International Economic Law Clinic

DEVELOPING GUIDELINES TO FACILITATE THE OPERATIONALISATION OF ALTERNATIVE DISPUTE RESOLUTION PROVISIONS IN THE AFRICAN CONTINENTAL FREE TRADE AREA (AFCFTA)

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Abbreviations

ACP	African, Caribbean, and Pacific
ACWL	Advisory Centre on WTO Law
ADR	Alternative Dispute Resolution
AfCFTA	African Continental Free Trade Area
AFSA	Arbitration Foundation of Southern Africa
AU	African Union
COMESA	Common Market for Eastern and Southern Africa
CoJ	Court of Justice
CRCICA	Cairo Regional Centre for International Commercial Arbitration
DG	Director-General
DSM	Dispute Settlement Mechanism
DSU	Dispute Settlement Understanding
EAC	East African Community
EACJ	East African Court of Justice
EC	European Communities
ECOWAS	Economic Community of West African States
EU	European Union
GATB	Geneva Agreement on Trade in Bananas
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
ICC	International Chamber of Commerce
ICSID	International Centre for Settlement of Investment Disputes
ILC	International Law Commission
LCIA	London Court of International Arbitration

LDC	Least-Developed Country
MPIA	Multi-Party Interim Appeal Arbitration Arrangement
NCIA	Nairobi Centre for International Arbitration
OAS	Organization of American States
OCR	Optical Character Recognition
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
REC	Regional Economic Community
SADC	Southern African Development Community
SPS	Sanitary and Phytosanitary
UN	United Nations
USSR	Union of Soviet Socialist Republics
UNCITRAL	United Nations Commission on International Trade Law
WTO	World Trade Organisation

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Executive Summary

The African Continental Free Trade Area (AfCFTA) provides for the Protocol on Rules and Procedures on the Settlement of Disputes to foster a predictable and accountable dispute settlement process. This is largely inspired by the World Trade Organisation's (WTO) Dispute Settlement Mechanism (DSM), a model that African countries have almost entirely ignored since the WTO was established in 1995. However, Arts. 8 and 27 AfCFTA's Protocol on Rules and Procedures on the Settlement of Disputes allow for disputing state parties to take advantage of more informal and *ad hoc* dispute resolution mechanisms such as good offices, mediation, conciliation, and arbitration. These alternative dispute resolution (ADR) provisions – if properly implemented – have the potential to address the inhibitors of African participation in formal dispute resolution.

The ADR provisions currently found in AfCFTA's protocols do not go beyond the basic rights and obligations granting parties recourse to ADR and provide only skeletal procedural guidance. This report provides suggested operational guidelines that could be used to facilitate the practical use by Members of faster, flexible, and streamlined ADR provisions contained in AfCFTA's Protocol on Rules and Procedures on the Settlement of Disputes.

These proposed guidelines are based primarily on various African ADR case studies, which include the ADR rules of the Common Market for Eastern and Southern Africa (COMESA) and the East African Community (EAC), as well as various domestic ADR guidelines found in Ghana, Kenya and South Africa. The selection and development of the guidelines were facilitated by interviews with several African ADR experts and practitioners,[1] from which the best practices outlined below were derived.

Flexibility

Within Africa there is a need to balance procedural flexibility with sufficient clarity of certain procedures within ADR proceedings. Various traditional

[1] See Annex 6 for the list of interviewees.

practices in African dispute settlement suggest that disputing Parties should be given autonomy to determine procedural elements through mutual agreement. This would include the composition of the arbitral tribunal or choice of mediator, the means of appointment of arbitrators or mediators, the means of removal, the use of alternative rules to govern proceedings, as well as the language of choice. However, where parties cannot agree on procedures, default stipulated procedural elements could be activated, including the use of a designated third party to assist the parties to use various forms of ADR. Additionally, it may be useful to provide procedural disciplines such as time schedules for procedural matters.

Confidentiality

African traditional dispute settlement is typically a fairly public and transparent affair, with the wider community given the opportunity to voice any interests which they may have in a dispute. However, this is not easily translatable into international ADR proceedings between State parties governed by international law. Indeed, confidentiality is typically a core tenant of ADR. However, interviews have indicated that parties should have the option to waive confidentiality through mutual agreement. This could partially address growing doubts as to the legitimacy of confidential dispute resolution proceedings on the continent and inform the future behavior of States within framework of the AfCFTA.

Third-Party Intervention

Third parties may have interests in the outcome of a dispute, and their participation could be important for its resolution. Thus, ADR procedures could be flexible enough to allow – with the agreement of the primary disputing parties – the inclusion of third parties in proceedings. As with allowing parties to waive confidentiality, creating a mechanism for the inclusion of third parties in ADR proceedings aligns with traditional forms of African dispute resolution and is an additional form of flexibility.

E-ADR

E-ADR may have an important role to play in ensuring the use of ADR provisions by African States. E-ADR offers significant cost savings which may

be crucial for African State Parties with limited financial resources. It is also more convenient and potentially efficient at eliminating long cross-continental travel times and in reducing administrative burdens.

Trusted Facilitators

The AfCFTA Secretariat is mandated to establish and maintain lists of highly qualified individuals who are willing, able, and qualified to serve as Panellists in formal dispute settlement proceedings. Interviews have suggested that it could be highly useful for the Secretariat to maintain a similar list of individuals who could serve as mediators, conciliators, and providers of good offices in ADR proceedings. A list of trusted, trained, and experienced individuals is important to securing the buy-in of parties to ADR proceedings and can help parties to decide on a third neutral party if they request Secretariat assistance.

Technical Assistance

Many African States may lack the financial resources and/or legal expertise needed to take advantage of the AfCFTA's formal DSM proceedings. Considering this, Art. 28 of the AfCFTA's Protocol on Rules and Procedures on the Settlement of Disputes allows for "technical cooperation" between the Secretariat and state parties to build expert capacity in dispute settlement procedures. Therefore, it is important that Secretariat or other outside assistance be made available to disputing AfCFTA Members.

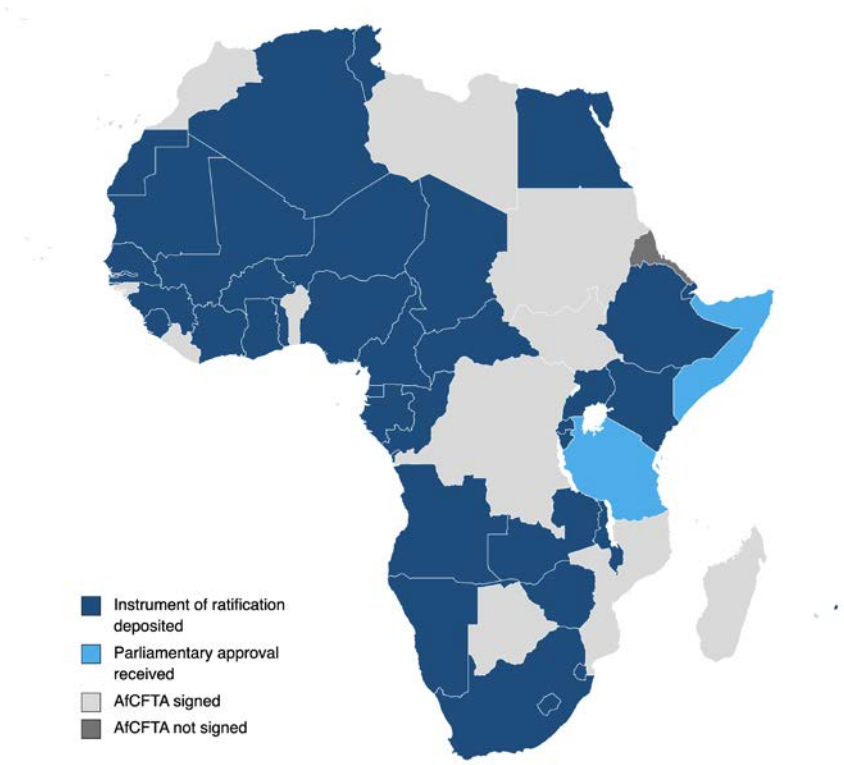
In sum, discerning the unique aspects to African dispute settlement through African case studies and interviews with experts from the continent informs the essence of this Report's research and ultimately the text of the *Guidelines* set out in Annexes 1 and 2. It is hoped that these Guidelines can provide the basis for AfCFTA Members and the AfCFTA Secretariat to facilitate the use of ADR to resolve disputes within the AfCFTA.

1. Introduction

The creation of the African Continental Free Trade Area (AfCFTA) was first approved in 2012, with trade commencing under its provision for the 36 ratifying African states (See figure 1) in January 2021. It is the largest free trade area in the world by number of countries involved other than the World

Trade Organisation (WTO) itself, covering a collective market containing 55 countries, 1.2 billion people, and $2.5 trillion in collective gross domestic product (GDP). The full implementation of the AfCFTA has the potential to boost intra-African trade by 52.3% and thus greatly contribute to continental-wide poverty alleviation and development.[2]

Figure 1: AfCFTA Agreement Status by Country[3]



However, these benefits will only materialize if African states manage to transition from abstract negotiation to concrete implementation and adherence to the AfCFTA rules. Enforcement of such agreed rights and obligations are up to affected AfCFTA Members. In this regard, the AfCFTA includes the Protocol on Rules and Procedures on the Settlement of Disputes. Modelled on the WTO, it establishes a formal dispute settlement mechanism (DSM) intended to guide the resolution of inter-State trade disputes.

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[2] AfCFTA, "Who We Are," AfCFTA - African Continental Free Trade Area, 2-21, https://afcfta.au.int/en/who-we-are.

[3] tralac, "Status of AfCFTA Ratification," tralac trade law centre, April 10, 2021, https://www.tralac.org/resources/infographic/13795-status-of-afcfta-ratification.html.

But history indicates that simply adopting WTO procedures may be ineffective in the African context. This is because the WTO dispute settlement procedures have been almost entirely ignored by African countries since the creation of the WTO in 1995. To date, these formal and relatively complex WTO procedures (and accompanying jurisprudence) have been ignored by African States to resolve trade disputes within Africa.

Fortunately, Arts. 8 and 27 AfCFTA's Protocol on Rules and Procedures on the Settlement of Disputes allow for state parties to resort to alternative dispute resolution (ADR) mechanisms such as good offices, mediation, conciliation, and arbitration. The inclusion of ADR as a means of dispute resolution provides a useful opportunity to explore what alternative procedures could stimulate the early, speedy, and cost-effective resolution of disputes between AfCFTA Members.

The AfCFTA negotiators left considerable flexibility to achieve functioning ADR procedures because ADR provisions in the Protocol on Rules and Procedures on the Settlement of Disputes do not go beyond the basic rights and obligations granting parties recourse to ADR. Art. 8, which addresses good offices, mediation, and conciliation, consists of six broad sub-articles which lay out basic procedural concerns/goals. Similarly, Art. 27 addresses arbitration in seven sub-articles that offer broad parameters and leave open the development of more detailed procedures.

Therefore, this report aims to provide procedural guidelines which may be used to operationalize the ADR provisions contained in the Protocol on Rules and Procedures on the Settlement of Disputes of the AfCFTA. This report is rooted in the historical and current use of various forms of ADR by African States that have ratified the AfCFTA. The methodology applied in this report seeks to meet the objective of developing procedures that reflect African experiences with ADR – experiences that will hopefully stimulate the use of ADR and will result in the prompt, efficient, and sustainable resolution of trade-related disputes between African States.

The Report supporting the proposed guidelines encompasses six sections. The **first introductory section** sets the scene for the report. The **second**

section contextualizes the utility of the ADR provisions in the AfCFTA. It posits that the non-participation of African countries in formal dispute settlement may well be based in the non-litigious culture of African States. Such States usually prefer to resolve disputes amicably through informal diplomatic channels or to bear the inefficiencies of trade barriers despite the promise of more open markets anticipated by the AfCFTA. Yet, this is not conducive to the maintenance of a certain, stable, and predictable trading environment for private non-State actors and can thus be a sub-optimal means of resolving trade disputes encompassed within the rights and obligations of the AfCFTA. The section posits that ADR may serve as a bridge between traditional forms of African dispute resolution and contemporary international practices. Thus, its operationalisation is particularly important for the implementation of the AfCFTA.

The **third section** provides comprehensive definitions of the forms of ADR examined in this report, namely good offices, mediation, conciliation, and arbitration, while the **fourth section** examines the use of ADR both in general international law and the WTO.

The **fifth section** focuses on the use of ADR in Africa. It examines ADR guidelines adopted within two African regional fora, namely the Common Market for Eastern and Southern Africa (COMESA) and the East African Community (EAC). These are accompanied by an examination of the domestic implementation of ADR procedures in three countries: the ADR Act in Ghana, the Arbitration Foundation of Southern Africa (AFSA) in South Africa, and the Nairobi Centre for International Arbitration (NCIA) in Kenya. These case studies, which are fully discussed in Annex 5, are used to distil several best practices.

Finally, **Annexes 1 and 2** introduce two separate guidelines for the operationalisation of Arts. 8 and 27 of the AfCFTA's Protocol on Rules and Procedures on the Settlement of Disputes which reflect the implementation of the ADR best practices identified in preceding sections.

2. The Utility of ADR in the AfCFTA

The use of ADR in the AfCFTA has the potential to serve as an efficient and effective mechanism for resolving disputes between African states. The history of African participation in formal international dispute resolution, most recently in the WTO, shows that African states have not used formal WTO dispute settlement provisions despite access to the Advisory Centre for WTO Law, (ACWL) whose attorneys are highly skilled and available at free or low-cost.

This section analyses the possible reasons for this lack of participation in more depth. It posits that efficient and user-friendly ADR procedures – particularly good offices and mediation – could stimulate the use of ADR by AfCFTA Members.

2.1. Non-participation of African Countries in Formal Dispute Settlement

African Members of the WTO have barely used the Dispute Settlement Mechanism (DSM). Of the 607 disputes brought since 1995, only two cases were brought by an African State as a complainant: Tunisia initiated panel proceedings twice against Morocco regarding the latter's anti-dumping measures implemented against imports of school textbooks from Tunisia.[4] These cases stand as the sole intra-African disputes at the WTO. Egypt and South Africa are the only other African States to have acted as respondents to cases brought by non-African countries.[5]

This absence of African States in WTO dispute settlement proceedings has raised many questions over the years. One reason advanced is that the low share of African States in global trade naturally leads to fewer disputes. But trade disputes exist regardless of whether the absolute quantity of trade in question is similar to other WTO Members. Indeed, the relative share of

[4] "WTO | Dispute Settlement - Map of Disputes between WTO Members," accessed October 29, 2021, https://www.wto.org/english/tratop_e/dispu_e/dispu_maps_e.htm.

[5] "WTO | Dispute Settlement - Map of Disputes between WTO Members."

African global trade suggests that African WTO Members should still have initiated far more proceedings than they have.[6]

One inhibitory factor which has previously been identified by African States themselves is the cost of litigation at the WTO.[7] Yet this lacks explanatory power for non-participation as cost inhibitions have largely been resolved through the creation of the ACWL.

The reticence to use formal WTO dispute settlement procedures is mirrored in the African regional integration schemes where States have specifically opted for dispute-avoidance frameworks.[8] This has meant that no single State-to-State dispute has been brought to the relevant dispute resolution body within any of the African regional economic communities (RECs).[9] And similar to the lack of involvement in the WTO, no single *trade* dispute between an African State and private investors/parties has been brought to the Southern African Development Community (SADC) Tribunal. This is remarkable given that SADC has the highest share of intra-regional trade in the world.[10]

It is reasonable to conclude that national legal capacity constraints in individual African States have played a role in inhibiting the ready use and inclination to pursue trade disputes. Yet, perhaps a more important inhibitor appears to be the culture of non-litigation embedded in the African legal tradition.[11] As the former President of the International Court of Justice, Prof. Olawale Elias writes "whereas African law strives consciously to reconcile the

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[6] P. Kenneth Kiplagat, "Dispute Recognition and Dispute Settlement in Integration Processes: The COMESA Experience," *Nw. J. Int'l L. & Bus.* 15 (1994): 437.

[7] African Group, "TN/DS/W/15: Negotiations on the Dispute Settlement Understanding," 2002, https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/TN/DS/W15.pdf&Open=True.

[8] Kiplagat, "Dispute Recognition and Dispute Settlement in Integration Processes."

[9] Olabisi D. Akinkugbe, "Dispute Settlement under the African Continental Free Trade Area Agreement: A Preliminary Assessment," *African Journal of International and Comparative Law* 28, no. Supplement (2020): 138–58.

[10] Alberto Behar and Lawrence Edwards, "How Integrated Is SADC? Trends in Intra-Regional and Extra-Regional Trade Flows and Policy," *Trends in Intra-Regional and Extra-Regional Trade Flows and Policy (April 1, 2011). Bank Policy Research Working Paper*, no. 5625 (2011).

[11] Taslim Olawale Elias, *The Nature of African Customary Law* (Manchester University Press, 1956); Interview with Mr. Clement Mkiva, Partner at Bowmans.

disputants in a lawsuit, English law often tends to limit itself to the bare resolution of the conflict by stopping at the mere apportionment of blame as between the disputants."[12]

2.2. Parallels with traditional African forms of dispute resolution

For centuries prior to colonisation, African traditional justice systems were oriented towards resolving disputes in amicable ways through traditional forms of negotiation and mediation. These were used to resolve all kinds of disputes (including commercial disputes) and mirror contemporary forms of ADR.[13] African village justice includes the notion of 'meeting under the tree' where disputes are resolved through community consensus. The overarching objective of the process is reconciliation between the parties, with the village elder or chief assuming the role of a mediator or arbitrator aiming to resolve the dispute in the larger context of overall peace of the community.[14] The process often included consultations with the parties expressing themselves to one-another and the larger community in a non-confrontational environment. Typically, the members of the village community were given the opportunity to respond with their own opinions on the matter. The use of forms of what could be labelled mediation or arbitration to resolve the dispute would vary: sometimes the village chief/elder would just facilitate the public exchange of views needed for parties to come to a mutual decision; at other times the chief/elder would make a decision according to what they thought is in the best interests of the community. However, in both cases any decision would need the consent of both the parties and the community to become legitimate.[15]

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[12] Elias.

[13] Nokukhanya Ntuli, "Africa: Alternative Dispute Resolution in a Comparative Perspective.," *Conflict Studies Quarterly*, no. 22 (January 2018).

[14] Catherine Price, "Alternative Dispute Resolution in Africa: Is ADR the Bridge between Traditional and Modern Dispute Resolution," *Pepp. Disp. Resol. LJ* 18 (2018): 393.

[15] Ntuli, "Africa."

These traditional processes persist to this day and offer an alternative to formal legal proceedings. Dr. Uwazie notes that "The notion of ADR fits comfortably within traditional concepts of African justice, particularly its core value of reconciliation (...) The average Ghanaian disputant would prefer the indigenous chief's arbitration, just as an Ethiopian would prefer to turn to the traditional Shimangele (elder) for conciliation of most civil or family matters".[16]

A study on disputes in South Sudan found that conflicting parties preferred an "organic mechanism for the court members to advise one another and improve their capacity to handle changing and interethnic cases, rather than necessarily to produce binding agreements or fixed definitions of law".[17] Indeed, today as much as 90% of disputes in South Sudan are resolved through traditional justice processes.[18] In Kenya, 51% of Kenyans favour referring problems to community leaders instead of the police, and 60% of Kenyans do not use courts to resolve disputes.[19] In total, only 36% of the rural population in sub-Saharan Africa would consider referring matters to a court as opposed to a village elder.[20]

Unsurprisingly, modern ADR has a proven track record in Africa due to its parallels to traditional dispute resolution. While there are many examples of successful African ADR initiatives, a trailblazing use of ADR was Ghana's 'mediation week' in 2003 as part of a wider judicial reform programme. The mediation week resolved 300 private cases pending before courts within 5

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[16] Ernest Uwazie, "Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability" (Africa Center for Strategic Studies, November 2011), https://africacenter.org/publication/alternative-dispute-resolution-in-africa-preventing-conflict-and-enhancing-stability/.

[17] Cherry Leonardi et al., "Local Justice in Southern Sudan," 2010, https://bu.userservices.exlibrisgroup.com/view/action/uresolver.do;jsessionid=4803F36D315C97487E2C192A8BE126F8.app02.na03.prod.alma.dc04.hosted.exlibrisgroup.com:1801?operation=resolveService&package_service_id=34111135730001161&institutionId=1161&customerId=1150.

[18] Ntuli, "Africa."

[19] Jasmine Dickerson, "ADR in Africa," *Business Conflict Blog* (blog), June 21, 2012, http://www.businessconflictmanagement.com/blog/2012/06/adr-in-africa/.

