), Butler, L., *Effects and Outcomes of Amicus Curiae Briefs at the WTO: An Assessment of NGO Experiences*, **pp.1, 11-19** *available at* http://nature.berkeley.edu/classes/es196/projects/2006final/butler.pdf

[54] Vanesa Vujanic, *Amicus Curiae Briefs and Non-Governmental Organizations in Investment Arbitration: Positive or Negative?* Croatian Legal Review. (January 2011)

Opening hearings to the public can be done in several ways: the public can assist the hearing in person, it can be broadcasted on a TV in a room in the same building or webcasted on the internet.

Advantages:

- Increases transparency, awareness and accessibility.[55]

Disadvantages:

- Expensive.
- Might undermine the character of the institution as a forum for confidential discussion between governments, and lead to trials by media.[56]

[55] Junji Nakagawa, Transparency in International Trade and Investment Dispute Settlement (Routledge, 2013)
[56] Amelia Porges, Dispute Settlement, Preferential Trade Agreement Policies for Development: A Handbook Part 2. **pp. 467–497** (2011), *available at* https://www.wto.org/english/res_e/reser_e/ersd201203_e.pdf

3.10 Overview of African dispute settlement mechanisms

In the following table, the reader will find how different African RTAs have dealt with the key issues highlighted above.

	COMESA	EAC	ECOWAS	SADC	TFTA[57]
Type	Court	Court	Court	Panel	Panel
Appellate Mechanism	None	Appellate Division	None	Appellate Tribunal	Appellate Body
Scope of application	Matter falling under the treaty / Advisory opinion / Preliminary rulings by national courts	Matter falling under the treaty / Advisory opinion / Preliminary rulings by national courts	Matter falling under the treaty / Advisory opinion / Preliminary rulings by national courts	Matter falling under the treaty / Advisory opinion/ Preliminary rulings by national courts	Terms of reference of the dispute; no advisory opinions/preliminary rulings
Binding decisions	Yes	Yes	Yes	Yes	Binding only after approval by the Tripartite Council
Overlap	Exclusive	Exclusive	Exclusive	Exclusive	Not discussed
Enforcement	Winning party can refer the case back to the tribunal which can impose a financial penalty.	Pecuniary obligation governed by the rules of civil procedure in force in the respondent state.	Back to the tribunal which can request political body to impose political sanctions by consensus.	Highest political body can impose political sanctions by consensus.	Panel recommends compensation and suspension of concessions and surveillance by tripartite council

[57] Based on the provisional TFTA Annex 13.

4 Recurring challenges and successes in African Dispute Settlement Mechanisms

4.1 Recurring challenges

There are many RTAs in Africa as stated above. However, they have not worked perfectly due to several issues. This section highlights the challenges with a view to deriving lessons from them for the benefit of CFTA DSM.

4.1.1 Judicial activism & judicial independence

Judicial activism refers to courts acting out of their mandates and making decisions based on personal or political considerations rather than existing laws. Judicial independence requires that courts should not be subjected to any improper influence arising from factors such as appointment of judges or judicial funding. This can be a source of consternation in RECs. The possibility of this is increased by lack of a pre-defined scope of jurisdiction, which would clarify the relevant laws to be applied. Most DSM of REC's in Africa have not adequately defined the range of possible complaints, causes of actions, as well the subject matter jurisdiction that a dispute resolution body is permitted to adjudicate.

SADC presents an example of a case where lack of a well-defined scope of jurisdiction presented conflicted opinion on the question of judicial activism by its member states. This was occasioned by the SADC Tribunal's decision in a case filed by a group of displaced landowners following the land reform program in Zimbabwe[58]. Ultimately, Zimbabwe alleged that the tribunal did not have jurisdiction to hear human rights issues[59]. As a result, the tribunal activities temporarily came to a halt but were later reconstituted with limited jurisdiction to determine interstate disputes only.

[58] Backlash Against International Courts in West, East and Southern Africa: Causes and Consequences.
Karen J. Alter, Northwestern University (kalter@law.northwestern.edu) James T. Gathii, Loyola University Chicago Laurence R. Helfer, Duke University Law School.
[59] Ibid.

It is therefore important that CFTA DSM provides mechanisms to avoid both judicial activism and preserve judicial independence.

4.1.2 Multiple membership and overlap of jurisdiction

A number of countries in Africa belong to more than one REC resulting in a possibility of over-lapping jurisdictions on a given subject matter. For example, there is an overlap of membership among some members of COMESA, EAC and SADC. This has a bearing on the effectiveness of a DSM. First, it creates legal uncertainty because several courts might have jurisdiction to hear the same disputes and might render conflicting decisions. Secondly, this leads to uncertainty for private actors who might not be able to know which legal regime is applicable. This therefore calls for the CFTA to consolidate overlapping jurisdiction and create a clear hierarchy to avoid conflicting case law.

4.1.3 Limited Human and Financial Capacity of member states

Limited human and financial capacity still plagues RECs as well as their members. The dispute settlement capacity of member states, in terms of skills, manpower and funds for research and analyses in preparation for claims is limited. This has over the years made a strong case for the need to put in place capacity building initiatives to fill the gap. Efforts of entities such as TRAP-CA have helped with enhancing capacity of trade experts though the gap is still present. Lack of financial resources to support REC activities has also been a challenge to many RECs in Africa.

4.1.4 Limited infrastructure and support for Dispute settlement

There are costs both to the maintenance and usage of a tribunal incurred by the member states and private individuals. Litigation can be lengthy, tedious and expensive. This is bound to make DSMs less attractive to member states and private individuals. Litigants are forced to weigh carefully the costs and benefits of litigation and may opt not to use the DSM available for them in the REC's. For example, the Tribunal on the Rwanda genocide was almost entirely funded by

the International community implying that without such support, it would not have accomplished its work that spanned almost two decades and involved costly investigations. Accordingly, a cost sharing mechanism should be put in place to encourage usage of the DSM in the CFTA.

4.1.5 Low Publicity

Many government officers as well as private business entities have limited knowledge about existence and operations of REC DSM systems. This has consequently limited scope of use. Increased awareness and knowledge of trade law and DSM is thus key in addressing the challenge.

4.1.6 Lack of usage due to informal trade and processes

A significant amount of trade in Africa is carried out using informal processes with no written agreements or legal entities such as registered companies, which makes it difficult for states to spot possible violations of trade obligations. Member states also continue to face the problem of data collection and storage. For example, in the case of the sugar export dispute reported in the East Africa business Newspaper[60] between Uganda and Kenya in 2015, the latter objected to sugar imports on grounds that the sugar did not originate from Uganda. This meant that it should be subjected to the Common External Tariff under the EAC rules of origin. Due to lack of data to support the claim, it took a political agreement between the two countries to agree on the way forward, which involved setting up a verification committee to ascertain the true origin of the sugar to be exported into Kenya. It is, therefore important that member countries promote formalization of trade processes and mechanisms to ensure adequate data and information for dispute resolution to be effective in the CFTA.

[60] Christabel Ligami, *Stringent rules set for sale of Ugandan sugar in Kenya to protect local industry,* The East African, August 15, 2015, *available at* http://www.theeastafrican.co.ke/news/Stringent-rules-set-for-sale-of-Ugandan-sugar-in-Kenya/-/2558/2833830/-/ec183ez/-/index.html

4.2 Successes

Despite the challenges, African DSMs have made certain achievements some of which include;

4.2.1 Accessible international disputes settlement Forum

Regional Economic Communities such as EAC have witnessed the establishment of judicial arms with rules of procedure that are flexible, user friendly and are acceptable to member states and as such, state parties find it easy to approach them. An example can be taken from the hearing procedure under the EAC Court of Justice. The Court from time to time and as it deems fit, can conduct its activities in any of the member states and not strictly in Arusha where the seat of the Court is thereby bringing Justice nearer to the people. As a matter of policy, whenever a case involves parties who come from the same area (country) the Court holds hearing and delivers Judgment in the Capital of that Partner' State.[61]

4.2.2 Peaceful settlement of disputes

In order to ensure harmony and peaceful regional cooperation and integration, REC's have successfully developed jurisprudence which has guided the Interpretation of the provisions of the governing treaties and laws and have also adopted policies for implementation of the jurisprudence ensuring respect for the founding principles of the Community. This is particularly important for a continent that has experienced a fair share of conflicts. Consequently, there has been a common understanding of the laws and informed decisions have eased relations between member states.

[61]In August 2010, the Appellate Division of the East African Court of Justice held a session in Nairobi and delivered a Judgment in Appeal No 1 of 2009 Prof. Peter Anyang'Nyong'o and 10 others

4.2.3 Judicial independence

Despite the previously discussed issue of judicial activism and threat to judicial independence. Having independent regional courts has been a major contribution to the peaceful development of Africa. For example, the EAC has often been praised for its independence, thanks to the limited grounds for political interference established in Article 26 of the Treaty Establishing the East African Community.

4.3 Goal: deep integration

Finally, it is important to note the goal of the CFTA. The AU and its member states designed the CFTA as a centralized vehicle to consolidate the FTAs in Africa. In its current anticipated structure, the CFTA might supplant the current FTAs in Africa in matters relating to trade and dispute settlement. However, the various FTAs will remain in place to handle subject matters not covered or regulated by the CFTA. As part of the overall strategy to increase regional integration in Africa, regional FTAs and RECs were to consolidate with each other and create the building for the CFTA. Therefore, the goal of the CFTA is deep integration on a model close to the European Union, Africa wants to appear as one block to the rest of the world. Therefore, DSM must ensure that it does not only solve conflicts but also prevent them from happening and that it lays out a solid basis for future expansion of the system.

5 Dispute Settlement Process analysis and recommendations

This section will look into the details of each step of a DSM and will make recommendation for each of them.

5.1 Type of Dispute Settlement Mechanism

5.1.1 Consultation

We recommend that the AU adopt a mandatory 30 days consultation period before a matter can be referred to a tribunal. The 30 days period is shorter than the 60 days allotted by the WTO, however the initial 30 days is designed to function as an evaluation period for the parties to determine whether pursuing an extended consultation has the potential to yield a positive result. This approach is in line with the AU's aim to create a dispute resolution system that is efficient. A shorter initial mandatory consultation period provides the disputing party an opportunity to gauge the likelihood of resolving a dispute through the consultation process without spending extended time and resources in a consultation process the parties do not believe will be successful.