[20] Jay Loschky, "Majority in Sub-Saharan Africa Wouldn't Use Formal Courts," Gallup.com, 2016, https://news.gallup.com/poll/190310/majority-sub-saharan-africa-wouldn-formal-courts.aspx.

days, with 90% of parties reportedly satisfied with the process. This success was replicated in the following years, with over 2500 cases being resolved through mediation in 2008.[21] Following this success Ghana replaced its arbitration act with a landmark ADR bill in 2010.[22]

The use of ADR continues to grow in many other African countries: Ethiopia launched a pilot ADR project in 2008, Nigeria held a private 'mediation week' in Lagos in 2009, and the first public act of South Sudan's Chief Justice of the Supreme Court was to call for extensive use of ADR within the fledgling justice system.[23]

In sum, both the traditional and more modern forms of ADR in the African context strongly suggest that ADR in the *trade* context has the potential to bridge the gap between traditional African notions of justice and formal legal procedures. Additionally, the more informal ADR procedures offer a means to resolve the financial and cultural inhibitors of African participation in international economic formal dispute resolution mechanisms. National trade officials who are not legal experts may well feel more comfortable and confident engaging in a State-to-State mediation where the focus is not necessarily on which country is legally right or wrong but rather on meeting the trade interests of both countries. In such a mediation, the echoes of historical traditional forms of mediations are quite strong. For these reasons, the proposed guidelines in this report for the operationalisation of the AfCFTA's ADR provisions aim to draw extensively on both the history and continuing active use of ADR in the African context.

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[21] Uwazie, "Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability."

[22] Parliament of the Republic of Ghana, "Alternative Dispute Resolution Act," 2010, http://mariancrc.org/wp-content/uploads/2011/09/Alternative-Dispute-Resolution-Act-2010-Act-798.pdf.

[23] Uwazie, "Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability."

3. Defining ADR

The starting point for defining ADR in the AfCFTA is Art. 8 of AfCFTA's Protocol on Rules and Procedures on the Settlement of Disputes. It provides explicitly for three types of State-to-State dispute settlement ADR methods that imply some form of third-party participation – good offices, mediation and conciliation. Each of these three forms of peaceful ADR dispute settlement can be described as 'diplomatic' or 'political' processes. ADR necessarily includes various forms of "negotiation" that are facilitated by each of these three methods of ADR.[24] As explored below, each of these three forms of ADR involve different degrees of third-party participation ranging from active interventions and suggestions for settlement to a more passive facilitative role.[25]

3.1. Good Offices

Good offices imply the least degree of active participation of the third party and can be used when States parties to a dispute have reached an impasse in their negotiations. The third party in this instance is typically a person of considerable stature who may also hold a high-level position – such as the Director General or a Deputy-Director General of the WTO. A skilled individual providing his or her good offices can assist the parties in de-escalating the dispute and ultimately facilitating a peaceful settlement.[26] An offer of good offices could be made both at the initiative of the holder of good offices or in response to a request of one or more parties to the dispute. In any case, all parties to the dispute must accept an offer of good offices. It is also essential that the parties to a dispute fully confide in a third party exercising good offices.[27] It would be appropriate for the provider of good offices to not share with a party confidential information provided to him or her by another party.

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[24] Antonio Cassese, "International Law" (Oxford: Oxford university press, 2005).

[25] Cassese.

[26] United Nations, *Handbook on the Peaceful Settlement of Disputes between States* (United Nations, 1992).

[27] United Nations.

Typically, in the first instance, the third party exercising good offices does not make any proposals on how to solve the dispute. Rather the holder of good offices will use active listening skills to fully understand the respective positions and interests of the disputing parties. An experienced holder of good offices will seek to develop a relationship of trust over time with the disputing parties. In that context, the parties may ask the third party to play a more activist role in suggesting possible elements to resolve a dispute.[28]

Good offices are a means of dispute settlement that may result in the acceptance and the application by the parties of other pacific procedures. The outcome of the procedure may vary, yet the general rule is that the third party exercising good offices can never take legally binding decisions.[29] And keeping the historical African dispute resolution in mind, the use of Good Offices appears analogous to the use of a village chief to resolve disputes among members of the community.

3.2. Mediation

Art. 8 of AfCFTA's Protocol on Rules and Procedures on the Settlement of Disputes also provides for *mediation* as an alternative means of settling a dispute. The majority definition of mediation throughout the world is "facilitated negotiation." The core principles of mediation are the parties' self-determination (as opposed to an arbitrator determining an outcome), the voluntary nature of the parties' participation, the confidentiality of information, the parties informed consent (usually represented by counsel in complex cases), and the strict neutrality of the mediator.

The process of mediation involves the mediator assisting negotiating parties who may be stuck and unable to reach an agreement. Mediators focus on working to get the parties to move beyond their narrow historical positions and to take forward-looking solutions to problems that meet their interests. A mediator's objective is to assist the disputing parties in identifying their

[28] United Nations.

[29] United Nations.

broader interests and to highlight the existence of mutual interests. Having identified interests, the mediator will then help parties explore different options for settlement and the use of objective standards in implementing agreed options.

Typically, mediators will *not* suggest options nor proffer their views on what might be the "best" solution for the parties. However, as with Good Offices, if the mediator has built up trust over time, the parties may ask the mediator to make a proposal, which, if accepted, will resolve the dispute.[30]

The ultimate goal of mediation is usually to secure the parties' agreement to a 'win-win' resolution where both parties obtain a satisfactory remedy.[31] Particularly in State-to-State disputes, such a settlement could result in a provisional solution to prevent further escalation of a situation in question, as opposed to permanent solution of all competing claims.[32]

Indeed, mediation can be used at all stages of a dispute, whether before or during judicial proceedings, on an *ad hoc* basis, or in accordance with the provisions of an applicable treaty.[33] The essential traditional features of mediation are informality and confidentiality. Because of political sensitivities, parties and mediators often do not make the details of the procedure public even after a dispute has been resolved.[34]

Mediation could be initiated at the initiative of a third party that is accepted by the disputing parties. Indeed, the mutual agreement to mediate is an essential element of a mediation. Forcing parties to mediate could well result in an unsuccessful mediation because any settlement outcome must be entirely

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[30] United Nations.

[31] Michael McManus and Brianna Silverstein, "Brief History of Alternative Dispute Resolution in the United States," South-East European Division of the World Academy of Art and Science (SEED-WAAS), I, no. 3 (November 1, 2011): 10.

[32] United Nations, *Handbook on the Peaceful Settlement of Disputes between States*.

[33] McManus and Silverstein, "Brief History of Alternative Dispute Resolution in the United States."

[34] United Nations, *Handbook on the Peaceful Settlement of Disputes between States*.

voluntary. Thus, the disputing parties must agree on both the recourse to mediation and the choice of the mediator(s).

The typical tasks of a mediator include taking the time before the mediation to have a clear sense of the issues, engaging in active listening to ensure each party has been fully heard; helping the parties to clarify the issues; working with the parties to draft proposals; identification of possible areas of mutual agreement between the parties; and adoption of provisional arrangements, among other tasks. With the importance of trust firmly in mind, it is essential for the mediator(s) to convince the parties to a dispute that they understand and respect the parties' positions and are not biased against either party.[35]

In some cases, agreements to mediate (or treaties that contain mediation clauses) provide for a time limit for the procedure, after which parties must resort to any other procedure of peaceful settlement; otherwise, mediation can be terminated when either party or the mediator declares non-acceptance of the procedure.[36]

In principle, the mediator's proposals for the settlement of a dispute do not bind the parties. However, the successful outcome of mediation can be formalized in an agreement, protocol, declaration *etc*., which should be signed or certified by the mediator(s). Moreover, the parties to a mediation may agree that their settlement agreement drafted at the end of a successful mediation can have binding force and be enforceable in a court of law, which is reflected in the provisions of the United Nations Convention on International Settlement Agreements Resulting from Mediation (the "Singapore Convention on Mediation").

Under the Singapore Convention on Mediation, the mediator generally does not assume any obligations after the procedure ends. However, in some

[35] United Nations.

[36] United Nations.

cases, mediators provided the parties further assistance regarding the implementation of the outcome of the mediation.[37]

Finally, as with Good Offices, the concept of mediation as it is practiced today is not fundamentally different than the historical African ADR precedents. Thus, the use of mediation to resolve State-to-State trade disputes may rest comfortably with the Members of the AfCFTA.

3.3. Conciliation

Conciliation is the third and last diplomatic means of peaceful dispute settlement provided in Art. 8 of AfCFTA's Protocol on Rules and Procedures on the Settlement of Disputes. Conciliation implies an even more active role of the neutral third party, whose task is to address and evaluate the factual and legal elements of a dispute and to assist in reaching a solution.[38]

Conciliation combines the elements of both inquiry and mediation and has two basic functions: to investigate and clarify the dispute-related facts and to endeavour to bring the parties to the dispute together in order to reach an agreement by setting forth the conciliator's assessment of the disputing parties legal rights and obligations. Ultimately, as in mediation (and good offices), the conciliator's objective is to assist the parties in negotiating a mutually agreeable solution to the dispute.[39]

Conciliation is also often closely linked to both negotiations and judicial means of dispute settlement. Many retired judges comfortably play the role of evaluative conciliators. The provisions of some treaties establish the failure of negotiations or consultations between contesting parties as a precondition for the recourse to conciliation. By contrast, sometimes conciliation itself is a precondition to submitting a dispute to any adjudicatory procedures.[40]

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[37] United Nations.

[38] Cassese, "International Law."

[39] United Nations, *Handbook on the Peaceful Settlement of Disputes between States*.

[40] United Nations.

In State-to-State dispute resolution, the procedure of conciliation often, yet not necessarily, involves the establishment of a conciliation commission, based on applicable bilateral and multilateral treaties or on an *ad hoc* basis. The commission generally consists of an odd number of conciliators, *i.e.*, a five-member (more often) or a three-member commission. Each party to a dispute appoints either one of the three or two of the five conciliators; the remaining one conciliator, usually a chairperson, is appointed by a joint decision of either all contesting parties or the conciliators appointed by the parties. In the case of any difficulties, the parties may invite a neutral third party to make the appointment. The conciliators are often appointed from the list of conciliators that is maintained according to treaty provisions.[41] In most cases, the conciliation commission itself adopts its rules of procedure.[42]

Conciliation techniques, apart from those that are typical for mediation, often include certain quasi-judicial elements. These include the right of the conciliation commission to summon and hear witnesses and experts, and the right of the parties to a dispute to be represented by agents, counsels and experts. As in other forms of ADR, conciliation procedures and outcomes are confidential.[43]

Just as in the case of many mediation clauses, conciliation provisions of treaties commonly establish various time limits for the conciliation commission to finalize its work. The usual time limits are six months (in earlier multilateral treaties) and twelve months (in more recent multilateral treaties). However, as a rule, treaties allow the parties to agree to their own procedures with respect to a variety of issues, including an early termination or an extension of the work of the conciliation commission.[44]

Conciliation generally results in the adoption of non-binding recommendations to contesting parties. The clarification of legal rights can be an important

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[41] United Nations.

[42] United Nations.

[43] United Nations.

[44] United Nations.

means of facilitating the negotiation of the parties who may revise their positions based on the conciliation recommendations and findings. Indeed, the use of conciliation may well facilitate a successful mediation by clarifying the legal positions of the parties and allowing them to focus their negotiations on their present and future mutual interests instead of their historical legal positions.

3.4. Arbitration

Unlike good offices, mediation and conciliation, arbitration, although on a voluntary basis, ultimately constitutes a 'compulsory' means of dispute settlement. The use of the term "compulsory" means that it is the arbitrators, and not the contesting parties, who render binding decisions. At the same time, the general principle of arbitration, as opposed to judicial settlement, is the mutual consent of contesting parties or States to have their dispute settled by *binding* arbitration. The consent of the parties to submit their dispute to arbitration may be contained in a treaty entirely devoted to dispute settlement, or in a specific provision of a general or sectoral treaty (a 'compromissory clause'). After a dispute has occurred, parties may also consent to arbitration *ad hoc* by concluding a special arbitration agreement or a '*compromis.*'[45]

The main feature of arbitration that makes it different from other forms of ADR is the legal force of its results: the outcome of an arbitration – an arbitral award – is always binding upon the parties to a dispute.[46] The adoption of an arbitral award also entails its execution. Arbitration agreements usually contain the provisions on what steps need to be taken for the execution of an award. In some instances, and if an applicable agreement provides for such possibility, either party may seek the revision of an award.[47]

Arbitration can be conducted by either a sole arbitrator or a group of arbitrators who form an arbitral tribunal. In most cases, compromissory

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[45] United Nations.

[46] Cassese, "International Law."

[47] United Nations, *Handbook on the Peaceful Settlement of Disputes between States*.

clauses provide for an odd number of arbitrators as members of the arbitral tribunal, most commonly three members. Just as it appears in conciliation procedure, each contesting party appoints either one of the three, or two of the five arbitrators. These pre-appointed arbitrators or the parties then jointly appoint the third or the fifth arbitrators, who often becomes a chairperson. If any difficulties arise, the parties may invite a neutral party (an individual or a State) to finalize the appointment.[48]

Once again, as in conciliation, arbitral tribunals are composed of individuals chosen by the parties, sometimes from a permanent list of arbitrators. However, no matter whether the arbitrators are appointed from a permanent list or not, their nationality and particular qualifications usually have significance for the parties.[49]

In most cases, arbitration agreements do not clarify in detail all procedural questions, if any, so that the arbitration tribunal has to determine the procedure for itself. The exact wording of a provision empowering the arbitral tribunal to decide on its procedure varies from one agreement to another: on some occasions, the competence of the arbitral tribunal is very broad; on other occasions, it is more restricted. This flexibility allows the parties to a dispute to delegate to the arbitral tribunal the range of powers as wide as they consider appropriate under determined circumstances.[50]

One of the advantages of arbitration as a means of ADR is the possibility to agree on the law that the tribunal will apply. At the same time, since arbitration is a means of judicial dispute settlement, agents (counsels) commonly represent the parties to a dispute, and the procedure involves such typical judicial actions as the submission of written memorials and counter-memorials, examination of the oral testimony of witnesses and experts and their cross-examination, etc.[51]

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[48] United Nations.

[49] United Nations.

[50] United Nations.

[51] United Nations.

In the case of *ad hoc* arbitration, a *compromis* can also specify the seat of the arbitral tribunal, or, alternatively, the place where the tribunal will hold its first meeting, so that the tribunal itself will decide on the place for subsequent meetings. Arbitral tribunals often require assistance by a secretariat or a registry. Standing tribunals, such as the Permanent Court of Arbitration, generally have a well-established permanent secretariat that is responsible for the administrative support to all disputes pending in the tribunal; in *ad hoc* tribunals, the parties may need to make necessary arrangements on the appointment of a secretary or a registrar and supporting staff.[52]

4. ADR in International Law

To develop guidelines to operationalise ADR in the AfCFTA, it is important to consider three different contexts: the use of ADR in State-to-State disputes involving AfCFTA Members; disputes involving *trade-related* issues encompassed by AFCFTA disciplines; and the essential fact that dispute resolution in AfCFTA involves a distinctly African environment. To provide support to the analysis of ADR in State-to-State disputes and on trade-related issues, this section explores ADR in general international law and ADR procedures and practices under the WTO. The approach is geared to extract best practices from each context and apply them in drafting the Guidelines.

4.1. ADR in General International Law

As explained in detail in Annex 4.1, not only is the peaceful settlement of disputes the right of the Members of AfCFTA, but also it is their natural duty, universally recognized as one of the general principles of international law and embodied in the UN Charter. Particularly, Annex 4.1 shows that the UN Charter provides for mediation, conciliation and arbitration as the possible means of peaceful dispute settlement. All AfCFTA Members are also States Members of the UN, and all the four means of ADR listed in the AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes stem from customary international law. Moreover, one of the indirect objectives of the

[52] United Nations.

Guidelines is the contribution to the maintenance of peace and friendly relations among States in the African region, hence the importance of the overview of ADR within the notion of general international law.

4.1.1. Good offices

A key aspect to understand the use of ADR in State-to-State disputes is to explore the exercise of good offices. This is particularly relevant because this form of ADR has not been used extensively outside the State-to-State context.

In international relations, the third party offering good offices can be a single third State or a group of States, an individual or an organ of a universal or regional international organisation.[53] The UN and regional organisations can also exercise good offices jointly. For instance, in the Central African region, the UN Under-Secretary General for Peace Operations and the then African Union Commissioner for Peace and Security[54] regularly exercised joint good offices missions to support the 2019 peace agreement in the Central African Republic and to facilitate the country's December 2020 elections.[55]

Good offices can be exercised according to the provisions of a treaty to which both contesting States are parties, or on an *ad hoc* basis, in line with a general obligation to settle international disputes by peaceful means. The role of the third party is normally to induce the parties to a dispute to resume negotiations and provide them with a channel of communication, so that the parties to a dispute could finally agree on a mutually acceptable solution.[56] In particular, the third party establishes contact with the sovereign State parties to the dispute through informal meetings with each party, ascertaining the positions of both sides and communicating to the parties each other's

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[53] United Nations.

[54] Currently *African Union Commissioner for Political Affairs, Peace and Security (AU-PAPS)*.

[55] United Nations, "Strengthening the Partnership between the United Nations and the African Union on Issues of Peace and Security in Africa, Including on the Work of the United Nations Office to the African Union," Report of the Secretary-General, 2021, https://reliefweb.int/sites/reliefweb.int/files/resources/S_2021_763_E.pdf.

[56] Cassese, "International Law."

positions. If disputing parties break off any direct contact, the third party may become the only channel of communication between them; in the latter case, such third party can exercise their good offices by visiting the capital cities of each State party to a dispute. Alternatively, the third party may request the parties to a dispute to send their representatives to a meeting with this third party together with representatives of the other party to the dispute, or alone, at a neutral location. If necessary, the third party also may carry out field missions to discover more about the situation that has led to a dispute. For instance, several technical missions took place on behalf of the UN Secretary-General who exercised good offices regarding the question of the Western Sahara.[57]

In international conventions, good offices are recognized as a means of peaceful dispute settlement. For example, in the 1899 and 1907 Hague Conventions for the Pacific Settlement of International Disputes. Arts. 2–8 of the Hague Conventions refers to good offices and mediation together, without underlying any difference between the two. This suggests that the two means are "usually seen as performing functions which may sometimes not be distinguishable in practical terms".[58] Good offices also are mentioned among the available peaceful dispute settlement means in some of more recent universal international instruments, for instance, the 1982 Manila Declaration.

Art. 33(1) of the UN Charter does not include explicitly "good offices" in the list of peaceful means to resolve State-to-State disputes. However, the UN Secretary-General has generally exercised good offices, either himself or through the appointment of special representatives and envoys.[59] The UN Secretary-General has lent his good offices at his own initiative, at the request of a competent UN organ, or upon the choice by the contesting States.[60]

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[57] United Nations, *Handbook on the Peaceful Settlement of Disputes between States*.

[58] United Nations.

[59] UN Peacemaker, "The Secretary-General & Mediation," 2021, https://peacemaker.un.org/peacemaking-mandate/secretary-general.

[60] Antônio Augusto Cançado Trindade, "Peaceful Settlement of International Disputes: Current State and Perspectives" (XXXI Course of International Law, Rio de Janeiro, Brazil, 2004), 46.

Although Chapter XV UN Charter ('The Secretariat') does not expressly empower the UN Secretary-General to exercise good services at his own initiative, the third UN Secretary Dag Hammarskjold created what became known as the 'Peking formula', assuming a neutral and independent position as a third party offering good offices to contesting States parties.

At the regional level, apart from the Agreement Establishing the AfCFTA, the 1948 Charter of the OAS, the American Treaty on Pacific Settlement ('Pact of Bogotá') and the ASEAN Protocol on Enhanced Dispute Settlement Mechanism explicitly refer to good offices are as a means of peaceful settlement of disputes. Notably, Art. X of the Pact of Bogotá explicitly distinguishes good offices and their desired outcome from other means of dispute settlement and their outcome, including mediation: "[o]nce the parties have been brought together and have resumed direct negotiations, no further action is to be taken by … (third parties); they may … be present at the negotiations".

In some instances, States offered their good offices to help contesting States to settle a dispute before it was referred to international or regional organisations. For instance, in 1960–1962, Switzerland exercised good offices regarding the Franco-Algerian conflict; in 1965, the USSR provided its good offices to India and Pakistan with the Kashmir issue.[61]

4.1.2. Mediation

There is a very close overlap between Good Offices and mediation. Most of the work of a person exercising Good Offices involves the tools and practices of a skilled mediator. Within general public international law, mediation may be exercised by a single State, by a group of States or may also be used within the framework of an international organisation, both global and regional. Mediation is often used by national organisations and associations.

Within the UN system, the practice of using mediation to facilitate negotiations between disputing State members is not uniform; mediation may be offered by

[61] United Nations, *Handbook on the Peaceful Settlement of Disputes between States*.

the UN Secretary-General, by the Security Council at the recommendation of the General Assembly, or by the Security Council itself.[62]

Mediation as a means of peaceful inter-State dispute settlement is recognized in the texts of many international conventions and other international instruments, both of general and more specific application. A few examples of universal treaties referring to mediation include the 1899 and 1907 Hague Conventions for the Pacific Settlement of International Disputes; the Charter of the United Nations; and the 1959 Antarctic Treaty.