After the initial mandatory 30-day consultation period, at the request of both parties, the member states involved in the dispute can request an additional 60-day consultation period, or enter into mediation for 60 days. If both parties involved do not agree to the additional 60-day extension for consultation or mediation after the mandatory 30-day consultation period, then the complaining party may request the establishment of a Panel. The 60-day extension period in conjunction with the 30-day initial consultation period provides the party a 90-day window to resolve a dispute using the consultation or mediation process. The 90-day period accommodates the additional time that might be necessary to negotiate a settlement in light of the potential distance amongst member states, lack of capacity and infrastructure.

Any interested person other than a consulting party who believes it has a substantial interest in the matter may participate in the consultations by notifying the other Parties in writing within seven days after the date of circulation of the request for consultations. The interested person shall include in its notice an explanation of its substantial interest in the matter. If the consulting

Parties consider that the interested person does not have a substantial interest, the matter should be referred to the African Union Commission Chairperson who shall decide whether the interested person has a substantial interest.

When good offices, consultation or mediation are entered after the initial 30-day mandatory consultation period, the complaining party shall allow a period of 90-day after the date of receipt of the initial request for consultation before requesting for the establishment of a panel. The complaining party may request the establishment of a panel during the 30-day initial period if the parties to the dispute jointly agree that the good offices, conciliation or mediation process has failed the settle the dispute.

Note, our recommendation mirrors the Tripartite DRM closely, except for a key difference. We recommend that the member states expressly adopt language that after the initial 30-day consultation period, both parties have to agree to extend the consultation period or enter into mediation. Explicitly requiring both parties to agree to the extension avoids the prospect of one party needlessly extending the consultation period where there is not a real prospect of solving the dispute during the extension.
The suggested treaty text for consultations can be found in Annex A.1.

5.1.2 Quasi-Judicial

5.1.2.1 Nomination

Taking into consideration that CFTA dispute settlement should ensure certainty, be cost effective and time efficient. We would recommend that the CFTA adopt a quasi-judicial model with a closed roster of panelists.
Each member state should propose one panelist to the African Union Commission; people meeting the qualification requirement might also apply by themselves to the African Union Commission. The African Union Commission must then nominate the 15 panelists that are the most qualified. The African Union Commission should endeavor to nominate panelists by consensus. However, in case of deadlock for more than 6 months, a majority vote should be taken. If no majority can be reached within 1 month, the Chairperson of the African Union Commission will

nominate the panelist. The pool of 15 panelists, called the CFTA Tribunal, shall have no more than one panelist coming from the same country. The panelists shall be nominated for a 5 years non-renewable term. Each dispute should be adjudicated by 3 panelists, called the panel, nominated by the President of the CFTA Tribunal. The President should be elected by the pool of panelists.

The panelists shall be nationals of a CFTA member states and shall possess the qualifications required in their respective countries for appointment to judicial office, or be jurists of recognized competence. They shall have demonstrated expertise in public international law. It is desirable that they have expertise in particular, in international investment law, international trade law and the resolution of disputes arising under international investment or international trade agreements.[62]

The CFTA member states and the African Union Commission should endeavor to approach the nomination question based on the following hierarchy. First, countries which are part of an RTA with a dispute settlement body should endeavor to nominate one of the judges of the regional court to the CFTA. For example, member states should endeavor to nominate a judge from the COMESA Tribunal as panelist for the CFTA. This will ensure their judicial independence as well as their knowledge of trade law. If it is not possible to nominate a judge from a regional tribunal, countries should endeavor to nominate legal academics, private lawyers, former national judges or retired government officials as panelists. If a legal academic is nominated to the CFTA dispute settlement body, he or she should not be allowed to publish or express views publicly relating to the interpretation of the CFTA during his or her mandate. If a private lawyer is nominated, he or she should not be allowed to represent parties before the CFTA dispute settlement body or provide legal counseling on matters related to the CFTA.

If the independence or impartiality of a panelist is successfully challenged before the President of the Tribunal, the President should nominate another panelist from the designated pool. If all panelists have been successfully challenged, the President should nominate panelists from an indicative list. This indicative list should incorporate the one person suggested by each member state

[62] Transatlantic Trade and Investment Partnership, Nov. 12, 2015,U.S.-E.U., art. 2.9,E.U.

for the panelist position. In case the workload of the CFTA Tribunal is not manageable by the Tribunal, the President might use the indicative list to constitute more panels.

5.1.2.2 Appellate mechanism

We recommend that the CFTA implements an appellate mechanism. In order to solve the first drawback of an appellate mechanism, the higher costs, we suggest that the Court of Justice of the AEC be used as an appellate body. The Court of Justice of the AEC is constituted under Article 18 of the Abuja Treaty.[63] It has yet to come into existence.[64] However, using the AEC Court of Justice as an appellate mechanism would solve the cost issue, save time on negotiations and further the implementation of the Abuja Treaty. First of all, it would save cost as no new court or appellate body would need to be created to hear appeals from the panel. Secondly, parties have already decided on the functioning of the Court of Justice in broad lines and this will save negotiating time. Third, using the Court of Justice as an appellate system will further the implementation of the Abuja Treaty by using one of its protocols and will link the CFTA to the rest of the African Union in order to fit in the deep integration goal of the African Union.

In order to solve the time efficiency issue, which can also lead to higher costs for the parties as an appellate mechanism will lengthen the process, we suggest that the scope of appeal be limited to manifest departure from previous case law, excess of power or non-respect of the rule of proceedings. Such an approach is taken in investment arbitration under the ICSID Convention.[65] Limiting the grounds for appeal will have several advantages. First of all, it will ensure that there is no frivolous appeal. Secondly, it will be more time efficient as the Court of Justice will only be able to hear appeals on limited grounds instead of conducting a *de novo* review. Third, it will avoid having the AEC Court of Justice, which is not a trade specialized court, to have to rule on technical trade issues. Finally, it will still bring the desired certainty that is brought by an appellate mechanism.

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[63] Abuja Treaty Establishing the African Economic Community, June 3, 1991, AL-AO-GA

[64] Stephen Wiles, *What is the ACJ?*, International Courts and Tribunals, http://guides.library.harvard.edu/c.php?g=309935&p=2070223

[65] *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States,* International Centre for Settlement of Investment Disputes, Ch. 4 Art. 50. (2006)

Hence, it is suggested that the Court of Justice of the AEC be used to hear appeals from first instance decision based on the following grounds:

- the Panel has manifestly exceeded its powers;
- there has been a serious departure from a fundamental rule of proceedings;
- there has been a manifest departure from previous decision which is not justified by cogent reasons;
- the decision has failed to state the reasons on which it is based;

Appeal against the decision of the panel should be made within 60 days of the decision and the Court of Justice of the AEC should render its judgment on the appeal within 120 days of the appeal.

In case the appeal is successful, the Court of Justice of the AEC can decide to refer back the dispute to the original panel to re-adjudicate the case if the grounds for the success of the appeal where substantial enough to lead to a possible different outcome of the case. The panel would then have 120 days to re-decide on the issues. The second panel decision might also be subject to appeal within 30 days of the decision and the Court of Justice would have to decide on the appeal within 90days.

5.1.2.3 Duration

In accordance with the AU's twin aim of creating a DSM for the CFTA that is both time-efficient and cost effective, we suggest the CFTA adopt a 16 months recommended period to resolve disputes stemming from the CFTA, from request for consultations to the issuance of a panel decision. Firstly, the consultation and mediation period might last from 30 to 90 days. Following the consultation period, the panel shall be constituted within 7 days of the panel request. Secondly, the panel proceedings should be expected to last maximum 10 months from the request to constitute a panel until the final submission. Lastly, the panel should have 3 months to render its findings and decision after the conclusion of the proceeding. The panel is thus granted 13 months to resolve the case. The panel should also be granted the ability to extend this time span if the circumstances require so. Once the decision is rendered, parties might appeal the decision before the EAC Court of Justice within 60 days. The Court of Justice then has 120 days to render a de-

cision on the appeal. If the appeal is successful, the case will be referred back to the original panel that will have 120 days to amend its previous decision. Once a panel decision has become final, either after the 60-day appeal period or after re-adjudication by the panel. The decision must be referred to the political body within 60 days for adoption. These recommendations are in line with the AU's twin aim of creating a dispute settlement system for the CFTA that is both efficient and cost effective and also meet the average time for WTO panel decisions to be adopted from the time of the creation of the panel.

5.1.2.4 Funding

Taking into consideration that the CFTA DSM is intended to operate at the lowest cost possible and to encourage usage by the member states, we recommend that the African Union Commission acts as Secretariat for the CFTA and to finance the CFTA DSM expenses from member states contribution. Incorporating cost cutting measures such as having panellist serve on a part time basis and being paid on a case-by-case basis will ease the financial burden while still paying the panellists a low monthly salary to ensure their availability. The option of having the parties to the dispute meet all the expenses including paying the panellists and secretariat cost may limit usage of DSM and is thus not recommended. However, disputing parties should have to pay for their own legal expenses.

It is also recommended that the CFTA DSM should not have its own hearing rooms but should use rooms available at the seat of the AU. On request of the respondent, the CFTA DSM might also decide to hold the hearing in the capital of the respondent party in order to lower costs or in a REC court room.

Progressively, member states may consider the option of establishing a separate DSM fund whilst taking into account considerations such as member states contributing to different degrees to the DSM Fund (based on size, GDP, number of cases filed in the past etc.). A country like Kenya could then contribute less than South Africa. As a matter of fact, at the 25th Africa Union Summit held in South Africa, Johannesburg in June 2015, AU affirmed a proposal for members to make contribution based on the sizes of their economy in future.

5.1.2.5 Conclusion

We therefore propose a quasi-judicial system with a closed roster of panelists with nominated panelists by the African Union Commission for 5 years with no fixed hearing rooms and the ability to move its seat if the parties require so. We also recommend that the Court of Justice of the AEC is used as an appellate mechanism on limited legal grounds.
The proposed treaty language to implement this option can be found in Annex A:1.