At the regional level, mediation as a means of peaceful dispute settlement is mentioned in a wide variety of treaties. These include, in addition to the Agreement Establishing the AfCFTA, the 1945 Pact of the League of Arab States, the 1948 Charter of the Organisation of American States and the American Treaty on Pacific Settlement (Pact of Bogotá). Among the above-mentioned examples, the Hague Conventions for the Pacific Settlement of International Disputes consider mediation and good offices as interchangeable procedures, while the Pact of Bogotá views mediation as a distinctive method and stipulates its functions and its institutional aspects.[63]

As in the provision of Good Offices, a mediator of State-to-State disputes is typically a highly esteemed and experienced expert in a particular field – such as trade – or he or she is a senior official of an international organisation.[64] The role and concrete task of the mediator may also change as the negotiations evolve between the parties. Ultimately, as in any type of mediation, the process is geared towards facilitating the negotiations between the parties. And mediation itself can often provide an avenue for other pacific settlement procedures.[65]

International law practice evinces that, in general, the mediator's proposals for the settlement of a dispute are not binding on the parties. For instance, Art. 6

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[62] United Nations.

[63] United Nations.

[64] Cassese, "International Law."

[65] United Nations, *Handbook on the Peaceful Settlement of Disputes between States*.

of the 1899 and 1907 Hague Conventions indicates that mediation has "exclusively the character of advice, and never have binding force". Yet, contesting States are free to agree on the binding character of the terms of mediation settlement.

4.1.3. Conciliation

Conciliation as a means of peaceful dispute settlement is widely applied in international relations. Because of the increase in the resort to conciliation after World War II and its successful application, the Institute of International Law (*Institut de Droit International*) in 1961 adopted 'Regulations on the Procedure of International Conciliation'. [66] In this document, the Institute recommended States "wishing either to conclude a bilateral conciliation convention or to submit a dispute which has already arisen to conciliation procedures before an *ad hoc* Commission", to adopt the rules contained in the Regulations.[67] Art. 1 of the Regulations defines 'conciliation' as a

> 'method for the settlement of international disputes of any nature according to which a Commission set up by the Parties, either on a permanent basis or on an *ad hoc* basis to deal with a dispute, proceeds to the impartial examination of the dispute and attempts to define the terms of a settlement susceptible of being accepted by them, or of affording the Parties such aid as they may have requested.'[68]

Conciliation appears in the dispute settlement provisions of various multilateral treaties. These treaties include general conventions and specific conventions on dispute resolution, such as the UN Charter (at the global level) and the 1948 Pact of Bogotá or the 1957 European Convention for the Peaceful Settlement of Disputes (at the regional level). Conciliation is also

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[66] Institut de Droit International, "International Conciliation" (Institut de Droit International, 1961), https://www.idi-iil.org/app/uploads/2017/06/1961_salz_02_en.pdf.

[67] Institut de Droit International.

[68] Institut de Droit International.

referred to in some existing sectoral conventions, such as the 1969 Vienna Convention on the Law of Treaties and the 1982 United Nations Convention on the Law of the Sea.

Conciliation has been used within the framework of the UN on many occasions based on resolutions of the General Assembly, for instance, the Commission of Conciliation for the Congo. On 11 December 1995, the General Assembly adopted resolution 50/50 'United Nations Model Rules for the Conciliation of Disputes between States', which reflect the general practice of conciliation and "apply to the conciliation of disputes between States where those States have expressly agreed in writing to their application" (Art. 1(1)). The General Assembly also recommended in resolution 35/52 of 4 December 1980 the use of the Conciliation Rules of the United Nations Commission on International Trade Law (UNCITRAL Conciliation Rules) "in cases where a dispute arose in the context of international commercial relations and the parties sought an amicable settlement of that dispute by recourse to conciliation".

The conciliation procedure provisions in treaties may contain a different answer to the following basic question: whether the procedure starts by mutual consent of all parties to the dispute, or whether the request for the initiation of conciliation by only one of the parties suffices.[69] While the first option is a traditional form of conciliation, the second one ('compulsory' conciliation) follows the newer trend, reflected in the 1969 Vienna Convention on the Law of Treaties and the 1982 United Nations Convention on the Law of the Sea.

As for the appointment of conciliators, the provisions of different treaties vary; among the universal multilateral treaties, the Annex to the Vienna Convention on the Law of Treaties contains detailed provisions on the appointment of conciliators based on a permanent list, including the additional requirement on the nationality of conciliators.[70]

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[69] United Nations, *Handbook on the Peaceful Settlement of Disputes between States*.

[70] United Nations.

In public international law, most treaties empower the conciliation commission to adopt its rules of procedure, in the light of the circumstances of a particular dispute; Art. 4 of the Regulations on the Procedure of International Conciliation reflects this general approach.[71]

While most conciliation clauses of international conventions provide for the adoption of non-binding recommendations to contesting parties, some treaties deviate from this general practice. For instance, the final sentence of Art. 85(7) of the 1975 Vienna Convention on the Representation of States in their Relations with International Organisations of a Universal Character reads as follows: "The recommendations … shall not be binding on the parties to the dispute unless all the parties to the dispute have accepted them … any party to the dispute may declare unilaterally that it will abide by the recommendations in the report so far as it is concerned". Art. 14(3) of the 1981 Treaty establishing the Organisation of Eastern Caribbean States goes so far as to provide that the recommendation of the conciliation commission "shall be final and binding on the Member States". In any event, nothing prevents the contesting States from reaching an agreement on a binding force of the report of the conciliators.

4.1.4. Arbitration

Many multilateral treaties, both at the global or regional level and both general and specific, as well as many bilateral treaties refer to arbitration as a means of peaceful dispute settlement. Both the 1899 and the 1907 Hague Conventions established the Permanent Court of Arbitration (PCA) "[w]ith the object of facilitating an immediate recourse to arbitration for international differences, which it has not been possible to settle by diplomacy".[72] The PCA Optional Rules for Arbitrating Disputes between Two States are based on UNCITRAL Arbitration Rules with changes to reflect diplomatic practice and more flexibility involved in inter-State disputes.

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[71] Institut de Droit International, "International Conciliation."

[72] United Nations, *Handbook on the Peaceful Settlement of Disputes between States*.

In 1958, the International Law Commission adopted the Model Rules on Arbitral Procedure (ILC Model Rules), which reflects the fundamental rules and common principles of arbitration. The ILC Model Rules may provide the useful guidance to the parties to a dispute if they decide to submit their case to arbitration.[73]

Art. 2 (2) ILC Model Rules refers to the "rules of law and the principles to be applied by the tribunal" as an optional provision, which the *compromis* shall include if such provision is "deemed desirable by the parties". However, some arbitration agreements do not specify the law applicable to a dispute. In this case, the ILC Model Rules suggest that the tribunal should apply the rules provided for in Art. 38 Statute of the International Court of Justice.[74]

International law rules support the binding nature of an arbitral award: as Art. 32 ILC Model Rules stipulates, the "arbitral award shall constitute a definitive settlement of the dispute". As for the revision of an arbitral award, under Art. 38 ILC Model Rules, a party may file an application for the revision of an award "on the ground of the discovery of some fact of such a nature as to constitute a decisive factor". This decisive factor must have been unknown to the tribunal and to the party requesting revision at the time when the award was rendered, and such ignorance must not have been the result of the negligence of the party requesting revision.[75]

4.2. ADR in the WTO

ADR provisions in AfCFTA's Protocol on the on Rules and Procedures on the Settlement of Disputes seem to have been modelled after Arts. 5 and 25 of WTO's Dispute Settlement Understanding (DSU). An examination and discussion of ADR experiences in the inter-state trade context of the WTO can thus prove useful to develop guidelines for ADR in the AfCFTA. This section presents WTO ADR procedures and practices to date to shed light on

[73] United Nations.

[74] International Law Commission, "Model Rules on Arbitral Procedure" (United Nations, 1958), https://legal.un.org/ilc/texts/instruments/english/draft_articles/10_1_1958.pdf.

[75] International Law Commission.

the most important elements to be considered in drafting user-friendly ADR Guidelines.

In the WTO, a solution that is mutually acceptable to the Parties to a dispute is clearly to be preferred.[76] The involvement of an independent neutral third party may help the disputing Parties to arrive at such solution. To allow such assistance, Art. 5 DSU provides for good offices, conciliation and mediation, to be engaged in a voluntary basis if the Parties to the dispute so agree[77] and Art. 25 DSU provides for arbitration as an alternative means of dispute settlement that can facilitate the solution of disputes that concern issues that are clearly defined by both parties.[78] Yet, these specific ADR provisions have not been used since the inception of the WTO.[79] And in fact, *any* form of ADR in resolving WTO disputes has been characterized as rarely used[80] or mostly forgotten.[81]

Concerned about the non-use by WTO Members of ADR procedures under Art. 5 DSU in the first years of the WTO, the WTO Director General (DG) in 2001 sent a communication to Members expressing his readiness to assist the membership should there be a request under this provision. The communication provides that "good offices, conciliation and mediation are seen as three different levels of involvement of the Director-General, with good offices being overseeing of logistical and Secretariat support, conciliation involving direct participation in negotiations and mediation including the possibility of actually proposing solutions, if appropriate".[82] As

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[76] Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), April 15, 1994, 1869 U.N.T.S. 401; 33 I.L.L. 1226 (1994), Art. 3.7.

[77] DSU, Art. 5.1.

[78] DSU, Art. 25.1.

[79] Nohyoung Park and Myung-Hyun Chung, "Analysis of a New Mediation Procedure under the WTO SPS Agreement," *Journal of World Trade* 50, no. 1 (2016): 93–115.

[80] World Trade Organization, "Communication from the Director General, Article 5 of the DSU", WT/DSB/25, 17 July 2001, p. 2.

[81] Bashar H. Malkawi, "Arbitration and the World Trade Organization—The Forgotten Provisions of Article 25 of the Dispute Settlement Understanding," *Journal of International Arbitration* 24, no. 2 (April 1, 2007): 173–88.

[82] World Trade Organization, "Communication from the Director General, Article 5 of the DSU", WT/DSB/25, 17 July 2001, footnote 9; These views on good offices, conciliation and

also set out in the document, flexibility regarding changing the role is to be maintained.

4.2.1. ADR Procedures and Practices in the WTO

Table 1 below summarizes existing Rules or Guidelines for the use of ADR procedures in the WTO. It should be highlighted, however, that even though some basic guidance exists, these WTO ADR procedures are far less detailed than the formal dispute settlement procedures used in WTO disputes over the past 25 years. In addition, WTO ADR procedures are less proscriptive than, for instance, the Rules provided by arbitration centres explored in the next sections on the African context. WTO guidelines for the use of ADR procedures largely provide parties with discretion to agree to whatever procedural format they wish – which may vary on a case-by-case basis.

Table 1: Summary of ADR procedures and Guidelines under WTO

ADR procedure	WTO provision	Situation	Rules/Guidelines
Good Offices	Art. 5 DSU	If requested, DG may offer good offices with the view to assisting Members to settle dispute	2001 DG Communication
	Art. 3.12 DSU (reference to 1966 Procedures)	Disputes between a developing and a developed party. If consultations fail, the less-developed party may request DG good offices	-
	Art. 24.2 DSU	Disputes involving a LDC Member. If consultations fail, LDC may request the DG or the Chairman of the DSB to offer their good offices with a view to assisting parties to settle dispute	-
	Art. 12.2 SPS	Disagreements among Members on specific SPS issues. Member may request with the good offices of the SPS Committee Chairperson	2014 Recommended Procedure SPS

mediation do not necessarily reflect the exact same understanding of such procedures in other *fora*.

Conciliation	Art. 5 DSU	If requested, DG may offer conciliation with the view to assisting Members to settle dispute	2001 DG Communication
	Art. 24.2 DSU	Disputes involving a LDC Member. If consultations fail, LDC may request the DG or the Chairman of the DSB to offer conciliation with a view to assisting parties to settle dispute	-
Mediation	Art. 5 DSU	If requested, DG may offer mediation with the view to assisting Members to settle dispute	2001 DG Communication
	Art. 24.2 DSU	Disputes involving a LDC Member. If consultations fail, LDC may request the DG or the Chairman of the DSB to offer mediation with a view to assisting parties to settle dispute	-
Arbitration[83]	Art. 25 DSU	Resort to arbitration shall be subject to mutual agreement of the parties	-
	Art. 21.3(c) DSU	To determine the reasonable period of time for compliance with DSB recommendations and rulings	-
	Art. 22.6 DSU	To determine the level of compensation and suspension of concessions	-

4.2.1.1. Good Offices, Conciliation and Mediation

As noted above, the DSU does not provide detailed procedures on the operation of good offices, conciliation, and mediation. Nor does it establish a timetable for their use in a dispute.[84] In light of this, in 2001, the DG communication provided "Procedures for Requesting Action Pursuant to Article 5 of the DSU",[85] and the SPS Committee adopted in 2014 a mediation procedure under Art. 12.2 Sanitary and Phytosanitary (SPS) Agreement.

[83] The Multi-Party Interim Appeal Arbitration Arrangement (MPIA) created pursuant to Art. 25 DSU also has Agreed Procedures for Arbitration, which are discussed below.

[84] Bashar H. Malkawi, "Arbitration and the World Trade Organization—The Forgotten Provisions of Article 25 of the Dispute Settlement Understanding," *Journal of International Arbitration* 24, no. 2 (April 1, 2007): 173–88.

[85] World Trade Organization, "Communication from the Director General, Article 5 of the DSU", WT/DSB/25, 17 July 2001, ATTACHMENT B.

However, aside from these initiatives, disputing WTO Members have not specifically agreed to use ADR procedures in the WTO.[86]

Under the SPS Agreement, Art. 12.2 provides that the SPS Committee shall "encourage and facilitate *ad hoc* consultations or negotiations among Members on specific SPS issues".[87] These ad hoc consultations can be dealt with by requesting the good offices of the SPS Chairperson, in accordance with the Working Procedures of the SPS Committee.[88] To facilitate the operationalisation of consultation requests under Art. 12.2 SPS, the SPS Committee adopted a recommended procedure in 2014.[89] The SPS *ad hoc* consultations are considered mediative in nature,[90] and the general procedure describes steps Members should follow to take recourse to Art. 12.2 SPS.

4.2.1.2. Arbitration

In the WTO, under the DSU, recourse to arbitration is possible under Art. 21.3(c), to determine the reasonable period of time for compliance with DSB recommendations and rulings; under Art. 22.6 DSU, to determine the level of compensation and suspension of concessions; and in Art. 25 DSU, as an alternative means of dispute settlement, which shall be the focus of this report.

Art. 25.2 DSU provides that resort to arbitration is subject to mutual agreement by the parties, which shall also agree on the procedures to be followed.[91] Overall, Art 25 DSU gives wide flexibility and discretion to parties

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[86] Park and Chung, "Analysis of a New Mediation Procedure under the WTO SPS Agreement."

[87] SPS Agreement, Art. 12.2.

[88] SPS Committee, *Working Procedures of the Committee*, G/SPS/1, 1995, para. 6.

[89] SPS Committee, *Procedure to Encourage and Facilitate the Resolution of Specific Sanitary or Phytosanitary Issues among Members in accordance with Article 12.2–Decision adopted by the Committee on 9 July 2014*, G/SPS/61.

[90] Park and Chung, "Analysis of a New Mediation Procedure under the WTO SPS Agreement."

[91] DSU, Art. 25.2.

that decide to engage in arbitration proceedings.[92] There are no specific procedures to operationalize Art. 25 DSU nor a timetable for the rules for WTO arbitration. Parties thus maintain their control over the process and must engage in a negotiation to agree on specific procedures to follow.[93] This initial negotiation on procedure may stop the arbitration in its tracks if the parties cannot reach agreement. Thus, some form of fixed procedures for an arbitration may facilitate the initial agreement of both disputing parties to make use of the arbitration mechanism.[94]

It is the great flexibility embedded in Art. 25 DSU that allowed for the creation of the Multi-Party Interim Appeal Arbitration Arrangement (MPIA), as an attempt to provide a temporary appeal function to WTO disputes in face of the paralysed Appellate Body. MPIA participant Members are also guided by Annex 1 of the MPIA communication,[95] which sets out procedures for arbitration, including appointment of arbitrators, time-limits, legal force of the arbitral award and third-party rights. Annex 2 of the communication contains, *inter alia*, a pre-selection process for the MPIA pool of arbitrators and could inspire rules on indicative lists or roster of persons qualified to act as neutral third parties in ADR procedures under the AfCFTA.

4.2.2. ADR Cases in the WTO

Only a very limited number of trade disputes in the past 25 years among WTO Members have been settled by taking recourse to ADR procedures under the WTO. Table 2 summarizes the few cases brought to date, which are explained in more depth in Annex 4. Good offices and mediation have been used more often than arbitration, particularly in the context of SPS disputes. From these cases, it becomes clear that procedural flexibility is a core feature

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[92] Malkawi, "Arbitration and the World Trade Organization—The Forgotten Provisions of Article 25 of the Dispute Settlement Understanding," April 1, 2007.

[93] Malkawi.

[94] Malkawi.

[95] World Trade Organization, "Statement on a Mechanism for Developing Documenting, and Sharing Practices and Procedures in the Conduct of WTO Disputes - JOB/DSB/1/Add.12," April 30, 2020, https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=263504.

of proceedings. For instance, Parties benefit from having leeway to choose the most adequate arbitrator or facilitator on a certain dispute and in determining the details of the proceedings: in *US – Section 110(5) Copyright Act (Article 25)*, Parties chose the original panellists in their dispute to sit as arbitrators; in the dispute on bananas, having requested the good offices of the former DG Pascal Lamy and allowing him to in consult with disputing parties and third parties in various capacities had a strategic role in constructing a reasonable settlement proposal. These lessons, in addition to the best practices specific from the African context, will guide the elaboration of Guidelines for the Operationalization of ADR in the AfCFTA.

Table 2: Summary of ADR cases in the WTO

ADR procedure	WTO provision	Case
Good Offices/Mediation	Art. 3.12 DSU (reference to 1966 Procedures)	Latin American countries, the EC and the US on Bananas
	Art. 12.2 SPS	2001: Canada and India. Dispute regarding Indian import restrictions on bovine semen from Canada on the grounds of bovine spongiform encephalopathy (BSE) concerns
		1998: Argentina and the EC. Dispute on EC measures to prevent the spread of citrus canker
		1998: US and Poland. Dispute on Poland restrictions on wheat and oilseeds
Mediation	(Similar procedures to Art. 5 DSU)	Philippines, Thailand, and EC on Tuna
Arbitration	Art. 25 DSU	2001: *US – Section 110(5) Copyright Act (Article 25)*. Arbitration to determine the level of nullification or impairment of the benefits due to the EC as a result of Section 110(B) of the US Copyright Act

5. ADR in the African Context

This section examines ADR provisions and guidelines in Africa at both the regional and national level in selected cases. This dual level of analysis seeks to integrate ADR procedures in the African context to the greatest extent

possible when drafting the Guidelines.[96] The section is further enriched by interviews and written questionnaire responses from African ADR practitioners and academics, which have been selected in light of their extensive experience in ADR procedures. These practitioners' views reflect a comprehensive representation of the different regions of Africa.[97]

At the regional level, out of the eight African Regional Economic Communities (RECs),[98] two have been selected as case studies, namely the Common Market for Eastern and Southern Africa (COMESA) and the East African Community (EAC). The choice was due to their explicit reference to arbitration proceedings in their dispute resolution protocols.[99]

In addition, the case selection at the domestic level had as a starting point desk research and the 2020 Arbitration in Africa Survey Report,[100] which sought to identify the top African Arbitral centres as voted by users of arbitration in Africa. Two of the top five arbitral centres as chosen by respondents were selected in this report: the Nairobi Centre for International Arbitration (NCIA), in Kenya, one of the largest international ADR centres in East Africa; and the Arbitration Foundation of Southern Africa (AFSA), in South Africa.

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[96] It is, however, beyond the scope of this report to address all examples of ADR in the African Context because of the growth of ADR in Africa.

[97] See Annex 6 for a full list of persons interviewed.

[98] Arab Maghreb Union (AMU), Common Market for Eastern and Southern Africa (COMESA), Community of Sahel-Saharan States (CEN-SAD), East African Community (EAC), Economic Community of Central African States (ECCAS), Economic Community of West African States (ECOWAS), Intergovernmental Authority on Development (IGAD), and the Southern African Development Community (SADC).

[99] While the SADC is an obvious omission from this case selection (given its regional significance and deep level of integration achieved), it was excluded because its DSM — the SADC Tribunal — was suspended in 2013, with no evidence of ADR being used prior to its suspension and no published guidelines on the use of ADR. The Economic Community of West African States (ECOWAS) has also not been examined, as its Draft Arbitration Rules, although under consideration by ECOWAS Council of Ministers, have not been made public as of the time of writing. ECOWAS Community Court of Justice, "ECOWAS CCJ Official Website | Mandate and Jurisdiction," accessed November 18, 2021, http://www.courtecowas.org/mandate-and-jurisdiction-2/.