5.2 Standing

It is clear that states will be granted standing before the CFTA dispute settlement body as the task of this memorandum is to design a state to state DSM. However, in order to avoid issues of lack of usage similar to those that have arisen in other RTAs, it is relevant to analyze two other options.
A first alternative, which would keep the dispute settlement international and diplomatic, would be to grant standing to the African Union Commission. The Commission is the African Union's secretariat. Similar to what the European Commission does, the African Union Commission could be granted the mission to oversee member states' laws that could violate the CFTA. If the African Union Commission believes that there has been a violation of the CFTA, it could bring a case against the violating state on behalf of the African Union. The only difference with our suggested state-to-state mechanism would be at the enforcement stage where the damages would be disbursed to the affected countries instead of the African Union Commission.[66]
A second alternative would be to allow private persons such as citizens or companies to bring cases before the dispute settlement body. Doing so would clearly increase the number of cases heard by the CFTA Tribunal and thus induce implementation of the treaty. It would also bring the CFTA closer to the business community and broader public opinion which may, in turn, enhance and support AU economic integration and broader ownership over the process. However, it could open a flood gate of cases and take the dispute settlement process out of the hands of the states. In any case, the African Union might decide to open standing to private parties for some

[66] See Section F

chapters and not others. For example, investment chapters usually have a different dispute settlement mechanism which is open to investors.

As we have been tasked to design a state-to-state DSM, this memorandum will be based on the assumption that only states have standings. However, we suggest that the negotiators consider opening standing at least to the African Union Commission.

5.3 Scope of Application

In this Section we will look at what sort of complaint and issues can be brought before the DSM, what should be the standard adopted by the dispute settlement body to review national decisions and whether some subjects should be excluded from jurisdiction.

5.3.1 Breach of obligation & Non-violation complaint

It is obvious that the CFTA should include a violation clause. However, to avoid judicial activism and ensure predictability in CFTA commitments engaged in, it would not seem advisable to include a non-violation option in the CFTA.

A proposed treaty article can be found in Annex A:2.

5.3.2 Interpretation

Regarding interpretation, allowing the dispute settlement body to interpret the CFTA outside of a dispute is a possibility such as the advisory opinion mechanism of the ICJ.[67] In any case, the political body of the African Union can take authoritative interpretations or subsequent agreements. We recommend that the CFTA should have both options, if interpretation questions can be decided by the political body, it should have the power to take an interpretation decision, by consensus of all CFTA parties. However, to avoid deadlocks, member states should also have the option to bring the interpretation question to the dispute settlement body. This solution has been widely adopted in Africa as the EAC, ECOWAS and SADC followed it. However, the TFTA

[67] Chapter IV, Statute of the International Court of Justice.

does not allow the dispute settlement body to be asked advisory opinions, following the WTO model.

A proposed treaty article can be found in Annex A:3.

5.3.3 Subject matter exclusion

RTAs dispute settlement procedures generally apply only with respect to the rights and obligations provided in that RTA. Some subject areas are often excluded from dispute settlement even when they are included in an RTA. RTAs may exclude panel interpretation of subjects that are reserved to specific bodies in one of the parties.

As such, the African Union already has a dispute settlement body for human rights disputes, the African Court on Human's and People's Rights. Moreover, mixing trade and human rights disputes in Africa has raised challenges in the past and it is thus better to keep them separate. Therefore, we suggest that dispute settlement chapter contains a clause excluding human rights from its scope. This means that first human rights themselves cannot be a ground for action for the CFTA as they should not be part of the substance of the treaty. Secondly, if the dispute has a substantial link to human rights such as racial discrimination, the CFTA DSM should decline jurisdiction. However, we would like to highlight to the reader that the second branch of the exclusion might have negative consequences where a dispute even remotely connected to human rights might not be adjudicatable because of this exclusion.

If a PTA contains "soft-law" obligations that urge but do not mandate economic or other cooperation, those obligations are often excluded from formal dispute settlement. Such an exclusion makes sure that no dispute settlement panel will ever read "should" as "shall." As a corollary, when obligations regarding a subject area are limited to soft law, that area is likely to be excluded from formal dispute settlement.[68] Such exclusions will depend on what the drafters of the CFTA decide regarding the obligations in the treaty. Chapters regarding anti-dumping or countervailing measures are also often excluded. For example, Chapter Three of the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada excludes trade remedies

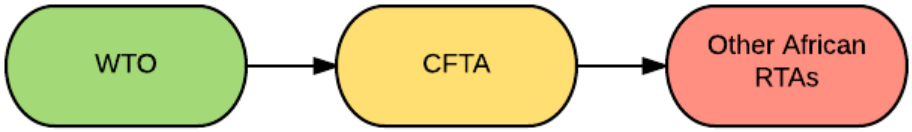
[68] Amelia Porges, Dispute Settlement, Preferential Trade Agreement Policies for Development: A Handbook Part 2. **pp. 467–497** (2011), *available at* https://www.wto.org/english/res_e/reser_e/ersd201203_e.pdf

from its scope. Similarly, the TPP excludes the application of the dispute settlement mechanism to, among others, Chapter 16 on Competition Policy.

5.4 Overlap between the CFTA and other trade regimes

A first point that must be discussed is how to solve substantive overlap between the different agreements. Secondly, the procedural overlap will be discussed starting with overlaps between the CFTA and the WTO Agreements. Finally, the DSM overlap between the CFTA and other African RTAs must be discussed. It will be recommended to give preference to the CFTA in both situations.

5.4.1 Substantive overlap



To solve substantive overlap, a hierarchy among the agreements must be established. The WTO Agreements must be at the bottom of this hierarchy as they reflect the lowest standard that the CFTA member states can agree too. Indeed, following the WTO's case law, states cannot agree on "WTO-minus rules" in RTAs, meaning they cannot reduce the commitment they made in the WTO.[69] Therefore, the WTO is at the bottom of the hierarchy so the CFTA needs provisions stating that WTO obligations of CFTA members are not affected because of the CFTA. Then comes the CFTA which should provide for more important commitment and stricter rules than the WTO. Therefore, the CFTA can provide for WTO *plus* commitments but not WTO *minus*. The CFTA is supposed to harmonize trade rules across Africa.

However, for matters not covered in the CFTA, the various RTAs in Africa will remain at the top of the hierarchy and be *lex specialis* to the CFTA in so far as they provide for deeper integration and do not conflict with the CFTA rules. Therefore, RECs in Africa can provide for CFTA plus obligations but in case the CFTA provides for deeper integration, the CFTA will take over. This

[69] Appellate Body Report, *Peru – Additional Duty on Imports of Certain Agricultural Products*, WT/DS457/AB/R, adopted 20 July 2015.

means that the various RECs cannot subtract obligations from the CFTA. This division is reflected in the Definitions for the CFTA Negotiations Guiding Principles as it preserves the *acquis* and allows for variable geometry within the CFTA by giving member states the possibilities to go for deeper regional integration with certain other member states if they wish to do so.

If a member state considers that a provision of the CFTA is inconsistent with a provision of another agreement to which it and at least one other member state are parties, on request, the relevant Parties to the other agreement shall consult with a view to reaching a mutually satisfactory solution.

5.4.2 Dispute settlement overlap

5.4.2.1 CFTA & WTO

Taking into consideration the fact that 8 CFTA member states are not party to the WTO[70] and that the CFTA aims at deep integration, it seems clear that the best solution is to give preference to the CFTA in case a dispute arise regarding obligations that are contained similarly in both the CFTA and the WTO Agreements. The EU Treaty has such a requirement[71] as it also enhances regional integration by showing that the Union can solve its internal disputes on its own. However, this does not mean that CFTA member states cannot bring a WTO case based on a WTO obligation which is not contained in the CFTA. It only means that in case a dispute could be brought in both forums, it should be brought to the CFTA DSM.

In order to solve the issue of uncertainty, it would however be wise to include a provision in the dispute settlement chapter making applicable the case law from the WTO to the CFTA albeit only, of course, on CFTA provisions that incorporate or are equivalent to WTO disciplines.

[70] Members and Observers of the WTO Map, https://www.wto.org/english/thewto_e/countries_e/org6_map_e.htm (2016)

[71] Case C 459/03, Commission of the European Communities v. Ireland (2003)

5.4.2.2 CFTA & RTAs

Once the CFTA enters into force, other RTAs in Africa will remain in place and it is therefore necessary to determine the relationship between those RTAs and the CFTAs. As the CFTA intends to be the main trade agreement in Africa, it is clear that its dispute settlement should be given priority for trade related disputes involving states when the dispute is over obligations which are similarly included in the CFTA and the RTA. However, an issue arises when a trade dispute that would normally fall under the CFTA arises but is brought by a private party under one of Africa's RTAs. To resolve this issue, it should first be made mandatory for RTAs dispute settlement bodies to follow the case law of the CFTA. Secondly, a preliminary ruling mechanism could be implemented by which RTAs dispute settlement bodies would have to request the CFTAs dispute settlement body to rule on the issue of interpretation of the law.
The suggested treaty article can be found in Annex A:4.

5.5 How should the decisions be adopted?

Our proposed solution would be to adopt the decision of an adjudicating body by a negative vote of three fourth or 75% of the political body. This solution would ensure that decisions of the judicial body can be rejected should the dispute settlement body oversteps its authority and a large majority of states recognize that it has done so. It would equally ensure judicial independence as in most cases this 75% majority will be hard to reach. Moreover, this approach gives the states the opportunity to discuss the decision in a political forum and might prevent them from challenging the dispute settlement body by other means.
The suggested treaty article can be found in Annex A:5.

5.6 How to enforce the decisions of the dispute settlement body?

Two of Africa's specificities must be taken into consideration for the enforcement mechanism. First, the CFTA aims at deep integration on the model of the European Union. Therefore, the enforcement mechanism should not only provide a way to stop the breach of obligations but also a

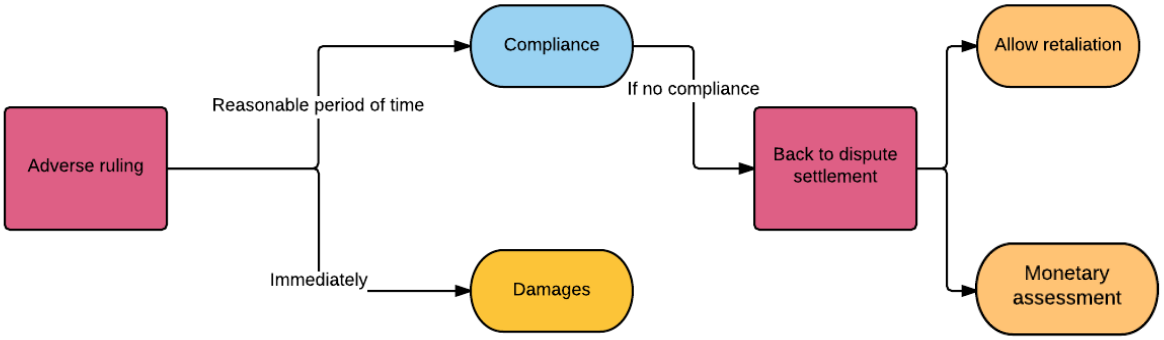
means to deter member states from breaching the agreement. Secondly, capacity building must be enhanced and enforcement mechanisms might help.