[100] Emilia Onyema, "2020 Arbitration in Africa Survey Report," 2020, http://eprints.soas.ac.uk/33162/.

The NCIA released extensive mediation guidelines in 2021, making it a useful case to discern appropriate international African mediation procedures. The AFSA recently created its own international ADR court accompanied by the release of best-practice international ADR rules in June 2021. AFSA has also created a dedicated procedure for e-ADR proceedings, which provide model guidelines for e-ADR in an African context. In addition, Ghana was chosen as the third case study since it has an extensive history of ADR utilisation and some of most comprehensive ADR legislation in Africa.[101] An extensive discussion and analysis of each of the case studies is contained in Annex 5.

5.1. African Best Practices and Their Implementation in the Guidelines

Representative and comprehensive ADR best practices have been distilled from these regional and domestic African case studies and have been used as inspiration for the elaboration of the ADR Guidelines. A complete of picture of all drafted provisions and their respective sources is provided in Annex 3.

Set out below are some of the key elements distilled from the conducted interviews, as well as from a review of African-based case studies as informed by international law principles, and the experience of the WTO studies as outlined in Section 4.

5.1.1. Flexibility

Interviews with African ADR practitioners have stressed a need to balance procedural flexibility with sufficient rigidity to facilitate the agreement of the parties to participate in the proceedings.[102] This point is also confirmed in relevant literature. While flexibility is embodied in many of the case studies' Rules mentioned above, the best example is found in Ghana's ADR Act. The

[101] Uwazie, "Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability."

[102] Interview with Mr. Phillip Aliker, Barrister and Chartered Arbitrator at Tanfield Chambers (London, England), Advocate and Chartered Arbitrator at Arbitration Chambers (Kampala, Uganda); Interview with Prof Brian Ganson, Professor & Head of the Africa Centre for Dispute Settlement at the University of Stellenbosch Business School.

Act allows for maximum flexibility in proceedings by granting parties autonomy to determine most elements of the procedure through mutual agreement. For example, parties are free to agree to the composition of the arbitral tribunal, the means of appointment of arbitrators, the means of removal, the use of alternative rules to govern proceedings, as well as the language of choice.

However, the Ghana ADR Act ensures that where disputing parties cannot agree on procedures, then defaults may be stipulated. For instance, Rule 14 of the Ghana Act grants parties autonomy to appoint arbitrators through their own procedure by consensus but offers the default procedure that each party appoints an arbitrator of their choice, with the two party-appointed arbitrators appointing a third and presiding arbitrator. This is extended to the section on mediation procedures, with parties able to determine the appointment process of the mediator and the number of mediators. Absent procedural consensus, the guidelines may also confer procedural power to the arbitrator. For example, Rule 31(7) states that "unless otherwise agreed by parties, the arbitrator may order a claimant to provide security for the costs of arbitration."[103] A combination of default options and arbitrator discretion may also be used to resolve a lack of consensus: Rule 34(10), which applies to communication between parties, provides that unless parties agree otherwise or the arbitrator orders otherwise, all written communication may be served personally or to the last known address of the party or its representative.[104]

Further examples from Ghana include Rule 55 which allows parties to agree to an apportionment of costs, otherwise by default costs are equally apportioned unless the arbitral tribunal decides to include expenses as part of an award against a party.[105] Rule 87 replicates this mechanism for mediation proceedings. Rule 66(1) even allows parties to appoint any individual or institution as a mediator regardless of their qualifications or interests. While the flexibility which permeates Ghana's ADR Act, may seemingly come at the

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[103] Parliament of the Republic of Ghana, "Alternative Dispute Resolution Act."

[104] Parliament of the Republic of Ghana.

[105] Parliament of the Republic of Ghana.

cost of efficiency and discipline, the Act provides for very strict time schedules which may not be deviated from.[106] This allows the ADR Act to strike a balance between flexibility and discipline for both mediation and arbitration procedures, even though the arbitration rules are more rigid and confer greater procedural power to the arbitrator given the more formal nature of arbitration.[107]

This balance has been incorporated into draft guidelines found in Annexes 1 and 2 to this Report. Annex 1 provides Guidelines for the Implementation of Art. 8 of the AfCFTA's Protocol on Rules and Procedures on the Settlement of Disputes (Good Offices, Conciliation and Mediation), while Annex 2 provides Guidelines for the Implementation of Art. 27 AfCFTA's Protocol on Rules and Procedures on the Settlement of Disputes (Arbitration) which embody the principle of flexibility. For instance, Art. 7 of Arbitration Guidelines allows the Parties to agree on the number of arbitrators and provides Parties with flexibility in determining the overall procedure for appointing arbitrators.

In addition to procedural flexibility, interviews have indicated that flexibility may also be extended to arbitral awards in that parties should be given legal avenues to perform substantive, particularly monetary obligations stemming from arbitral awards in alternative ways.[108] Although the possibility of an arbitral award that entails monetary compensation is not provided for in the AfCFTA Protocol, the contesting parties may, through mutual agreement, empower the Arbitral Tribunal to award such a compensation. This is reflected in Art. 18.4 of the Arbitration Guidelines, which indicates that, subject to mutual agreement by all Parties, an award may provide for the payment of compensation or otherwise impose a monetary obligation on either Party to a dispute. Also subject to mutual agreement by the Parties, such obligation may be substituted, in whole or in part, by an alternative appropriate non-monetary obligation.

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[106] Parliament of the Republic of Ghana.

[107] Parliament of the Republic of Ghana.

[108] See Annex 6 for the list of persons interviewed.

5.1.2. Confidentiality – Or Not

Confidentiality is a staple characteristic of ADR proceedings under international law.[109] However, as discussed in Section 2.2, confidentiality can run counter to traditional forms of African dispute settlement. Instead, traditional dispute settlement was made purposefully public to involve the wider community in the resolution of the dispute. This made the procedure and outcome more transparent and legitimate in the eyes of the wider community, who were also given the opportunity to voice any interests which they may have in the dispute.[110]

This historical notion of transparency in resolving village disputes is not easily translatable into international ADR proceedings between state parties governed by international law. Indeed, in a dispute between two African states involving relatively narrow trade irritants, the classical application of confidentiality in all forms of ADR may be appropriate. The use of confidential ADR procedures – as opposed to more transparent formal Dispute Settlement Provisions – may well foster a solution based on the disputing parties' mutual interests. Through the lens of the interests of the disputing parties, the traditional use of confidentiality in business-related disputes has been deemed essential to reach a mutually agreed solution.[111]

On the other hand, interviews have indicated that it may be helpful to provide parties with a legal carveout allowing them to waive confidentiality obligations through mutual agreement. [112] This is particularly the case involving environmental or natural resource disputes where interests in, for example,

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[109] Cassese, "International Law."; Interview with Mr. Nene Amegatcher, active judge of the Supreme Court of Ghana, ex-President of the Ghana Bar Association, Managing Partner at Sam Okudzeto & Associates.

[110] Price, "Alternative Dispute Resolution in Africa."

[111] Interview with Mr. Ike Ehribe, Visiting Professor for International Legal Studies at SOAS University of London and Accredited Mediator.

[112] Interview with Adv Michael Kuper, Chairman of the Arbitration Foundation of Southern Africa (AFSA); Interview with Ms. Olusola Adegbonmire, Member of Board of Directors of Kigali International Arbitration Centre (KIAC), Senior Managing Partner at Sola Ajijola & Co; Interview with Prof. Jeswald Salacuse, Dean Emeritus at the Fletcher School of Tufts University.

access to water, affects several different States and their citizens.[113] Increased transparency could partially address growing doubts as to the legitimacy of confidential dispute resolution proceedings on the continent as seen in the backlash against investor-State dispute settlement.[114] In some cases, transparency could also allow non-participating States to identify their own interests in a dispute, with the public outcome of the dispute providing guidance for the future behavior of States within the framework of the AfCFTA.

Several of the case studies point to the possibility of allowing parties to waive confidentiality. Rule 79.2 of Ghana's ADR Act allows parties to waive the confidentiality obligations of mediators. However, the Ghana ADR Act does not go further to allow parties to waive their own confidentiality obligations. On the other hand, Rule 34.5 allows parties to arbitration to waive the confidentiality of arbitration proceedings which are otherwise confidential by default.[115] Additionally, Rule 34 NCIA Arbitration Rules allow parties to waive the confidentiality of proceedings and the award through mutual agreement in writing, with the same provision reflected as Rule 15 in the NCIA Mediation Rules.[116] The AFSA international arbitration rules do not contain a similar legal carveout, while the COMESA and EAC arbitration guidelines do not explicitly deal with the confidentiality of proceedings.

Interestingly, Art. 27 of the AFCFTA's Protocol on Rules and Procedures on the Settlement of Disputes ("Arbitration") does not explicitly state that arbitration proceedings or awards are confidential, while Art. 8 ("Good Offices,

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[113] Written questionnaire responded by Ms. Emilia Onyema, Visiting Professor for International Legal Studies at SOAS University of London, Accredited Mediator, Solicitor in England & Wales, Fellow at the Chartered Institute of Arbitrators and Fellow at HEA; Interview with Dr. Mohamed Abdel Raouf, Vice Chairman of the Board of Trustees and Member of the Advisory Committee of the Cairo Regional Centre for International Commercial Arbitration (CRCICA), Partner and Head of Arbitration Group at Abdel Raouf Law Firm.

[114] Olabisi D. Akinkugbe, "Africanization and the Reform of International Investment Law," *Case Western Reserve Journal of International Law* 53 (2021).

[115] Parliament of the Republic of Ghana, "Alternative Dispute Resolution Act."

[116] Nairobi Centre for International Arbitration (NCIA), "NCIA Arbitration and Mediation Rules, Revised Version," 2015, https://ncia.or.ke/wp-content/uploads/2021/02/Final-NCIA-Revised-Rules-2019.pdf.

Conciliation and Mediation") does. Therefore, the general default for mediation, conciliation, and good offices should be confidentiality. Nevertheless, it would be appropriate to create some flexibility for a *mutual* agreement between parties to waive confidentiality in these ADR proceedings, particularly pertaining to final outcomes. In addition, arbitration proceedings should remain confidential, while awards should be non-confidential by default with confidentiality only through the mutual agreement of parties.

Thus, Art. 6.1(b) of the Mediation Guidelines developed in this Report allow parties to mutually agree to waive confidentiality of proceedings through mutual written consent, while Art. 8.6 provides for the possibility of parties to mutually agree to waive the confidentiality of the settlement agreement. This mechanism is also embodied in Art. 7 of the Good Offices Guidelines, Arts. 9 and 21 of the Conciliation and Arbitration Guidelines, respectively.

5.1.3. Third Party Intervention

Interested third parties are typically not able to participate in mediation, conciliation, and good offices. Indeed, Art. 8 of the Protocol does not refer to a means for third parties to join proceedings for these types of ADR, while Art. 27 (arbitration) does allow for third-party joinders. However, as outlined in Section 5.1.3, there may be a range of disputes involving multi-state interests that could be negatively impacted by a bilateral settlement. In those instances, the mediator and the disputing parties may be well-advised to seek to secure the views and inputs of interested third parties.

However, it should be emphasized that the overwhelming practice in the context of ADR in the form of mediation and arbitration is to not provide a forum for interested third parties to intervene. This practice exists throughout the world and includes both international State disputes as well as private sector disputes.

This resistance to third party intervention is not surprising because ADR in the form of mediation of a narrow bilateral trade dispute exists to facilitate the negotiation between the two disputing parties. And in the case of arbitration, the process is designed to provide a binding resolution to two parties unable to negotiate a solution. The invocation of ADR procedures – unlike the formal

WTO dispute settlement procedures – is primarily a focus on the ability or inability of two Member States to *negotiate.*

That said, there are classes of disputes that involve multi-State interests, *i.e.,* water or resource rights, public health, sanitary and phytosanitary issues, etc. Thus, even in mediation, there could be flexibility for the parties to agree to include the views of interested third parties. These are disputes where multiple parties could have significant interests in the outcome of a mediation or an arbitration or the application of good offices. The participation of such third parties may be important to the peaceful resolution of a dispute. In such a situation, the third party neutral and the primary disputing parties would be wise to consider whether they will be able to achieve a lasting settlement if it does not take the interests of important third parties into effect.

Thus, it would be important for ADR procedures to be flexible enough to allow an agreement among the disputing parties to allow interested third parties into the proceedings. However, that participation must include the agreement of both primary disputing parties to meet the traditional notions of confidentiality and the party's autonomy to resolve their particular dispute – should they so decide. If there is such a mutual agreement among the primary disputing parties, then as with allowing parties to waive confidentiality, creating a mechanism for the inclusion of third parties in ADR proceedings aligns with traditional forms of dispute resolution in the African context and is an additional form of flexibility.

This flexibility, which is always subject to the Parties' mutual agreement and understanding, has been incorporated into the Guidelines in the Annexes. Thus, Art. 5.9 of the mediation guidelines allow the disputing parties to include third parties in mediation sessions through mutual agreement, which is replicated as Art. 6.7 of the conciliation guidelines. Art. 14 of the arbitration guidelines allows for an intervention or a joinder by third parties, with their participation in any mode contingent on the consent of the parties as per Art. 27.4 of the Protocol.

5.1.4. E-ADR

The use of online dispute resolution has greatly increased in the last few years due to the COVID-19 pandemic. This development has forced many of the proceedings into virtual replicas of previously physical spaces such as courtrooms. This transition is also applicable to online ADR (e-ADR), which is becoming increasingly common. While there may be complaints about this virtual imposition on traditional in-person proceedings, e-ADR may have several advantages of particular relevance to Africa.

First, e-ADR is much cheaper as parties to not have to cover travel and lodging costs of themselves, witnesses, experts, the arbitral tribunal, and others. Costs associated with booking a physical venue for protracted periods of time are also saved. These cost savings may be significant for African State Parties with limited financial resources, which could encourage their participation in ADR proceedings. [117] Second, e-ADR is much more convenient and potentially efficient. Africa is the largest continent in the world by landmass with long cross-continental travel times, which are eliminated for all individuals involved in online proceedings. Eliminating these additional temporal and administrative burdens may also promote the efficiency of proceedings, as confirmed during the interviews.[118]

In recognition of the potential benefits of e-ADR both the AFSA and NCIA have released dedicated e-ADR guidelines. AFSA's 'Remote Hearing Protocol' consists of ten articles which are intended to be used in conjunction

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[117] Interview with Mr. Nene Amegatcher, active judge of the Supreme Court of Ghana, ex-President of the Ghana Bar Association, Managing Partner at Sam Okudzeto & Associates.

[118] Interview with Mr. Phillip Aliker, Barrister and Chartered Arbitrator at Tanfield Chambers (London, England), Advocate and Chartered Arbitrator at Arbitration Chambers (Kampala, Uganda); Interview with Prof Brian Ganson, Professor & Head of the Africa Centre for Dispute Settlement at the University of Stellenbosch Business School; Interview with Adv Michael Kuper, Chairman of the Arbitration Foundation of Southern Africa (AFSA); Interview with Dr. Adewale Olawoyin, President of the Lagos Court of Arbitration, Managing Partner at Olawoyin & Olawoyin Legal Practitioners & Consultants; Interview with Mr. Clement Mkiva, Partner at Bowmans; Interview with Mr. Ike Ehribe, Visiting Professor for International Legal Studies at SOAS University of London and Accredited Mediator; Interview with Dr. Mohamed Abdel Raouf, Vice Chairman of the Board of Trustees and Member of the Advisory Committee of the Cairo Regional Centre for International Commercial Arbitration (CRCICA), Partner and Head of Arbitration Group at Abdel Raouf Law Firm.

with any other arbitration guidelines. These include articles addressing online due-process, accessibility, virtual proceedings, presentation of documents, submission of evidence, online etiquette, and technical requirements.[119] NCIA's 'Virtual Hearing Guidelines' consist of 13 clauses with a very similar scope to those in the 'Remote Hearing Protocol', although it does include additional provisions on the creation of a pre-hearing virtual agreement and interpretation.[120]

The Guidelines in the Annexes include provisions which grant parties recourse to e-ADR proceedings. Arts. 11.6 and 11.7 in the arbitration guidelines give parties recourse to virtual arbitration, with the latter article allowing parties to adopt dedicated e-ADR guidelines (akin to the AFSA and NCIA's dedicated guidelines) prior to proceedings. These same provisions are adapted in Art. 6.2 in the Good Offices Guidelines, Art. 5.2 in the Mediation Guidelines, and Art 6.2 in the Conciliation Guidelines.

5.1.5. Indicative List or Roster of Qualified Facilitators/Arbitrators

AfCFTA's Protocol on the Rules and Procedures on the Settlement of Disputes provides in Art. 10 that the Secretariat shall establish an indicative list or roster of individuals who are willing, able, and qualified to serve as Panellists. Although the reference is originally intended for formal dispute settlement panel proceedings, interviews have suggested that it would be pertinent for the Secretariat to maintain a similar list of individuals to serve as mediators, conciliators, and arbitrators.[121] A list of trusted, trained, and experienced individuals could be important to securing the buy-in of parties to

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[119] AFSA, "Remote Hearing Protocol," 2020, https://arbitration.co.za/wp-content/uploads/2020/10/Remote-Hearing-Protocol.pdf.

[120] Nairobi Centre for International Arbitration (NCIA), "NCIA Virtual Hearing Guidelines," September 2020, https://ncia.or.ke/wp-content/uploads/2021/05/NCIA-Virtual-Hearing-Guidelines.pdf.

[121] Interview with Mr. Phillip Aliker, Barrister and Chartered Arbitrator at Tanfield Chambers (London, England), Advocate and Chartered Arbitrator at Arbitration Chambers (Kampala, Uganda); Interview with Mr. Clement Mkiva, Partner at Bowmans.

ADR proceedings when parties are unable to appoint a mutually agreed upon a facilitator or arbitrator.

Art. 5.2 of the NCIA mediation guidelines acknowledges this benefit by mandating parties which fail to agree on a mediator to appoint a mediator from the list of accredited mediators maintained by the NCIA.[122] This is also found in Ghana's ADR Act, with Rule 115.1 (d) mandating that the 'ADR Centre'[123] maintain a list of qualified arbitrators and mediators for persons who request their services.[124]

Accordingly, the maintenance of a list of qualified mediators/conciliators/arbitrators is included in the Guidelines found in the Annexes to this report. Arts. 3.3, 2.7, and 7.5 create this possibility for mediation, conciliation, and arbitration respectively.

5.1.6. Technical Assistance

Art. 28 of the AfCFTA's Protocol on Rules and Procedures on the Settlement of Disputes allow for "technical cooperation" between the Secretariat and State Parties. Art. 28.1 allows the Secretariat to provide additional legal advice and assistance regarding dispute settlement in a manner which ensures that it remains impartial. Art. 28.2 also allows the Secretariat to organise special training courses for State Parties to develop expert capacity in dispute settlement procedures. Interviews have also confirmed that the provision of technical assistance could be an important element for the operationalization of ADR in Africa, especially in light of existing capacity building issues.[125]

The provision of technical assistance for parties to ADR procedures is also found in the EACJ Arbitration Rules, with Rule 19 allowing the arbitral tribunal

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[122] Nairobi Centre for International Arbitration (NCIA), "NCIA Arbitration and Mediation Rules, Revised Version."

[123] Ghana's ADR Act included a schedule which called for the establishment of a national Alternative Dispute Resolution Centre. However, to this date no such centre has yet been established.

[124] Parliament of the Republic of Ghana, "Alternative Dispute Resolution Act."

[125] Interview with Mr. Clement Mkiva, Partner at Bowmans.

at the request of a party to instruct any court or tribunal to assist the party in taking evidence of a witness and transmitting it to the arbitral tribunal.[126] Rule 20 of the NCIA Mediation Rules also allow for the registrar, on the request of the mediator of parties, to provide administrative assistance (such as sourcing translators and facilities) that would facilitate the mediation process.[127] The COMESA Arbitration Guidelines and the AFSA International Rules do not specifically provide for the option of technical assistance.

The provision of technical assistance has been integrated into the guidelines contained in the Annexes to align with Art. 28 of the AfCFTA's Protocol on Rules and Procedures on the Settlement of Disputes. Art. 4.1 of the general provisions which apply to good offices, mediation, and conciliation allow the parties or the mediator (with the consent of the parties) to approach the Secretariat to provide administrative assistance. Art. 4.2 also allows members to request assistance from the Secretariat to "promote their understanding of the use and functioning of the guidelines". Art. 4.3 also refers to Art. 28 of the AfCFTA's Protocol on Rules and Procedures on the Settlement of Disputes to allow parties to seek the additional forms of assistance contained therein. The structure and character of Art. 4 is replicated as Art. 15 in the arbitration guidelines contained in Annex 2.