It stems from the above that the basis for an enforcement mechanism should be compliance. However, compliance as it is applied in the WTO, has two drawbacks. First, it is only forward looking. Secondly, it lacks an incentive to comply.

A solution to the first issue is to couple compliance with damages for past harm. Hence, if the dispute settlement body finds that a measure has violated the agreement, it would, first, order the responding state to comply with the measure within a reasonable period of time and, second, grant damages to the complaining party to repair the harm already done. However, damages should not be granted for the whole trade damage suffered since the introduction of the measure. The panel may only grant damages for the period of time starting from the filling of the request for consultation and up to the end of the reasonable period of time for compliance. The damages should be paid to the complaining party in order to cover the costs of litigation. Should there be money left, the complaining party should endeavor to distribute it to the local companies who have suffered the most damage from the measure. The complaining party should be able to enforce the decision on damages before national courts of all CFTA members.

A solution to the second issue is retaliation. If the responding state does not implement the measure within a reasonable period of time, the complainant can be allowed to retaliate. However, retaliation might not be enough to ensure compliance.

The most efficient way to solve this issue would be to couple retaliation to a monetary assessment system. In this sense, if the responding state does not implement the decision within a reasonable period of time, the complainant could require retaliation together with the imposition of a periodic monetary assessment on the responding state. The monetary assessment would be equivalent to 25% of the allowed monthly retaliation amount to be paid on a monthly basis. It would be paid to a fund so as to be used for capacity building.



The suggested treaty text can be found in Annex A:6.

5.7 How to involve non-state actors?

The dispute settlement in the CFTA will be a state to state mechanism. However, as it has been noticed in other African RTAs, most cases are brought by private parties. Therefore, to avoid an issue of lack of usage, it is important to involve the business community in the process. On the other hand, transparency and third party involvement can become costly and burdensome.

5.7.1 Petition

Studies illustrate the critical role played by developing-country stakeholders in disputes.[72] This is so because they usually have more knowledge of facts, commercial data, and negotiating priorities. It is therefore important to provide them with means to reach out to their government. Involving private businesses can also help with the issues of costs and capacity building.

First, the CFTA should require member states to have a petition system by which private businesses can request their home states to bring a dispute against another state. This will avoid a lack of usage of the dispute settlement system while letting the chance to states to solve their dispute amicably.

Secondly, all governments involved in trade disputes now expect stakeholders to hire or pay for legal counsel to assist the government. This should be formalized into the CFTA. In a situation where a case is brought following petition by a private party, this party could be required to assist in paying the cost of litigation by its state, unless the private party can not afford to do so. This will help reduce cost for the state while enhancing capacity building by hopefully involving African law firms.

In case, the African Union Commission is granted standing before the CFTA, private parties should be allowed to petition the African Union Commission instead of their national governments. The African Union Commission would then bring a case against the violating state if they believe there is a reasonable ground for a violation. In case standing before the CFTA Tribunal

[72] Tussie, Diana, and Valentina Delich. 2005. "Dispute Settlement between Developing Countries: Argentina and Chilean Price Bands." In *Managing the Challenges of WTO Participation: 45 Case Studies,* ed. Peter Gallagher, Patrick Low, and Andrew L. Stoler. Cambridge, U.K.: Cambridge University Press

is granted to private parties, no petition system should be implemented as private parties will be able to access the CFTA Tribunal on their own.

5.7.2 Amicus brief

Amicus curiae have many advantages. However, allowing them altogether would prove too costly in a place where funds might be limited. In order to limit this disadvantage, it is recommended that the CFTA allows for amicus briefs but with several limitations. First, the dispute settlement body should only have a right and not an obligation to consider them. Secondly, the number of pages of the brief should be limited to a minimum. Third, the deadline of the submission should be as early as possible so that the dispute settlement body has sufficient time to decide how to deal with the brief.

5.7.3 Open proceedings

Taking into consideration the benefit of opening hearing to the public, we would recommend than the proceedings be live streamed on the internet so as to enhance openness, involvement of community and ensure independence.