5.2. Application of Best Practices in Drafting AfCFTA ADR Guidelines

The best practices outlined above informed the Africa-centred orientation of the Guidelines contained in Annexes 1 and 2 of this report. In addition, the drafting process took into account several methodological approaches.

First, when appropriate, some of the Guidelines' provisions were inspired precisely by other provisions on formal dispute settlement procedure in AfCFTA's Protocol on Rules and Procedures on the Settlement of Disputes.

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[126] EACJ, "East African Court of Justice Arbitration Rules, 2012," 2012, https://www.eacj.org//wp-content/uploads/2012/08/EACJ_Arbitration_Rules.pdf.

[127] Nairobi Centre for International Arbitration (NCIA), "NCIA Arbitration and Mediation Rules, Revised Version."

The intent was to follow the logic and guiding principles of AfCFTA dispute settlement.

Second, as previously outlined, relevant existing rules and guidelines from African case studies have been generally used as a source of inspiration. For instance, AFSA Mediation Rules were used as one of the main sources of inspiration for the Mediation Guidelines. However, there were other instances where no African-based ADR procedures were available. In those instances, the Guidelines were based on internationally accepted practices of, for example, mediation and arbitration, with due regard given to the traditions and practices of African States. Alternatively, some provisions were inspired, by analogy, by those from existing African-specific rules and guidelines for other means of ADR (*e.g.*, NCIA Mediation Rules inspired many provisions of the Conciliation Guidelines).

Third, the Guidelines are generally based on the relevant practices of the African States, where available. In some instances, other international (*i.e.*, non-African) rules and guidelines, most notably in the field of good offices and conciliation, enriched the substance of the Guidelines and filled in important gaps. For instance, UNCITRAL Conciliation Rules and UNCITRAL Arbitration Rules proved particularly important, as, although adopted outside the African context, they contain the most concise and widely applicable rules on the conduct of conciliation and arbitration.

6. Conclusion

The AfCFTA has enormous potential to change the economic trajectory of African States and the continent, significantly boosting intra-African trade. Bringing into effect the latent benefits arising from the letter and spirit of the AfCFTA will rely, however, on successful implementation of the agreement. In this regard, effective dispute settlement within the AfCFTA can be a key to ensuring the smooth and predictable flow of trade in the continent.

The AfCFTA's Protocol on Rules and Procedures on the Settlement of Disputes provides for both more complex formal dispute settlement processes and flexible, less costly and simpler ADR procedures for resolving trade conflicts. It remains to be seen to what extent African states will rely on the

formal litigation model that is designed to function like formal WTO dispute settlement – a model that African states have not used for the past 25 years. ADR procedures that look and feel like traditional African processes may well stimulate the resolution of disputes arising out of the rights and obligations under AfCFTA's substantive rules.

More specifically, Arts. 8 and 27 of AfCFTA's Protocol on Rules and Procedures on the Settlement of Disputes grant Member States recourse to ADR procedures such as good offices, mediation, conciliation, and arbitration. Yet, detailed procedural guidelines are not provided for their use. This creates both a risk and an opportunity. The risk is that AfCFTA Members will simply ignore ADR use altogether if no viable guidelines are developed. The opportunity, if seized, is that AfCFTA Members can create an African-centric approach to African-based disputes. This is a real opportunity to create a functioning and flexible rule of law that disputing parties can adjust and control to reach win-win sustainable solutions to inevitable trade disputes.

This is especially important given the new challenges that AfCFTA Members are to address. In particular, as of December 2021, the preparations for the negotiations of the Investment Protocol under the AfCFTA Agreement are underway, yet at the early stages. The Investment Protocol is to be concluded according to Art. 7 of the AfCFTA Agreement, and it is expected that the document will consider the use of ADR techniques.[128] Therefore, the authors hope this report will help not only in the implementation of the ADR provisions in the Dispute Settlement Protocol, but also with regard to dispute settlement within the future AfCFTA Investment Protocol, further advancing international trade and economic welfare in the region.

Whatever ADR guidelines are ultimately developed under the AfCFTA, they must consider, address, and attempt to solve the historical lack of African State participation in dispute settlement processes. The absence of African

[128] Rwatida Mafurutu, "The AfCFTA Investment Protocol: Preparations for the Negotiations and Expectations," tralac, December 9, 2021, https://www.tralac.org/blog/article/15456-the-afcfta-investment-protocol-preparations-for-the-negotiations-and-expectations.html.

State participation in the WTO dispute settlement framework is quite telling – and it has *real* consequences. It implies a weakening of trading rights.

In this regard, and with a view to solving this issue, the methodological approach of this report aimed to develop guidelines with a carefully thought-out design that draws on best practices identified in the African context. The result is provided through two sets of Guidelines to operationalise Arts. 8 and 27 of the AfCFTA's Protocol on Rules and Procedures on the Settlement of Disputes: the first for Good Offices, Mediation, and Conciliation, and second one for Arbitration. It is the hope of the authors that the report may assist the AfCFTA Members and the AfCFTA Secretariat in developing and negotiating functioning and user-friendly procedures that will enhance the use of ADR in the AfCFTA. Operationalisation of ADR procedures will contribute to the effective implementation of the agreement. To this end, this report may provide a solid basis to help in overcoming post-colonial obstacles in dispute settlement in Africa by developing substantive and procedural African ADR Guidelines.

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Annex 1: Guidelines for the Implementation of Art. 8 AfCFTA's Protocol on Rules and Procedures on the Settlement of Disputes (Good Offices, Conciliation and Mediation)

GENERAL PROVISIONS

Article 1 – Interpretation

1. In these Guidelines, unless context otherwise requires:
   (a) "**Conciliator"** means a third party neutral mutually agreed to by the Parties whose objective is to enquire into and assess the respective rights and obligations of the disputing Parties and the circumstances of a dispute with a view to resolution of a dispute;
   (b) **"(Deputy) Secretary General"** means (Deputy) Secretary General of the AfCFTA;
   (c) **"DSB"** means the Dispute Settlement Body established under Article 5 of AfCFTA's Protocol on Rules and Procedures on the Settlement of Disputes;
   (d) **"Member State"** means a Member State of the AfCFTA;
   (e) **"Party"** means a Member State that is a party to a dispute;
   (f) "**Protocol**" means the AfCFTA's Protocol on Rules and Procedures on the Settlement of Disputes;
   (g) **"Facilitator"** means any appropriate third party that is requested to provide, offers to provide, or exercises good offices, conciliation, or mediation;
   (h) "**Mediator"** means a third party neutral mutually agreed to by the Parties whose objective is to facilitate the voluntary negotiation and resolution of a dispute by agreement of the disputing Parties;
   (i) "**Secretariat**" means AfCFTA Secretariat.

Article 2 – Calculation of Time Limits

1. Unless otherwise agreed upon by the Parties, for the purpose of calculating a period of time, such period shall begin to run on the first

calendar day following the day when a written communication is received by the addressee.

Article 3 – Language of Proceedings

1. Where the Parties have agreed that disputes or differences between them shall be referred to Article 8 of the Protocol, the Parties are free to agree on the language of proceedings. If the Parties cannot reach an agreement on the language of the proceedings, the Facilitator shall determine such language after consultation with Parties.

Article 4 – Technical Assistance

1. With a view to facilitating the conduct of the good offices, conciliation or mediation proceedings, the Parties, or the Facilitator subject to the prior consent of the Parties, may make necessary arrangements for administrative assistance by a suitable institution or person, including the Secretariat.
2. Member States, in particular least-developed country Member States, may request assistance from the Secretariat or other entities to promote their understanding of and the use and implementation of these Guidelines.
3. Member States may seek additional legal advice and assistance from whatever entity or person they choose consistent with Article 28 of the Protocol.

Article 5 – Amendment

1. Member States shall decide to keep, modify, or terminate these Guidelines in light of the experience of Member States in its implementation.
2. The Guidelines applicable to good offices, mediation and conciliation proceedings shall be those in force at the time of commencement of the proceedings unless Parties have agreed otherwise.

PART I

GOOD OFFICES

Article 1 – Appropriate Facilitator

1. For the purposes of the present Guidelines, good offices can be provided by the following Facilitators:
    (a) Any individual or a group of individuals designated pursuant to the agreement of the Parties;
    (b) Any Member State or a group of Member States;
    (c) Any third State or a group of third States, or a group of Member States and third States;
    (d) An organ of a universal or regional international organisation.
2. In any case, an appropriate Facilitator shall not have any personal interest in the outcome of the dispute and/or have any bias with respect to any of the Parties.

Article 2 – Secretary General

1. The Secretary General shall consider promptly any request by any Member States or offer to provide his or her good offices as provided in Article 8.6 of the Protocol.
2. In carrying out his or her tasks, the Secretary General may consult with any Member States Parties, including the Parties to a dispute.
3. The Secretary General may designate any other individual to assist and/or act as a provider of good offices in his or her stead.

Article 3 – Request of Good Offices

1. At all times, the Member States concerned may request an appropriate Facilitator to use their good offices with a view to the resolution of the dispute or other outstanding differences between such Member States.
2. Where a request of good offices is made by a Party to the Secretary General, such request shall be notified to the DSB and the Secretariat as provided in Article 8.6 of the Protocol.
3. The Facilitator so requested by the Member States shall express their consent or rejection of the request for provision of good offices by communicating to the Member States concerned an offer or a rejection

of good offices within thirty (30) days after the receipt of the request to use their good offices.

4. Under no circumstances shall the rejection of the request of good offices be construed as an unfriendly act.

Article 4 – Offer of Good Offices

1. At all times, any appropriate Facilitator may offer the contesting Member States to use their good offices with a view to the resolution of the dispute or other outstanding differences between such Member States.
2. The Member States concerned shall express their consent or rejection of the provision of good offices by such appropriate Facilitator by means of the written acceptance or rejection of an offer of good offices within thirty (30) days after the receipt of such an offer.

Article 5 – Roles and Duties of the Facilitator

1. The Facilitator exercising good offices shall:
    (a) make every effort to assist the Parties to resume or continue negotiations;
    (b) provide the Parties with a channel of communication that the Facilitator and the Parties deem appropriate;
    (c) establish contact with the Parties by means of informal meetings with each Party, ascertain the position of each Party, and collect relevant information;
    (d) engage in joint meetings with the disputing parties or in private sessions with each of the parties as the Facilitator may deem appropriate to facilitate the parties' negotiation;
    (e) perform any other duties that the Facilitator and/or the Parties deem appropriate in the circumstances.
2. With the agreement of the disputing Parties, the Facilitator may offer his or her views on possible options to resolve the dispute.
3. At all times, the Facilitator exercising good offices shall be obliged to discharge their duties in good faith.

Article 6 – Conduct of Good Offices Proceedings

1. The Facilitator shall, in consultation with the Parties, conduct the proceedings has he or she believes will best facilitate the Parties negotiation and the resolution of the dispute.
2. With the agreement of the disputing Parties, the good offices proceedings may take place in person or by any other means, including by video conference, or a combination thereof.
3. Parties engaging in good offices proceedings have a duty to act in good faith and cooperate with the other Party in the settlement of the dispute.
4. No non-Party to the dispute shall have the right to intervene or participate in Good Offices proceedings except with the agreement of the disputing Parties.

Article 7 – Confidentiality

1. All written and oral statements, documents, information and materials, all proposals, if any, and terms of any settlement in connection with good services shall be confidential.
2. The Facilitator shall maintain the confidentiality of information obtained from one of the parties in a private meeting with such party unless the party providing the information permits the facilitator to share the information with the other party.
3. The above restrictions regarding confidentiality shall not apply where the disputing Parties have expressly agreed in writing to the contrary.

Article 8 – Termination of Good Offices

1. The exercise of good offices shall be terminated if:
    (a) Any disputing Party decides to terminate their participation in the good offices' procedures;
    (b) The Parties reach the mutually acceptable settlement of a dispute;

(c) The Facilitator decides that the continuation of the exercise of good offices will no longer facilitate the negotiation between the parties.

PART II

MEDIATION

Article 1 – Scope of Application

1. If the disputing Parties agree, a mediation may be initiated consistent with Article 8 of the Protocol. The Parties agree to engage in the mediation process in accordance with these Guidelines with the understanding that, upon mutual agreement, any of these Guidelines may be amended or not used.

Article 2 – Request for Mediation

1. Parties that have agreed to mediate a dispute may notify the Secretariat that they request mediation.
2. The request referred to in paragraph (1) may be made by writing, telephone, or other form of verbal or electronic mode of communication and shall state the names, addresses including e-mail addresses and telephone numbers of the parties and a brief identification of the subject of the dispute.
3. A request for mediation through telephone, or any other verbal mode of communication shall, unless the Parties agree otherwise, be confirmed in writing.

Article 3 – Agreement on the Mediator

1. On receipt of the notice of the joint request for mediation, the Secretariat shall meet with the Parties to assist them in selecting a mediator.
2. The Parties may request the Secretariat to recommend names or provide a list of suitable persons to serve as mediator.
3. The Secretariat shall establish and maintain an indicative list or roster of individuals who are willing and able to serve as mediators.

4. Upon agreement of the parties on the choice of a mediator, the Member States concerned shall confirm their agreement to the mediator in writing.
5. In recommending or appointing individuals to act as mediator, the institution or person called upon by the Parties shall, at all times, ensure the independence and impartiality of a Mediator, as well as take into account the advisability of appointing a Mediator of a nationality other than that of the States Parties.
6. There shall be one mediator in a dispute unless the Parties agree otherwise. If there is more than one mediator, the mediators shall act jointly.
7. The Parties may agree in writing at any time to replace the mediator. If a mediator resigns, is incapacitated or otherwise becomes unable to perform the mediator's functions, the Parties shall agree to a new mediator pursuant to these Guidelines.
8. The Secretariat shall notify the proposed replacement mediator(s) selected by the Parties and shall require the mediator to, within 30 days of receipt of the notice from the Secretariat, confirm in writing his or her acceptance or otherwise, to act as a mediator in the dispute.

Article 4 – Qualifications and Role of Mediator

1. A person appointed as a Mediator shall before accepting the appointment, disclose any circumstance relating to that person that may:
    (a) create a likelihood of bias; or
    (b) affect the conduct of the mediation.
2. A Mediator may be any qualified individual agreed to by the parties whether or not they are listed on any indicative list. Such individuals shall:
    (a) have expertise or experience in mediating disputes involving international trade, other matters covered by the Agreement;
    (b) be in the position to provide the time and attention necessary to properly facilitate the negotiations of the parties;

(c) agree to participate in the mediation consistent with an agreed fee structure;

(d) be impartial, independent of, and not be affiliated to or take instructions from, any Party.

3. A person shall not act as a Mediator if he or she has a conflict of interest that may affect or be perceived by the Secretariat or the Parties to affect the independence or impartiality of the Mediator, unless the Parties are notified in writing of the conflict of interest, and they consent in writing to the appointment of that Mediator.
4. If during the course of the mediation, a Mediator becomes aware of any facts or circumstances that might call into question the Mediator's independence or impartiality in the eyes of the Parties, the Mediator shall disclose those facts or circumstances to the parties in writing without delay. A Party may object to the continued participation of the Mediator. In such a case, the Secretariat shall replace the mediator.

Article 5 – Conduct of Mediation

1. The procedures of the mediation shall be agreed to by the Parties. The procedures should provide sufficient flexibility to facilitate an effective and timely resolution of the dispute.
2. The mediation proceedings may take place in person or by any other means that do not require physical presence as the Parties agree, including by videoconference, or a combination thereof.
3. The Parties shall, in consultation with the Mediator, agree on the following:

   (a) The date and time of each mediation session;

   (b) the venue for the mediation

   (c) the provision of necessary administrative services and the sharing of any fees therefore, as will be required for the mediation.
4. The Mediator will conduct the mediation with fairness to all Parties and will take particular care to ensure that all Parties have adequate opportunities to be heard, to be involved in the process and to have the

opportunity to seek legal or other advice before finalising any resolution.

5. The Mediator shall conduct a mediation in a manner that he or she considers appropriate, while taking into consideration:
    (a) The circumstances of the dispute;
    (b) The wishes of the Parties;
    (c) Any practical considerations that may be relevant to the prompt resolution of the dispute.
6. Prior to or during the mediation, a Mediator may:
    (a) communicate or conduct meetings with the Parties jointly or separately; either directly or through their representatives; directly, by telephone, videoconference or electronically as the Mediator considers it fit and just;
    (b) where necessary, and if the Parties agree to pay the expenses, the mediator shall assist the parties in securing expert advice on a technical aspect of the dispute
7. A Mediator does not have the authority to make a determination, offer his or her opinion of the merits of the dispute, or impose a settlement on the parties, except as the Parties may jointly decide to the contrary.
8. Parties to a mediation have a duty to act in good faith in the mediation and cooperate with the other Party in the settlement of the dispute.
9. Except where the Parties agree, a non-Party to the mediation shall not attend nor participate in a mediation session.

Article 6 – Confidentiality

1. Every person involved in the mediation, including the Mediator, individuals assisting the Mediator, and the Parties and their representatives, shall keep all matters, documents, information and materials relating to or arising out of the mediation private and confidential unless:
    (a) the disclosure is necessary to give effect to the mediation settlement;
    (b) there is mutual written consent of the Parties to the mediation.

2. Every person involved in the mediation, including the Parties and their representatives, acknowledges that any information, materials and settlement terms passing between them are produced solely for the purposes of the mediation and may not be produced as evidence or disclosed in any other proceeding, or any other formal or informal dispute resolution process.
3. Any information submitted to the Mediator by a Party in caucus or private session shall be considered as confidential information between the Party providing the information and the Mediator unless the Party providing the information consents to its disclosure to any other Party to the mediation or the Mediator is compelled to disclose this information by law.

Article 7 – Termination of the Mediation

1. The Mediation shall be terminated if:
    (a) one of the Parties makes a written declaration to the Mediator to terminate the mediation;
    (b) the Parties sign a written Settlement Agreement;
    (c) the Mediator, after consultation with the Parties, makes a written declaration that he or she does not believe that further attempts at mediation will assist in the settlement of the dispute.
2. The Mediator may suspend or terminate the mediation or withdraw as Mediator when he or she reasonably believes the circumstances require it,
3. Where the Mediator suspends, terminates or withdraws from a mediation, the Mediator shall:
    (a) maintain the obligation of confidentiality as to all aspects of the suspension, termination or withdrawal;
    (b) promptly inform the Secretariat of the termination, suspension or withdrawal.

Article 8 – Settlement Agreement

1. Where it appears to the Mediator that there exist elements of a settlement which may be acceptable to the Parties, the mediator may,

with the agreement of the Parties, formulate the terms of a possible settlement and submit them to the Parties for their consideration. After receiving the observations of the Parties, the Mediator may reformulate the terms of a possible settlement in light of the his or her understanding of the results of the negotiation.

2. If the Parties reach agreement on a settlement of the dispute, they may draw up and sign a settlement agreement. If requested by the Parties, the Mediator may assist them in drawing up the settlement agreement.
3. When the Parties sign the settlement agreement, the Parties may agree that the settlement shall be binding on them.
4. The Mediator shall certify the settlement agreement and furnish a copy to each of the Parties.
5. Where the Parties agree that a settlement agreement is binding under paragraph (3), the settlement agreement shall have the same effect as an arbitral award.
6. Settlement agreements shall remain confidential unless the Parties agree otherwise.

Article 9 – Exclusion of Liability

1. The Mediator, the Secretariat, and any person appointed in the mediation shall not be liable to any person (including the Parties to the dispute) for any act or omission done, in good faith and with due authority, in the discharge of the functions in connection with the mediation.

Article 10 – Resort to Arbitration or Judicial Proceedings

1. The Parties to a mediation shall not initiate, during the mediation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject matter of the mediation proceedings.

Article 11 – Role of Mediator in Other Proceedings

1. Unless otherwise agreed by the Parties or required by law, the Mediator shall not:
    (a) act as a representative or counsel of a party to a mediation;
    (b) appear as a witness in any arbitral or judicial proceedings; or

(c) render advice to a person on a dispute that is the subject of the mediation.

2. Unless otherwise agreed by the Parties or required by law, the Parties and the mediator shall agree that they shall not:
   (a) present the mediator as a witness in any judicial proceedings;
   (b) summon the mediator as a witness; or
   (c) compel the mediator to give evidence or to produce documents in any subsequent judicial proceedings or arbitration.

Article 12 – Resort to Other Means of Dispute Settlement

1. At any time, subject to Art. 10, the Parties may undertake to submit their dispute to any other pacific procedure of dispute settlement.

Article 13 – Costs and Fees

1. Unless the Parties agree otherwise, the remuneration of the Mediator, their travel expenses and lodging expenses, and agreed professional fees shall be borne in equal part by the Parties to a dispute.
2. A Party to a dispute shall bear all other costs of the process as determined by the Arbitral Tribunal.
3. Parties to the dispute shall be required to deposit their share of the mediation expenses with the Secretariat prior to the commencement of a mediation.
4. The provisions of paragraphs (1)-(3) are without prejudice to the possibility for the Mediator to assist the Parties *pro bono*.