5.7.4 Preliminary rulings

Another way to involve third parties is, as described above, to give the power to other regional courts to request preliminary rulings on points of law. In a case where a private party brings a trade case against a state in a REC court, if the obligation at issue is substantially the same in the REC and in the CFTA, the REC court might have to ask the CFTA Tribunal to clarify the law. Similar to the doctrine of *acte clair* in European law, which is the idea that there is no need to refer a point of law which is reasonably clear and free from doubt, the REC court will have to ask the CFTA to clarify the law when the interpretation of the obligations raises questions. A panel shall be constituted to render the preliminary ruling. Once the panel is constituted, it shall render the ruling within 3 months. This will enhance the role of non-state actors before the

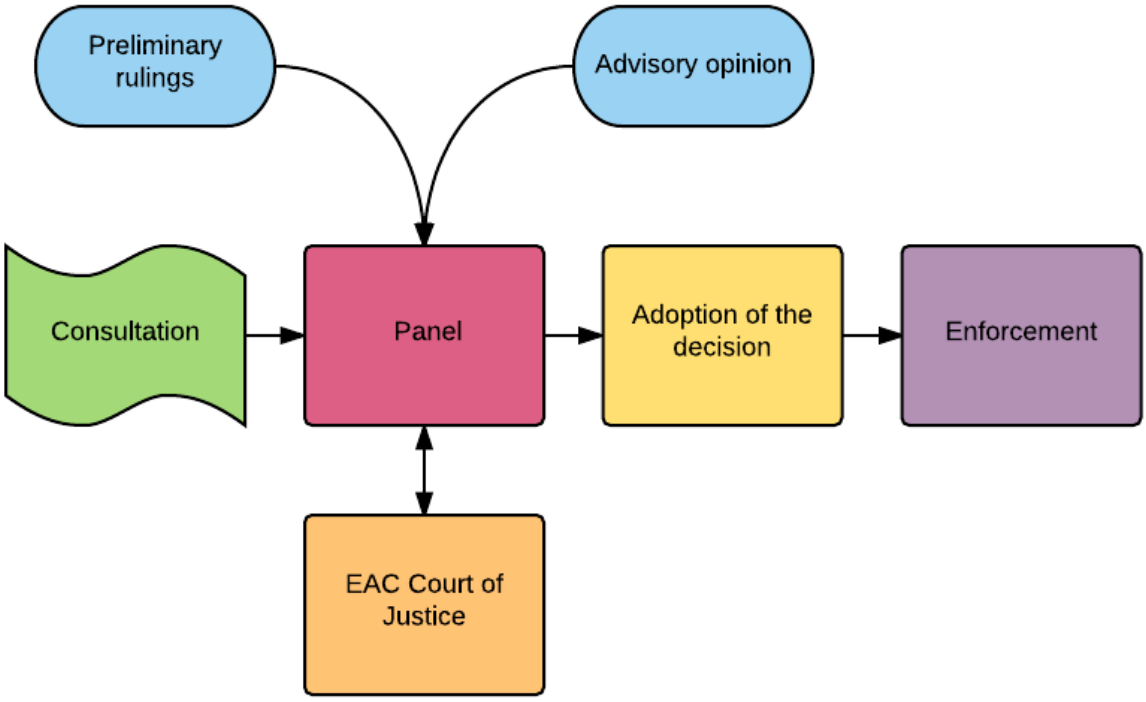
CFTA dispute settlement body without having to give them a right to access the dispute settlement body. Moreover, it will also avoid a lack of usage issue as the dispute settlement body will not only deal with state to state disputes but also interpreting and harmonizing trade rules within Africa.

Suggested treaty articles on how to involve non-state actors can be found in Annex A:7.

6 Combination for dispute settlement mechanism

Taking into consideration all the issues discussed above in the context of the unique challenges faced by African RECs and the adopted objectives and guiding principles for negotiating the CFTA, the following quasi-judicial model of dispute settlement is recommended.

A flow chart representation of the model is as shown below;



A dispute would go as follow:

1. The parties are required to conduct consultation before going to a panel for at least 30 days renewable for 60 days if both parties agree so.

   If the consultations fail, a panel will be automatically established upon request by the claimant. Three panelists will be nominated by the President of the CFTA Tribunal out of the 15 panelists closed roster nominated by the African Union Commission. Additionally, we propose that the CFTA establish a supplementary list of panelists. The list will serve as a data base from which a standing panelist may be substituted by the President on grounds such as conflict of interest, or perceived likelihood of bias. The panelist members of the closed roster

will be paid a low monthly salary to ensure their availability. The panelists will also be compensated for each dispute adjudicated.

2. The length of the proceedings from the creation of the panel to the final submission should be 10 months, and the panel will subsequently have 3 months to render its decision.
3. Once the decision is rendered, the panel decision can be appealed to the EAC Court of Justice within 60 days based on limited grounds. The EAC Court of Justice would have 120 days to decide on the appeal. In case the appeal is successful, the EAC Court of Justice would send the case back to the original panel to correct the decision.
4. Once the panel has rendered a decision, if the decision is not appealed, or after re-adjudication following an appeal, the decision will be referred to the CFTA political body. The CFTA political body will then adopt the decision except if 75% of the membership votes against it.
5. The decision will indicate that the responding state must bring its law into conformity and possible damages for past harm from the date of the request for consultations up to the end of the reasonable period of time for compliance.
6. Once the decision is adopted, the responding state will have to comply with it. If the responding state does not comply within a reasonable period of time, the winning party can request a panel to allow retaliation and determine the amount of retaliation and impose a possible periodic monetary assessment.
7. Preliminary rulings from lower regional trade courts must be referred to a Panel when there is a question of law that falls under or overlap with the CFTA except if the interpretation of the obligation is clear in the eyes of the regional trade court. Appeal of the preliminary ruling is possible on similar limited grounds as the appeal from disputes.
8. The CFTA political body can request advisory opinions on points of law to a Panel. Appeal of the advisory opinion is possible on similar limited grounds as the appeal for disputes.