PART III

CONCILIATION

Article 1 – Scope of Application

1. Where Parties have agreed that disputes or differences between them shall be referred to conciliation under the Article 8 of the Protocol, then such disputes or differences shall be submitted to conciliation in

accordance with these Guidelines subject to such modification as the Parties may agree.

Article 2 – Number and Appointment of Conciliators

1. There shall be one Conciliator unless the Parties agree that there shall be two or three Conciliators.
2. Where there is more than one conciliator, they ought, as a general rule, to act jointly.
3. In conciliation proceedings with one Conciliator, the Parties shall agree on the name of a sole Conciliator.
4. In conciliation proceedings with two Conciliators, each Party shall appoint one Conciliator.
5. In conciliation proceedings with three Conciliators, each Party appoints one Conciliator. Subject to the agreement of the Parties, either the Parties shall agree on the name of the third Conciliator, or the latter shall be appointed by the other two Conciliators.
6. The Parties may request the assistance of an appropriate institution, particularly the Secretariat, or other persons regarding the appointment of Conciliators and may in doing do may request the Secretariat to recommend names or provide a list of suitable persons to serve as Conciliator. In recommending or appointing individuals to act as Conciliator, the institution or person called upon by the Parties shall, at all times, ensure the independence and impartiality of a Conciliator, as well as take into account the advisability of appointing a Conciliator of a nationality other than that of the States Parties.
7. The Secretariat shall establish and maintain an indicative list or roster of individuals who are willing and able to serve as conciliators.

Article 3 – Qualifications and Role of Conciliator

1. The role of a conciliator(s) is to examine and assess the circumstances of a particular dispute and to provide an objective assessment of the legal rights and obligations under the AfCFTA for each of the disputing parties. The conciliators shall typically provide the Parties with a confidential report or decision designed to assist the parties in clarifying

their rights and obligations with a goal of facilitating a resolution of their dispute. The parties may agree to use the results of the conciliation in continuing their negotiations or in their use of mediation or Good Offices.

2. The Conciliators shall be guided at all times by principles of objectivity, fairness and justice, with due regard the legitimate interests, rights and obligations of the Parties.
3. The Conciliators may conduct the conciliation proceedings in such a manner as they consider appropriate, taking into account the circumstances of the case, the expectations expressed by the Parties, including any request by a Party that the Conciliators hear oral statements, and the need for a speedy settlement of the dispute.
4. A person shall not act as a Conciliator if that person has a conflict of interest that may affect or be perceived by the Secretariat or Parties to affect the independence or impartiality of the Conciliator, unless the Parties are notified in writing of the conflict of interest and they consent in writing to the appointment of that Conciliator.
5. A person appointed as a Conciliator shall before accepting the appointment, disclose any circumstance relating to that person that may:
    (a) create a likelihood of bias; or
    (b) affect the conduct of the conciliation.
5. A Conciliator may be an individual listed on the indicative list or any other person agreed to by the parties or an individual on the roster of the Secretariat pursuant to Article 4.5 of these Guidelines. Such individuals shall:
    (a) have expertise or experience in law, international trade, other matters covered by the Agreement or in alternatives means of resolution of disputes;
    (b) Be chosen strictly on the basis of objectivity, reliability and sound judgment;
    (c) be impartial, independent of, and not be affiliated to or take instructions from, any Party.

6. If during the course of the conciliation, a Conciliator becomes aware of any facts or circumstances that might call into question the Conciliator's independence or impartiality in the eyes of the Parties, the Conciliator shall disclose those facts or circumstances to the parties in writing without delay. A Party may object to the continued participation of the Conciliator. In such a case, the Secretariat shall replace the conciliator.

Article 4 – Submission of Statements to Conciliator

1. The Conciliators shall, upon their appointment, request each Party to submit a brief written statement describing the general nature of the dispute and the points at issue. Each Party shall send a copy of its statement to the other Party.
2. The Conciliators may request each Party to submit a further written statement of its position and the facts and grounds in support thereof, supplemented by any documents and other evidence that such Party may deem appropriate. The Party shall send a copy of its further statement to the other Party.
3. At any stage of the conciliation proceedings, the Conciliators may request any Party to provide such additional information as the Conciliators deem appropriate.

Article 5 – Representation and Assistance

1. The Parties may be represented or assisted by persons of their choice. The names and addresses of such persons shall be communicated in writing to the other Party and to the Conciliators; such communication shall specify, inter alia, whether the appointment is made for purposes of representation or of assistance.

Article 6 – Conduct of Conciliation

1. The procedures of the conciliation shall provide sufficient flexibility to ensure an effective and timely resolution of the dispute.
2. The conciliation proceedings may take place in person or by any other means that do not require physical presence as the Parties agree and

consider appropriate considering all relevant circumstances, including by video conference, or a combination thereof.

3. The conciliators may invite the Parties to meet with them or may communicate with them orally or in writing. The conciliators may meet or communicate with the Parties together or with each of them separately.
4. Unless the Parties have agreed upon the place where meetings with the Conciliators are to be held, the Conciliators shall determine such place after consultation with the Parties, with due regard to the circumstances of the conciliation proceedings.
5. The Parties shall, at all times, cooperate with the Conciliators in good faith.
6. Unless the Party concerned can provide reasoned justification to the contrary, the Parties shall comply with requests by the Conciliators to submit written materials, provide evidence and attend meetings.
7. Except where the Parties agree, a non-Party to the conciliation shall not attend nor participate in the conciliation proceedings.

Article 7 – Suggestions by Parties for Settlement of Dispute

1. Each Party may, at its own initiative or at the invitation of the Conciliators, submit to the Conciliators suggestions for the settlement of the dispute.

Article 8 – Report or Decision of the Conciliator(s)

1. Where the Conciliators issue a written report or decision regarding the legal rights and obligations of the parties under the AfCFTA, the parties may consider that such report or decision could form the basis for a resolution of their dispute. Alternatively, the parties could agree that the conciliation report or decision could be used to facilitate further negotiations, including through the use of Good Offices or mediation.
2. If the Parties reach agreement on the settlement of a dispute on the basis of a decision or report of the conciliators, the parties may request the assistance of the conciliators in drawing up the terms of a settlement agreement.

3. When the Parties sign the Settlement Agreement, the Parties may agree that the settlement shall be binding on them.
4. The Conciliators shall certify the Settlement Agreement and furnish a copy to each of the Parties. The Parties may include in the Settlement Agreement a clause that any dispute arising out of or relating to the Settlement Agreement shall be submitted to arbitration.
5. The Report or Decision of the Conciliator(s) and the Settlement Agreement shall only remain confidential through mutual agreement of the parties.

Article 9 – Confidentiality

1. Every person involved in the conciliation, including the Parties and their representatives, shall keep all matters, documents, information and materials relating to or arising out of the conciliation private and confidential unless:
    (a) the disclosure is necessary to give effect to the conciliation settlement;
    (b) there is mutual written consent of the Parties to the mediation.
2. Every person involved in the conciliation, including the Parties and their representatives, acknowledges that any information, materials and settlement terms passing between them are produced solely for the purposes of the conciliation and may not be produced as evidence or disclosed in a court, or any other formal or informal dispute resolution process, except as otherwise required by law.
3. Any information submitted to the Conciliator by a Party in caucus or private session shall be considered as confidential information between the Party providing the information and the Conciliator unless the Party providing the information consents to its disclosure to any other Party to the conciliation or the Mediator is compelled to disclose this information by law.
4. Any report or written decision or other document issued by the conciliators shall remain confidential and shall not be used in any other proceedings without the mutual agreement of the parties.

Article 10 – Termination of Conciliation Proceedings

1. The conciliation proceedings shall be terminated:
    (a) Upon the issuance of a report or decision by the conciliators.
    (b) Upon the signing of the Settlement Agreement by the Parties;
    (c) Upon the adoption by the Conciliators of a written declaration, after consultation with the Parties, to the effect that further efforts at conciliation are no longer justified;
    (d) Upon the submission of a written declaration by one or another of the Parties to the Conciliators to the effect that the conciliation proceedings are terminated;
    (e) Upon acceptance by the Parties to engage in any other pacific procedure of dispute settlement.

Article 11 – Exclusion of Liability

1. The Conciliator, the Secretariat, and any person appointed in the mediation shall not be liable to any person (including the Parties to the dispute) for any act or omission done, in good faith and with due authority, in the discharge of the functions in connection with the conciliation.

Article 12 – Resort to Other Means of Dispute Settlement

1. At any time, the Parties may undertake to submit their dispute to any other pacific procedure of dispute settlement. Parties participating in a conciliation may agree that the decisions of the conciliator(s) may be used by a person offering good offices or in a mediation to facilitate the negotiations of the parties.
2. Unless the Parties agree to the contrary, the results of a conciliation may not be used in an arbitration proceeding.

Article 13 – Costs and Fees

1. Unless the Parties agree otherwise, the remuneration of Conciliators, their travel expenses and lodging expenses, and agreed professional fees shall be borne in equal part by the Parties to a dispute.
2. A Party to a dispute shall bear all other costs of the process.

3. Parties to the dispute shall be required to deposit their share of the conciliation expenses with the Secretariat prior to the commencement of mediation.
4. The provisions of paragraphs (1)-(3) are without prejudice to the possibility for the Conciliators to assist the Parties *pro bono*.

Article 14 – Role of Conciliator in Other Proceedings

1. Unless the parties agree to the contrary, the Conciliators shall not act as a person providing good offices, mediator or an arbitrator in any other proceedings relating to a dispute that was the subject of conciliation proceedings.

Annex 2: Guidelines for the Implementation of Art. 27 AfCFTA's Protocol on Rules and Procedures on the Settlement of Disputes (Arbitration)

PRELIMINARY

Article 1 – Interpretation

1. In these Guidelines, unless context otherwise requires:
   (a) "**Arbitral Tribunal**" means a sole arbitrator or a panel of arbitrators appointed in accordance with these Guidelines;
   (b) "**Claimant**" means a Member State of the AfCFTA that has referred a dispute for arbitration;
   (c) "**Member State**" means a Member State of the AfCFTA;
   (d) "**Party**" means a Member State acting as a Claimant or a Respondent at an arbitration proceeding before the Arbitral Tribunal;
   (e) "**Protocol**" means the AfCFTA's Protocol on Rules and Procedures on the Settlement of Disputes;
   (f) "**Respondent**" means a Member State against which recourse to arbitration is made;
   (g) "**Secretariat**" means AfCFTA Secretariat.

Article 2 – Scope of application

1. Where Parties have agreed that a dispute between them shall be referred to arbitration under Article 27 of the Protocol, then such disputes shall be settled in accordance with these Guidelines subject to any modification thereto as the parties may agree upon.
2. These Guidelines shall govern the selection of arbitrators, the arbitration proceedings, and the enforcement of arbitral decisions.

Article 3 – Written Communications

1. Any written communication by the Arbitral Tribunal, the Secretariat or any Party may be delivered by any appropriate means that provides a record of its delivery or transmission.
2. After the constitution of the Arbitral Tribunal, all communications shall take place directly between the Arbitral Tribunal and the Parties, with the Secretariat copied on all such communications.
3. A written communication shall be deemed received on the earliest day it is delivered to the addressee through diplomatic channels in accordance with Article 3(1). Such time shall be determined with reference to the recipient's time zone.
4. Where a written communication is being communicated to more than one Party, or more than one arbitrator, such written communication shall be deemed received when it is communicated pursuant to Article 3(1) to the last intended recipient.

COMMENCEMENT OF ARBITRATION

Article 4 – Request for Arbitration

1. Any State Party wishing to have recourse of a particular dispute to an arbitration under Article 27 of the Protocol (the "Claimant") shall notify the other State Party (the "Respondent") in writing of its request for that dispute to be referred for arbitration, giving the reasons for the request, including identification of the issues and an indication of the legal basis for the complaint.
2. Upon receipt of the request of the initiation of arbitration, the Respondent shall, unless the Parties otherwise mutually agreed, reply to the request within ten (10) days after the date of its receipt and shall

enter into negotiations in good faith within a period not exceeding thirty (30) days after the date of receipt of the request, with a view to assessing whether an agreement to arbitrate is appropriate, and, if so, the procedures to be used in the arbitration proceedings ("Arbitration Agreement"). Both Parties have the unqualified right to refuse to enter into an Arbitration Agreement.

Article 5 – Arbitration Agreement

1. The Arbitration Agreement between the States Parties shall indicate, *inter alia*, the nature and circumstances of the dispute giving rise to the arbitration, the intention of the Parties to submit their dispute to arbitration subject to the subsequent agreement on the procedures and identity of arbitrators.
2. The Arbitration Agreement, once concluded by all Parties, shall be communicated to the Secretariat at the earliest opportunity.

COMPOSITION AND ESTABLISHMENT OF ARBITRAL TRIBUNAL

Article 6 – Number of arbitrators

1. The Parties shall determine the number of arbitrators except that the number must be uneven, including the possibility of the appointment of a sole arbitrator.
2. Absent the determination of the number of arbitrators by the Parties, the Arbitral Tribunal shall consist of three arbitrators.

Article 7 – Appointment of Arbitral Tribunal

1. Except as the Arbitration Agreement stipulates otherwise, the Parties shall agree on the procedure for appointing the arbitrator(s).
2. If the Parties cannot agree on the procedures for appointing arbitrators or if the arbitration agreement does not provide for such procedures, then each Party in an arbitration that requires the appointment of three arbitrators, shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who will be the Chairperson of the Arbitral Tribunal.
3. The appointment of an arbitrator shall be made by the Secretariat in consultation with the Parties within ten (10) days if:

(a) a Party fails to appoint an arbitrator within ten (10) days from the receipt of a request to do so from the other party; or

(b) the two appointed arbitrators fail to agree on the third arbitrator within ten (10) days from the date of their appointment.

4. The Parties may request the Secretariat to recommend names or provide a list of suitable persons to serve as arbitrator. In recommending or appointing individuals to act as arbitrator, the Secretariat shall ensure the independence and impartiality of an arbitrator, as well as take into account the advisability of appointing an arbitrator of a nationality other than that of the States Parties.
5. The Secretariat shall establish and maintain an indicative list or roster of individuals who are willing and able to serve as arbitrators. The Parties may agree to qualified arbitrators that are not on the indicative list.
6. In an arbitration that requires the appointment of a sole arbitrator, if the Parties cannot agree on an arbitrator within ten (10) days after referring the matter to arbitration, the arbitrator shall be appointed by the Secretariat in consultation with the Parties within ten (10) days.

Article 8 – Qualifications and Role of Arbitrators

1. An arbitrator conducting arbitration under these Guidelines shall be impartial and independent of the parties and shall not act in the arbitration as advocate for any party.
2. An arbitrator shall not, whether before or after appointment, advise any party on the merits or outcome of the dispute.
3. An arbitrator may or may not be an individual listed on the indicative list or roster of the Secretariat pursuant to Article 7.5 of these Guidelines. Such individuals shall:

(a) have expertise or experience in law, international trade, other matters covered by the Agreement or the resolution of disputes arising under international trade agreements;

(b) Be chosen strictly on the basis of objectivity, reliability and sound judgment;

(c) be impartial, independent of, and not be affiliated to or take instructions from, any Party.

4. If, during the course of the arbitration, an arbitrator becomes aware of any facts or circumstances that might call into question its independence or impartiality in the eyes of the Parties, the arbitrator shall disclose those facts or circumstances to the parties in writing without delay.

Article 9 – Challenge or Removal of Arbitrators

1. A Party may withdraw its agreement to an arbitrator if the Party has justifiable doubts as to the arbitrator's impartiality or independence, or if the arbitrator does not possess qualifications expressly agreed on by the Parties.
2. A Party may withdraw its agreement to an arbitrator it has nominated, or in whose appointment it has participated, only for reasons of which this Party becomes aware after the appointment has been made.
3. A Party who intends to withdraw its agreement to an arbitrator shall, within 15 (fifteen) days upon the constitution of the Arbitral Tribunal or becoming aware of any circumstances indicated in paragraph (1), send a written statement of the reasons for removal to the Arbitral Tribunal, the Secretariat, and all other Parties.
4. Where a Party has withdrawn its agreement to an arbitrator, then
   (a) the other Party may consent to the removal; or
   (b) the arbitrator may, in writing to the Secretariat and all Parties, resign from office.
5. The removal or resignation from office by the arbitrator shall not indicate acceptance of the validity of the grounds of challenge.
6. Where an arbitrator is required to be removed by one Party, and neither condition provided for in subparagraph (4) is fulfilled, the AfCFTA Secretary General shall make the decision on the removal of an arbitrator within 15 (fifteen) days of the receipt of the written request to make such decision.
7. Upon resignation or acceptance of the removal of an arbitrator, a replacement arbitrator shall be appointed pursuant to Articles 6 and 7.

CONDUCT OF ARBITRATION

Article 10 – Applicable Rights and Obligations under AfCFTA

1. The Arbitral Tribunal shall decide the disputes submitted to it in accordance with the rights and obligations of the parties under the AfCFTA.
2. If all Parties so agree in writing, the Arbitral Tribunal can decide a dispute from equity and conscience.

Article 11 – Hearings

1. After studying the written submissions of the Parties and all documents relied upon, the Arbitral Tribunal shall hold a hearing if any of them so requests or, failing such a request, it may of its own motion decide to schedule a hearing.
2. The Arbitral Tribunal shall organise the conduct of any hearing in advance, in consultation with the Parties, as it sees fit. The Arbitral Tribunal shall have the fullest authority under the Arbitration Agreement to establish the conduct of a hearing, including its date, form, content, procedure, time-limits and venue.
3. The Arbitral Tribunal shall give to the Parties reasonable notice in writing of any hearing, including the relevant date, time and venue.
4. If witnesses are to be heard, each Party shall communicate at the preliminary meeting, at least fifteen (15) days before the hearing, to the Arbitral Tribunal and to the other Party, the names and addresses of the witnesses the Parties intend to present, the subject upon and languages in which such witnesses will give their testimony.
5. At any time during the proceedings, the Arbitral Tribunal may summon any Party to provide additional evidence.
6. The hearing may take place in person or by any other means that do not require physical presence as the Arbitral Tribunal considers appropriate considering all relevant circumstances, including by videoconference, or a combination thereof. The Arbitral Tribunal may make directions for the interpretation of oral statements made at a

hearing and for a record of the hearing if it deems that either is necessary in the circumstances of the case.

7. Where the due process rights of each Party may be protected otherwise than by physical hearing, as mutually agreed by the Parties and determined by the Arbitral Tribunal, hearings in the arbitration may be conducted virtually in accordance with Virtual Hearing Guidelines to be determined by the Parties (such as the 2020 Africa Academy Protocol on Virtual Hearings in Africa, NCIA Virtual Hearing Guidelines, AFSA Remote Hearing Protocol), and any such procedural order as may be issued by the Arbitral Tribunal. It is hereby agreed that no objection shall be taken to the decision, order, or award of the Arbitral Tribunal on the ground that the hearing regarding the dispute was conducted virtually.

Article 12 – Representation and Assistance

1. The Parties may be represented or assisted by persons of their choice. The names and addresses of such persons shall be communicated in writing to the other Party, to the Secretariat and the Arbitral Tribunal; such communication shall specify whether the appointment is being made for purposes of representation or assistance.

Article 13 – Powers of the Arbitral Tribunal

1. The Arbitral Tribunal may conduct the arbitral proceedings in such manner as it considers appropriate in consultation with the Parties.
2. At all times, the Arbitral Tribunal is under a general duty to:
    (a) act in a fair and impartial manner in respect of all Parties; and
    (b) adopt procedures appropriate for the conduct of the arbitration in an expeditious and cost-effective manner, taking account the particular circumstances of the dispute.
3. If deemed essential by all Parties and the Arbitral Tribunal, the Parties and the Arbitral Tribunal shall hold a case management conference with a view to establishing any additional procedural rules and a procedural timetable.

4. The Arbitral Tribunal's powers, at all times subject to its duty to provide the Parties a reasonable opportunity to state their views, shall include, *inter alia*:
    (a) allowing a Party to supplement, modify or amend any claim, defence, or any other written statement submitted by such Party;
    (b) abridging or extending any period of time prescribed by the Guidelines, any agreement of the parties or any order made by the Arbitral Tribunal;
    (c) conducting such enquiries as the Arbitral Tribunal considers necessary or expedient;
    (d) ordering any Party to make any documents, goods, samples, property, site or thing under its control available for inspection examination or analysis by the Arbitral Tribunal, any other Party, any expert to such Party and any expert to the Arbitral Tribunal;
    (e) ordering any Party to produce to the Arbitral Tribunal and to other Parties any documents or copies of documents in their possession;
    (f) deciding as to the admissibility, relevance or evidential value of any material demonstrated by either Party or any expert opinion;
    (g) discontinuing the arbitration whereby the latter has been abandoned by the Parties and/or all claims and counterclaims have been withdrawn by the Parties.

Article 14 – Joinder and Intervention

1. At any stage in arbitration proceedings, a Party or non-Party to the arbitration may file an application for one or more additional Parties to be intervene in an arbitration on condition that all Parties agree to the intervention.
2. The Parties' agreement to grant an application for intervention is without prejudice to the Arbitral Tribunal's power to subsequently decide any question as to its jurisdiction over the intervening third Party's rights and obligations.
3. At any stage in arbitration proceedings, a Party or non-Party to the arbitration may file an application with the Arbitral Tribunal for one or

more additional Parties to be joined in an arbitration as a Claimant or a Respondent, provided that all Parties have expressed consent to the joinder of the additional Party and the latter Party is *prima facie* bound by the respective arbitration agreement.

4. The Parties' agreement to grant an application for joinder is without prejudice to its power to subsequently decide any question as to its jurisdiction over the additional Party's rights and obligations.

Article 15 – Technical Assistance

1. With a view to facilitating the conduct of the arbitration proceedings, the Parties, or the Arbitral Tribunal subject to the prior consent of the Parties, may make necessary arrangements for administrative assistance by a suitable institution or person, including the Secretariat.
2. Members, in particular least-developed country Members, may request assistance from the Secretariat or other entities to promote their understanding of the use and functioning of these Guidelines.
3. Members may seek additional legal advice and assistance from whatever entity or person they choose consistent with Article 28 of the Protocol.

TERMINATION OF ARBITRATION

Article 16 – Amicable Settlement

1. At all times, before the final award is made, the Parties are encouraged to reach an amicable settlement of a dispute before the Arbitral Tribunal. In the event of such settlement, the Arbitral Tribunal shall either issue an order for the termination of the arbitral proceedings or record the settlement in an award on agreed terms if requested by the Parties. Such an award need not be reasoned.

Article 17 – Grounds for Termination of the Arbitration

1. Apart from the provision of Article 16, the arbitral proceedings before the Arbitral Tribunal shall be terminated if:
    (a) the Arbitral Tribunal decides that it lacks jurisdiction over the dispute;
    (b) the Claimant withdraws the claim;

(c) the Tribunal decides that the continuation of the proceedings has become unnecessary or impossible.

Article 18 – Arbitral Award

1. The Parties to a dispute shall accept the Arbitral Tribunal's decision as final and binding. The Parties shall not seek a second arbitration.
2. Where the Arbitral Tribunal is composed of more than one arbitrator, an award is made by majority decision. If there is no majority, an award shall be made by the presiding arbitrator alone.
3. Absent the Parties' written agreement to the contrary, an award shall indicate the reasons upon which it is based.
4. Subject to the mutual agreement of all Parties, an award may provide for the payment of compensation or otherwise impose a monetary obligation on either Party to a dispute. Such obligation may be substituted, if the Parties so agree, in whole or in part, by an alternative non-monetary obligation that the Parties deem appropriate. At all times, such alternative obligation shall be subject to the execution by all Parties in good faith.

Article 19 – Mediation

1. Upon receipt of the Arbitration Agreement under Article 5(2), the Secretariat may invite the Parties to mediate pursuant to the Guidelines for the Implementation of Article 8 of the Protocol. The Parties shall be at liberty to accept or decline the invitation.
2. Subject to Article 18, the Parties may at any stage of the proceedings agree to mediate in accordance with the Guidelines for the Implementation of Article 8 of the Protocol.
3. The Parties shall promptly notify the Arbitral Tribunal and the Secretariat of the agreement to mediate.
4. Unless the Parties otherwise agree, arbitration proceedings shall be suspended pending the outcome of the mediation commenced pursuant to paragraph (1) or (2).

5. Where a dispute has been referred to mediation and the Parties have failed to reach a settlement, the arbitration proceedings shall proceed in due course.

Article 20 – Costs

1. The remuneration of arbitrators, their travel expenses and lodging expenses, and agreed professional fees shall be borne in equal part by the Parties to a dispute, or in proportions determined by the Arbitral Tribunal.
2. A Party to a dispute shall bear all other costs of the process as determined by the Arbitral Tribunal.
3. Parties to the dispute shall be required to deposit their share of the arbitrators' expenses with the Secretariat at the time of establishment of the Arbitral Tribunal.

Article 21 – Confidentiality

1. All documents and statements, both written and oral, information, materials and proposals in connection with the arbitration shall be confidential, except for the arbitration award, which shall be made public and notified to the DSB for enforcement consistent with Art. 27.5 of the Protocol.
2. The above provision shall not apply if and to the extent that the Parties have expressly agreed in writing to the contrary.

Article 22 – Amendment

1. Members shall decide to keep, modify or terminate these Guidelines in light of the experience of Members in its implementation.
2. The Guidelines applicable to arbitration shall be those in force at the time of commencement of the arbitration unless the Parties have agreed otherwise.

Annex 3: Sources Used to Inform ADR Guidelines

The two tables below set out in detail the source and inspiration for each of the articles provided in the good offices, mediation, conciliation and arbitration Guidelines developed in this report. As highlighted in Section 5, most provisions are inspired by existing guidelines and Rules from African *fora*, in both regional and domestic contexts. In instances where African guidelines were not readily available, recourse was taken to UNCITRAL Rules or WTO-related ADR procedures.

Guidelines for the Implementation of Art. 8 AfCFTA's Protocol on Rules and Procedures on the Settlement of Disputes (Good Offices, Conciliation and Mediation)		
Article Number	**Title**	**Inspiration**
GENERAL PROVISIONS		
1	Interpretation	
2	Calculation of Time Limits	
3	Language of Proceedings	
4	Technical Assistance	2014 Recommended Procedure Article 12.2 SPS
5	Amendment	
PART I - GOOD OFFICES		
1	Appropriate Facilitator	UN Handbook on Peaceful Dispute Settlement
2	Secretary General	Dispute Settlement Understanding, Communication from the WTO Director-General
3	Request of Good Offices	UN Handbook on Peaceful Dispute Settlement
4	Offer of Good Offices	UN Handbook on Peaceful Dispute Settlement
5	Roles and Duties of the Facilitator	UN Handbook on Peaceful Dispute Settlement
6	Conduct of the Good Offices Proceedings	AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes
7	Confidentiality	UN Handbook on Peaceful Dispute Settlement
8	Termination of Good Offices	UN Handbook on Peaceful Dispute Settlement
PART II - MEDIATION		
1	Scope of Application	AFSA Mediation Rules
2	Request for Mediation	AFSA Mediation Rules

3	Agreement on the Mediator	AFSA Mediation Rules, AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes, NCIA Mediation Rules, the Ghana Alternative Dispute Resolution Act (Act 798)
4	Qualifications and Role of Mediator	AFSA Mediation Rules, AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes, NCIA Arbitration Rules, the Ghana Alternative Dispute Resolution Act (Act 798)
5	Conduct of Mediation	AFSA Mediation Rules, AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes, NCIA Mediation Rules, the Ghana Alternative Dispute Resolution Act (Act 798)
6	Confidentiality	AFSA Mediation Rules, AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes
7	Termination of Mediation	NCIA Mediation Rules
8	Settlement Agreement	The Ghana Alternative Dispute Resolution Act (Act 798)
9	Exclusion of Liability	AFSA Mediation Rules, NCIA Mediation Rules
10	Resort to Arbitration or Judicial Proceedings	NCIA Mediation Rules
11	Role of Mediator in Other Proceedings	NCIA Mediation Rules
12	Resort to Other Means of Dispute Settlement	
13	Costs and Fees	The Ghana Alternative Dispute Resolution Act (Act 798), NCIA Arbitration Rules
PART III - CONCILIATION		
1	Scope of Application	AFSA Mediation Rules
2	Number and Appointment of Conciliators	UNCITRAL Conciliation Rules, AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes
3	Qualifications and Role of Conciliator	NCIA Mediation Rules, the Ghana Alternative Dispute Resolution Act (Act 798), AFSA Mediation Rules, AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes, UNCITRAL Conciliation Rules

4	Submission of Statements to Conciliator	UNCITRAL Conciliation Rules, NCIA Mediation Rules
5	Representation and Assistance	UNCITRAL Conciliation Rules
6	Conduct of Conciliation	UNCITRAL Conciliation Rules, AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes
7	Suggestions by Parties for Settlement of Dispute	UNCITRAL Conciliation Rules
8	Report or Decision of the Conciliator(s)	UNCITRAL Conciliation Rules
9	Confidentiality	AFSA Mediation Rules, UNCITRAL Conciliation Rules
10	Termination of Conciliation Proceedings	UNCITRAL Conciliation Rules
11	Exclusion of Liability	AFSA Mediation Rules
12	Resort to Other Means of Dispute Settlement	UNCITRAL Conciliation Rules
13	Costs and Fees	UNCITRAL Conciliation Rules
14	Role of Conciliator in Other Proceedings	UNCITRAL Conciliation Rules

Guidelines for the Implementation of Art. 27 AfCFTA's Protocol on Rules and Procedures on the Settlement of Disputes (Arbitration)		
Article Number	**Title**	**Inspiration**
PRELIMINARY		
1	Interpretation	COMESA Arbitration Rules, EACJ Rules of Arbitration and NCIA Arbitration Rules
2	Scope of application	UNCITRAL Arbitration Rules
3	Written Communications	AFSA International Arbitration Rules
COMMENCEMENT OF ARBITRATION		
4	Request for Arbitration	AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes, EACJ Rules of Arbitration
5	Arbitration Agreement	AFSA International Arbitration Rules, UNCITRAL Arbitration Rules
COMPOSITION AND ESTABLISHMENT OF ARBITRAL TRIBUNAL		
6	Number of arbitrators	AFSA International Arbitration Rules, the Ghana Alternative Dispute Resolution Act (Act 798)

7	Appointment of Arbitral Tribunal	The Ghana Alternative Dispute Resolution Act (Act 798), AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes, NCIA Arbitration Rules
8	Qualifications and Role of Arbitrators	AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes, NCIA Arbitration Rules
9	Challenge or Removal of Arbitrators	NCIA Arbitration Rules
	CONDUCT OF ARBITRATION	
10	Applicable Rights and Obligations under AfCFTA	EACJ Rules of Arbitration
11	Hearings	COMESA Arbitration Rules, AFSA International Arbitration Rules
12	Representation and Assistance	EACJ Rules of Arbitration
13	Powers of the Arbitral Tribunal	AFSA International Arbitration Rules
14	Joinder and Intervention	AFSA International Arbitration Rules
15	Technical Assistance	2014 Recommended Procedure Article 12.2 SPS
	TERMINATION OF ARBITRATION	
16	Amicable Settlement	EACJ Rules of Arbitration
17	Grounds for Termination of the Arbitration	EACJ Rules of Arbitration
18	Arbitral Award	AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes, AFSA International Arbitration Rules
19	Mediation	NCIA Arbitration Rules
20	Costs	AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes
21	Confidentiality	NCIA Arbitration Rules
22	Amendment	AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes, 2014 Recommended Procedure Article 12.2 SPS

Annex 4: Additional Information on ADR in International Fora

4.1. Peaceful dispute settlement in the context of the UN

According to a generally accepted definition by the PCIJ, an '(international) 'dispute' is a "disagreement on a point of law or fact, a conflict of legal views or of interests between two persons".[129]

The duty of peaceful settlement of international disputes is one of the general principles enshrined in the UN Charter, governing the conduct of all Member States of the Organisation.[130] According to Article 2(3) of the UN Charter, "[a]ll Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered".[131] Article 33 (2) provides that the Security Council may, when it deems necessary, call upon the parties to settle their dispute by peaceful means.

Before the UN was created, there had been no universal prohibition for the members of the international community to resolve their disputes by means of war.[132] However, after the UN Charter was adopted in 1945, the principle of peaceful settlement of disputes has gradually been extended to all States as a customary rule of international law. The principle was reaffirmed in a number of the General Assembly resolutions, including resolutions 26/25 (XXV) of 24 October 1970, 37/10 (XXV) of 15 November 1982 and 40/9 of 8 November 1985.[133] In particular, the principle of peaceful settlement of international disputes was restated in the 1970 Declaration on Principles of International

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[129] Rwatida Mafurutu, "The AfCFTA Investment Protocol: Preparations for the Negotiations and Expectations," tralac, December 9, 2021, https://www.tralac.org/blog/article/15456-the-afcfta-investment-protocol-preparations-for-the-negotiations-and-expectations.html.

[130] Handbook on the Peaceful Settlement of Disputes between States

[131] UN, "Charter of the United Nations and Statute of the International Court of Justice," 1945, https://treaties.un.org/doc/Publication/CTC/uncharter.pdf.

[132] League of Nations, "Covenant of the League of Nations," 1924, https://www.iilj.org/wp-content/uploads/2016/08/The-Covenant-of-the-League-of-Nations.pdf.

[133] United Nations, *Handbook on the Peaceful Settlement of Disputes between States*.

Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations (the General Assembly resolution 26/25 (XXV))[134], and the 1982 Manila Declaration on the Peaceful Settlement of Disputes (the General Assembly resolution 37/10).[135]

The principle of the peaceful settlement of international disputes is interconnected with other principles of international law, *i.e.*, sovereign equality of States, refraining from the threat or use of force, inviolability of frontiers, territorial integrity of States, non-intervention in internal affairs and so on.[136] Those principles "are of primary significance and … equally and unreservedly applied, each of them being interpreted taking into account the others".[137]

Chapter VI of the UN Charter, 'Pacific Settlement of Disputes' particularly examines the duty of Member States to resolve their disputes in a peaceful manner. Article 33(1) of the UN Charter envisages the list of means of peaceful dispute settlement: "[t]he parties to any dispute … shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice". The list of means to resolve international disputes in a peaceful manner according to the UN Charter is, therefore, non-exhaustive[138]; the same dispute can be subject to more than one of the enlisted means of settlement, both at the regional and at the universal level, hence the complementarity of means of peaceful settlement.[139] The parties to an international dispute are free to agree upon such means of dispute

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[134] UN, "Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations," 1970, https://legal.un.org/avl/pdf/ha/dpilfrcscun/dpilfrcscun_ph_e.pdf.

[135] Emmanuel Roucounas, "Manila Declaration on the Peaceful Settlement of International Disputes," United Nations Audiovisual Library of International Law, 1982, https://legal.un.org/avl/pdf/ha/mdpsid/mdpsid_e.pdf.

[136] United Nations, *Handbook on the Peaceful Settlement of Disputes between States*.

[137] Conference on Security, "Conference on Security and Co-Operation in Europe Final Act," 1975, https://www.osce.org/files/f/documents/5/c/39501.pdf.

[138] Roucounas, "Manila Declaration on the Peaceful Settlement of International Disputes."

[139] Trindade, "Peaceful Settlement of International Disputes: Current State and Perspectives."

resolution as they consider “appropriate to the circumstances and the nature of their dispute”[140], which entails the principle of free choice of means.[141]

Moreover, the means of peaceful dispute settlement provided for in Article 33 (1) of the UN Charter are also complementary to the exercise of powers by the Security Council as the UN principal organ bearing “primary responsibility for the maintenance of international peace and security” (Article 24 (1)).[15] The International Court of Justice (ICJ) has supported the complementarity of means of peaceful settlement of disputes, for example, in the *Aegean Sea Continental Shelf* case[142] and the *Nicaragua versus United States* case (Jurisdiction and Admissibility).[143]

4.2. ADR cases in the WTO

4.2.1. DG Good offices: Latin American countries, the EC and the US on Bananas

ADR procedures were key to resolving one of the longest lasting disputes in the history of the multilateral trading system: the Bananas trade war. The dispute concerned the preferential tariff treatment the EU provided to African, Caribbean, and Pacific (ACP) countries, which was challenged as discriminatory by Latin American banana producers. After years of litigation under the GATT and the WTO, in November 2007, Colombia requested the good offices of the DG, pursuant to Art. 3.12 DSU to assist in reaching a mutually acceptable solution on an acceptable level of import tariff for bananas into the EU.[144] The following year Panama also requested DG’s good offices.[145] During the almost ten months of good offices proceedings,

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[140] UN, “Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations.”

[141] United Nations, *Handbook on the Peaceful Settlement of Disputes between States*.

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[144] Eckart Guth, “The End of the Bananas Saga,” *Journal of World Trade* 46, no. 1 (2012): 1–32.

[145] World Trade Organization, “Lamy Hails Accord Ending Long Running Banana Dispute - Press/591,” December 15, 2009, https://www.wto.org/english/news_e/pres09_e/pr591_e.htm.

DG Lamy held several meetings with the disputing parties, in addition to other interested WTO Members, ACP banana producers, other banana producers and importers, and tabled various proposals for the tariff parameters with a view to finding an acceptable solution. The parties to the dispute faced numerous disagreements until the announcement of a comprehensive agreement, the Geneva Agreement on Trade in Bananas (GATB), in December 2009, which finally settled the dispute.[146] In the bananas dispute, the choice for the good offices of DG Pascal Lamy was decisive in reaching a solution, since he had a strategic openness and close relationship with the EU.[147] His leadership was instrumental in paving the way for the resolution of the issue and also illustrates the importance of flexibility in the proceedings, in terms of providing space for the facilitator to consult with parties and proposing solutions.

4.2.2. Mediation: Philippines, Thailand, and EC on Tuna

In 2002, the Philippines and Thailand, requested mediation to the DG, to examine the extent to which the legitimate interests of the Philippines and Thailand were being unduly impaired as a result of the implementation by the EC of the preferential tariff treatment for canned tuna originating in ACP states.[148] If the mediator were to conclude there had been an impairment, he/she could propose means by which the situation could be addressed.[149] Since the disputing Members did not consider the matter to be a "dispute" within the terms of the DSU, the mediation did not occur precisely under Art. 5 DSU, although it was covered by procedures *similar* to those envisaged under such provision. The DG appointed DDG Rufus H. Yerxa to mediate the dispute, which was later successfully resolved based on his advisory

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[146] Guth, "The End of the Bananas Saga."

[147] DG Pascal Lamy had been the Commissioner for Trade at the European Commission from 1999 to 2004.

[148] *Request for Mediation by the Philippines, Thailand and the European Communities-Communication from the Director-General*, WT/GC/66, 16 Oct. 2002.

[149] *Ibid*.

opinion.[150] The case demonstrates the importance of allowing flexibility in the appointment of the mediator and illustrates how mediation could be a time-effective procedure, since a mutually agreed solution was reached less than four months after the request for mediation had been made.[151]

4.2.3. Good Offices/mediation cases under Art. 12.2 SPS

Art. 12.2 SPS and the good offices of the SPS Committee Chair have been resorted to in three relevant cases. In 2001, Canada and India tried to reach a mutually agreed solution by holding consultations pursuant to Art. 12.2 SPS to address a dispute regarding Indian import restrictions on bovine semen from Canada on the grounds of bovine spongiform encephalopathy (BSE) concerns.[152] Although the dispute has reportedly been partially resolved thus far, Canada has communicated that the procedures "allowed for continued good-will on both sides to find a reasonable solution to the issue."[153]

In another case, the SPS Committee Chair offered his good offices under Art. 12.2 SPS to assist Argentina and the EC in resolving a dispute on measures to prevent the spread of citrus canker in 1998.[154] The issue was later reported as resolved by Argentina, with the Chair's good offices having helped the parties reach a mutually agreed solution.[155]

An additional instance of resort to Art. 12.2 SPS also occurred in 1998, when the US requested the SPS Chair to use his good offices to facilitate consultations with Poland on restrictions on wheat and oilseeds.[156] Although

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[150] *Request for Mediation by the Philippines, Thailand and the European Communities- Communication from the Director-General – Addendum,* WT/GC/66/Add.1, 23 Dec. 2002.

[151] Park and Chung, "Analysis of a New Mediation Procedure under the WTO SPS Agreement."

[152] SPS Committee, *Canadian Experience Using Article 12.2 ad hoc Consultations to Facilitate the Resolution of an SPS Trade-Related Issues*, G/SPS/GEN/1080, 25 Nov. 2011.

[153] *Ibid*.

[154] SPS Committee, *Specific Trade Concerns- Note by the Secretariat*, G/SPS/GEN/204/Rev.9 /Add.3, 6 Feb. 2009.

[155] *Ibid*.

[156] SPS Committee, *Specific Trade Concerns- Note by the Secretariat*, G/SPS/GEN/204/ Rev.9/Add.2, 9 Feb. 2009.

in this particular case no resolution had been reported, it is noteworthy that in all instances, the presence of the SPS Committee Chair as a third party added rigour to the process and helped disputing parties to approach issues in a more constructive manner.

4.2.4. Arbitration: *US – Section 110(5) Copyright Act (Article 25)*

Under Art. 25 DSU, the only case brought to date occurred in 2001 between the US and the EC. In this case, the parties mutually agreed to resort to arbitration to determine the level of nullification or impairment of the benefits due to the EC as a result of Section 110(B) of the US Copyright Act of the US, which had been found to be in violation of WTO rules.[157] The US and the EC could choose the original panellists in their dispute to sit as arbitrators and, for instance, agreed that the legal principles developed under Art. 22 DSU proceedings would apply to their case.[158] This case of resort to arbitration under Art. 25 DSU illustrates the high level of discretion granted to the parties in establishing the rules to be followed in the arbitration proceedings in the WTO.

Annex 5: Additional Information on African Case Studies

6.1. ADR in RECs

6.1.1. COMESA

Founded in 1994, the Common Market for Eastern and Southern Africa (COMESA) is the largest REC in Africa. It consists of 21 member states[159]

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[157] Malkawi, "Arbitration and the World Trade Organization—The Forgotten Provisions of Article 25 of the Dispute Settlement Understanding," April 1, 2007.

[158] Malkawi.

[159] Member states of COMESA include Burundi, Comoros, Democratic Republic of the Congo, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia, Zimbabwe

with a combined population of 583 million, GDP of $805 billion, and $324 billion in global trade. In geographic terms COMESA covers almost two-thirds of the African continent.

Art. 7 of the Founding Treaty of COMESA establishes the COMESA Court of Justice (CoJ) with the mandate to “ensure the adherence to law in the interpretation and application of this (the COMESA) treaty”.[160] While the COMESA CoJ is empowered to hear disputes between states and private parties within member states, Art. 28 extends the jurisdiction of the court to any arbitration matter which arises from (a) an arbitration clause contained in a contract to which the Common Market or any of its institutions is a party which confers such jurisdiction; or (b) on matters arising from a dispute between the Member States regarding the Treaty if the dispute is submitted to it under a special agreement between the Member States concerned.[161] Thus, the COMESA CoJ may hear arbitration cases which concern any bodies of COMESA, or if the COMESA CoJ is given explicit jurisdiction through an arbitration clause contained in an agreement between member states. This means that private parties do not have access to the arbitration function of the COMESA Court of Justice, which is the only form of ADR it is empowered to provide.[162]

However, Rule 53.1b in the COMESA Court of Justice’s Rules of Procedure allow the court to determine during the pre-trial proceedings if the case may benefit from "the possibility of mediation, conciliation or any other form of alternative dispute resolution where the Court may direct that the case proceeds to mediation or other form of alternative dispute resolution and fix a time frame for their completion".[163] However, these ADR processes would take place outside of the COMESA CoJ’s mandate, with Rule 53.5 stating that

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[160] COMESA, “Treaty Establishing the Common Market For Eastern and Southern Africa,” 2009, http://comesacourt.org/wp-content/uploads/2018/10/Comesa_treaty_revised_2009.pdf.

[161] COMESA.

[162] COMESA.

[163] COMESA, “COMESA Court of Justice Rules of Procedure,” 2016, http://comesacourt.org/wp-content/uploads/2018/10/RULES-of-the-Court_final.pdf.

"Where the mediation or conciliation or any other form of alternative dispute resolution fails, the matter shall proceed to trial."[164]

Therefore, within the scope of ADR the COMESA CoJ is primarily concerned with arbitration. To this end it released an updated set of rules governing arbitration proceedings in 2018, which provide comprehensive guidance relating to the composition and jurisdiction of the arbitration tribunal, the means to select and remove arbitrators, the proceedings, and the award and cost allocations.[165]

6.1.2. EAC

The East African Community (EAC) is a regional intergovernmental organisation of six Partner States: The Republics of Burundi, Kenya, Rwanda, South Sudan, the United Republic of Tanzania, and the Republic of Uganda, with its headquarters in Arusha, Tanzania.

The Community was established in accordance with Treaty for the Establishment of the East African Community (EAC Treaty). The Treaty was signed on 30 November 1999 and entered into force on 7 July 2000 upon ratification by the first three Partner States.

The East African Court of Justice (EACJ) was created in accordance with Article 9 of EAC Treaty, which recognizes the EACJ as one of the Organs and Institutions of the Community.[166] The Court was established in November 2001. Under Article 27 (1) of the EAC Treaty, the task of the EACJ is to "ensure the adherence to law in the interpretation and application of and compliance with … (EAC Treaty)".[167] However, Article 28 (2) provides that the 'initial' jurisdiction of the EACJ, *i.e.*, the interpretation and application of the EAC Treaty, is subject to extension to "other original, appellate, human rights

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[164] COMESA.

[165] COMESA, "COMESA Court Arbitration Rules," 2018, https://comesacourt.org/wp-content/uploads/2019/11/COMESA-COURT-ARBITRATION-RULES-2018.pdf.

[166] EAC, "The Treaty for the Establishment of the East African Community," 1999, https://www.eala.org/uploads/The_Treaty_for_the_Establishment_of_the_East_Africa_Community_2006_1999.pdf.

[167] EAC.

and other jurisdiction" according to what the Council of the Community determines. The Partner States of the Community should operationalize the extended jurisdiction by concluding a respective protocol.[168]

Apart from the general jurisdiction of the EACJ, Article 32 of the EAC Treaty enables it to serve as an arbitration panel. Notably, under this article, the EACJ has jurisdiction to hear and determine any matter, arising from either of the following: (a) an arbitration clause contained in a contract or agreement to which the Community or any of its institutions is a party and which confers such jurisdiction to the EACJ; (b) a dispute between the Partner States of the Community regarding the EAC Treaty if a special agreement between these Partner States provides for the submission of this dispute to the EACJ arbitration; (c) an arbitration clause contained in a commercial contract or agreement in which the parties have conferred jurisdiction on the EACJ.[169]

Therefore, as an arbitral tribunal, the EACJ is competent to handle such diverse categories of disputes as commercial disputes between private parties, disputes of different nature between the Community itself or its institutions and any third parties, as well as inter-State disputes between the Partner States of the Community (with regard to the provisions of the EAC Treaty only).

Article 42 of EAC Treaty empowers the EACJ to adopt the rules of procedure to "regulate the detailed conduct of the business of the Court".[170] In exercising this provision, in 2012, the EACJ adopted 'The East African Court of Justice Arbitration Rules' (Rules of Arbitration). The EACJ Rules of Arbitration were designed to make EACJ arbitration efficient, cost-effective, flexible, confidential, neutral, binding and expeditious.[171]

The mode of application of the Rules of Arbitration as such is very flexible: Rule 1 (2) provides that the EACJ Rules of Arbitration shall apply to every

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[168] EAC.

[169] EAC.

[170] EAC.

[171] EACJ, "East African Court of Justice Arbitration Rules, 2012."

arbitration under Article 32 of the EAC Treaty *unless* (emphasis added) the parties to an arbitration agree otherwise. The parties to any arbitration may also agree to modify or wave the application of any of the rules. Moreover, in the case of the conflict between any Rule and a provision of the law applicable to the arbitration from which the parties cannot derogate, the latter prevails.[172]

Under Rule 1 (4), an 'arbitrator' at the EACJ is a judge or judges of the EACJ that constitute(s) the Tribunal, while the 'tribunal' means the Court when it exercises the jurisdiction under Article 32 of the EAC Treaty, including a judge acting as a sole arbitrator. Therefore, in the case of the EACJ, the Court is not just a seat of an arbitral tribunal. Rather, the Court itself takes the form of an arbitral tribunal when it acts in accordance with Article 32 of the EAC Treaty.[173]

The claimant party initiates arbitration by notifying the respondent in writing of its request to refer a particular dispute to arbitration; this claimant party then submits the request to the Registrar. The date of the receipt of such by the Registrar becomes the date of commencement of the arbitral proceedings. The claimant must also pay the fee when submitting the request, and, within seven days, provide the respondent with: (a) a copy of the request and claim; (b) copies of annexures to the claim; (c) evidence of payment of fee. Within 15 days after the receipt of these documents, the respondent must submit an answer to the Registrar and to the claimant; the respondent may file a counterclaim.[174]

Rule 8 addresses the issue of the appointment of arbitrators. In this regard, the appointing authority (that is, the President or the Vice President the EACJ) appoints, from among the Judges of the EACJ, an arbitral panel or a Sole Arbitrator. The appointing authority then appoints the Chairman of the Tribunal from among the Judges that have been appointed for the Tribunal.

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[172] EACJ.

[173] EACJ.

[174] EACJ.

During the process, appointing authority should bear in mind the necessity to secure the appointment of independent and impartial arbitrators.[175]

The arbitral tribunal at the EACJ decides the dispute "in accordance with the law chosen by the parties", with the possibility to decide on the substance of the dispute *ex aequo et bono*, if the parties expressly authorize it to do so (Rule 11). In the absence of the choice of the law, the Tribunal applies the rules of law that it considers appropriate.[176]

Under Rule 12, before an arbitration proceeding starts, the Tribunal shall hold a preliminary conference with the parties to draw up the document defining the agreed Terms of Reference, which must be signed by the parties and the Tribunal. After the Terms of Reference have been signed, it becomes impossible for any party to present new claims or counterclaims that fall outside the Terms of Reference. However, the Tribunal may allow for an exception from this prohibition, considering all relevant circumstances.[177]

To ensure smooth arbitration proceedings, it is vital that arbitrators are impartial and independent, and that they understand their role and the significance of the rules.[178] To this end, Rules 16-19 contain the provisions concerning the impartiality and the replacement of arbitrators. On the one hand, a prospective arbitrator must disclose to the appointing authority (and an appointed arbitrator – to the parties) any circumstances that could affect his or her impartiality or independence. On the other hand, any party to a dispute may challenge an arbitrator if this party believes that there are circumstances that "give rise to justifiable doubts as to that arbitrator's impartiality or independence". If the other party does not agree to the

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[175] EACJ.

[176] EACJ.

[177] EACJ.

[178] Faustin Ntezilyayo, "The East African Court of Justice's Arbitral Jurisdiction over Commercial Contract Disputes," n.d., https://www.academia.edu/21863943/The_East_African_Court_of_Justices_Arbitral_Jurisdiction_over_Commercial_Contract_Disputes.

challenge and the challenged arbitrator does not withdraw, the appointing authority makes the decision on the challenge.[179]

Rule 23 is of particular importance; this is a rule commonly known as a 'Competence-Competence' rule.[180] This provision assesses the question of the jurisdiction of an arbitral tribunal over an objection that it has no jurisdiction, including an objection as to the existence or validity of the arbitration agreement. Rule 23 gives an affirmative answer to this question; the decision of the Tribunal on this issue is final.[181]

Rules 24-25 provide an overview of what the arbitral proceedings at the EACJ comprise. The Tribunal principally acts as a judicial organ: it studies the written submissions of the parties and the pertaining evidence; hears the parties together in person if any of them so requests, or on its own motion; makes arrangements for the translation of oral testimony and for a record of the hearing; takes measures for protecting trade secrets and confidential information of any person involved in the proceedings etc. However, almost all of the Tribunal's powers are conditional upon the parties' approval or request. It is remarkable that the hearings must be held in camera unless the parties agree otherwise (Rule 25 (4)).[182]

To ensure the effectiveness of the EACJ as an arbitral tribunal when the arbitrators may need the assistance of technical experts in a certain field beyond their own knowledge, Rule 26 empowers the Tribunal to appoint one or more experts to report to it on any specific issue. The Tribunal may also require a party to "give, produce or provide to such expert any relevant information, documents, goods or other property" for examination. The parties incur the expenses in relation to the appointment of experts; the Tribunal

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[179] EACJ, "East African Court of Justice Arbitration Rules, 2012."

[180] Doug Jones, "Competence-Competence," no. 75 (2009).

[181] EACJ, "East African Court of Justice Arbitration Rules, 2012."

[182] EACJ.

determines the proportion in which each party should contribute to expert fees.[183]

When it comes to decision making, in arbitral proceedings with three or more arbitrators, the majority makes any decision or order of the Tribunal.

There are certain grounds for the termination of arbitral proceedings, including where: the Tribunal decides that it has no jurisdiction; the Claimant withdraws the claim; or the Tribunal decides that the continuation of the proceedings has become unnecessary or impossible. Under Rule 29, the parties retain the possibility to settle their dispute during the arbitral proceedings. In this case, the Tribunal also terminates the proceedings. If the parties so request, the Tribunal may record the terms of such settlement in the form of an arbitral award.[184]

The proceedings generally result in the adoption of an arbitral award, which is formalized in writing and is generally final and binding on the parties. The award is not necessarily confidential; it may be made public, but only if all the parties' consent to it.[185]

Within 30 days after the adoption of an award, either party may also request the Tribunal to provide the interpretation of the award or of its part or to correct the award or its part. Moreover, under Rule 35, within 30 days after the receipt of the award, either party may apply to the Tribunal with a request to review the award on the grounds envisaged by Rule 35. Such grounds include: (a) some incapacity of a party to the arbitration agreement; (b) invalidity of the arbitration agreement; (c) absence of notice of the arbitral proceedings to the party making the application; *etc.*[186] The list of the grounds for the review of an award reflect the traditional practice of arbitral tribunals. Unlike the International Centre for Settlement of Investment Disputes (ICSID) Convention, which provides for different grounds for the revision and the

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[183] EACJ.

[184] EACJ.

[185] EACJ.

[186] EACJ.

annulment of an award, the EACJ Rules of Arbitration lack the possibility of the annulment of an award. Notably, the EACJ Rules of Arbitration comprise all different grounds, including when the award was obtained through fraud or corruption, into the single category of those that may result in the revision of the award.[187]

The Tribunal itself has the power to decide on whether the request for review is justified; in the case of an affirmative decision, the Tribunal may hear such matter or evidence as it deems necessary and review the award within 45 days after the receipt of the request.

The final part of the Rules of Arbitration (Rules 37-38) covers the issue of arbitral costs and fees.

In the first place, under 37 (1), there are no fees that are payable to the arbitrators. Only the costs of arbitration, which include filing fees, the expenses incurred by the Tribunal to obtain expert advice and other assistance, the costs for legal representation etc., are payable in relation to arbitration proceedings.

In principle, the costs of arbitration are borne by the unsuccessful party. At the same time, the Tribunal may apportion such costs between the parties if it considers such apportionment reasonable.[188]

6.2. ADR Domestic Contexts

6.2.1. Ghana

As mentioned in section 2.2, Ghana has a long and successful history of using ADR to resolve disputes. Between 2008 and 2014, 34,700 cases were mediated with just under 50% of those reaching a settlement agreement.[189] Ghana's positive experience with ADR let to the institutionalisation of ADR through the creation of dedicated ADR legislation in 2010 after almost 10

[187] EACJ.

[188] EACJ.

[189] Price, "Alternative Dispute Resolution in Africa."

years of public consultations and re-drafting.[190] The Alternative Dispute Resolution Act, Act 798 (ADR Act) began with the creation of an ADR taskforce in 2001 to provide recommendations relating to the integration of ADR into Ghana's judicial system.[191] The ADR Act is the most comprehensive ADR legislation in Africa having successfully integrated ADR, including mediation, into Ghana's civil justice system.[192] The success of this legislation has been attributed to the extensive government support for ADR processes stemming from its understanding of the value of ADR. Political support was needed to build domestic capacity in ADR specialisation as trained ADR specialists are essential for its efficacy, while the Ghanaian government also worked to raise awareness of ADR with key stakeholders within the justice system.[193] This need for capacity building and spreading awareness among member states may be important lessons for the Secretariat if the use of ADR is to truly flourish within the AfCFTA.

The ADR Act is divided into five parts. The first two provide extensive procedural guidelines for the use of arbitration and mediation respectively, while the latter three deal with the recognition of customary arbitration, the creation of a dedicated ADR centre (which has still not materialised 11 years later), and administrative matters.

The arbitration guidelines consist of sections pertaining to procedure, qualification and appointment of arbitrators, fees and costs, jurisdiction, and awards. The mediation guidelines consist of individual provisions on a wide range of procedural issues including appointment of mediators, obligations of disclosure by mediators, the powers of the mediator, the confidentiality of mediation, the settlement agreement, and the distribution of costs.[194]

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[190] Uwazie, "Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability."

[191] Price, "Alternative Dispute Resolution in Africa."

[192] Price.

[193] Uwazie, "Alternative Dispute Resolution in Africa: Preventing Conflict and Enhancing Stability."

[194] Parliament of the Republic of Ghana, "Alternative Dispute Resolution Act."

Notably, under Rule 82 mediation outcomes are binding and enforceable as court judgements.[195] This creates assurance for parties that the mediation process is as secure as a trial in court, which may incentivise the use of mediation given that recourse to dispute resolution is often to obtain an enforceable remedy.[196]

Clearly Ghana's ADR Act, as the most comprehensive ADR legislation in Africa, holds several key lessons for the creation of ADR guidelines within the context of the AfCFTA.

6.2.2. Kenya

In Kenya, the Nairobi Centre for International Arbitration (NCIA) is one of the most active centres for the promotion of international arbitration and alternative procedures for dispute resolution. In addition to delivering training and accreditation, the Centre established in 2013 provides a neutral venue and institutional support for the conduct of arbitration and mediation. NCIA is administered by a Board of Directors which comprises professionals from the East African Region. The NCIA provides a set of procedural guidelines on arbitration with timelines and a case counsel to assist the tribunal in the collation of documents, and parties in complying with the tribunal directions.[197] On mediation, the Centre administers the process on behalf of the parties and mediator and provides a conducive environment to facilitate the mediation.

The NCIA provides for Arbitration and Mediation Rules, which have been effective since December 2015. Arbitration Rules have been revised in 2019.[198] Notably, Rule 18(4) NCIA Arbitration Rules provides a great amount of flexibility in proceedings, stating that the Arbitral Tribunal may, with the consent of all parties, meet at any geographical location it considers

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[195] Parliament of the Republic of Ghana.

[196] Price, "Alternative Dispute Resolution in Africa."

[197] Nairobi Centre for International Arbitration (NCIA), "Nairobi Centre for International Arbitration (NCIA)," Nairobi Centre for International Arbitration, accessed November 5, 2021, https://ncia.or.ke/about-us/.

[198] Nairobi Centre for International Arbitration (NCIA), "NCIA Arbitration and Mediation Rules, Revised Version."

appropriate to hold meetings or hearings. Rule 22(5) explicitly mentions that a hearing may be conducted via videoconference, telephone, or other electronic means. Rule 32 provides that the Centre may invite parties to mediate upon receipt of a response to a request for arbitration, but parties are at liberty to accept or decline the invitation.

On mediation, 24 rules make up the 2015 NCIA Mediation Rules.[199] For instance, there are elaborate rules on the appointment of mediators, foreseeing the possibility of disagreement between the parties. In such case, the Registrar shall propose 3 names of mediators from the Centre's panel of Accredited Mediators, and parties shall jointly select a mediation on this basis, according to Rule 8. Importantly, Rule 11 NCIA Mediation Rules clarifies the role of a mediator in a dispute, providing that a mediator may communicate with parties jointly or separately, directly, by telephone, videoconference or electronically, as the mediator considers fit. Rule 22 further explains the role of a mediator in proceedings other than the particular dispute, for instance, stating that a mediator cannot appear as a witness or representative of a party to a mediation. Confidentiality is stressed in NCIA Mediation Rules: Rule 15(1) details that all matters arising from the mediation are confidential unless disclosure is compelled by law, necessary to give effect to an agreement reached to settle any part of the dispute, or there is written consent by parties, and Rule 15(2) requires parties to sign a confidentiality undertaking. Rule 20 NCIA Mediation Rules states that the Registrar may arrange for administrative assistance to facilitate the mediation.

The Centre also makes available Virtual Hearing Guidelines, which adapt and reproduce the 2020 Africa Academy Protocol on Virtual Hearings in Africa.[200] NCIA's Virtual Hearing Guidelines set out how communications shall be made in online proceedings, specific logistics to be followed, rules of conduct for virtual hearings, as well as several clauses on recordings, security and

[199] Nairobi Centre for International Arbitration (NCIA).

[200] Africa Arbitration Academy, "Africa Arbitration Academy Protocol on Virtual Hearings in Africa," April 2020, https://www.africaarbitrationacademy.org/wp-content/uploads/2020/04/Africa-Arbitration-Academy-Protocol-on-Virtual-Hearings-in-Africa-2020.pdf.

privacy considerations and technical standards. [201] On cybersecurity standards, the Guidelines make reference to the Protocol on Cybersecurity in International Arbitration 2020, [202] which has been created to provide a framework for determining reasonable information-security measures for arbitration matters.

6.2.3. South Africa

The Arbitration Foundation of Southern Africa (AFSA) was established in 1996 to provide the venue for the alternative dispute resolution by mediation, conciliation, and arbitration, as well as to train and develop arbitrators and mediators. With the adoption of the International Arbitration Act in 2017, AFSA established its International Division for the administration of international arbitration on the African continent.

To facilitate and regulate its work as a mediation and arbitration centre, AFSA adopted a number of guiding instruments, including the AFSA Mediation Rules, the Commercial Rules (for domestic arbitration), the Standard and Expedited Rules (for the conduct of unadministered arbitration, including the guidelines on e-arbitration), and, most recently, the AFSA International Arbitration Rules (for international arbitration).

The AFSA Mediation Rules is a comprehensive set of norms applicable where parties have agreed to submit “disputes or differences between them” to mediation under the AFSA Mediation Rules or “words to similar effect”, subject to such modification as the parties may agree upon (Art. 1(1)). The AFSA Mediation Rules apply even if the agreement between the parties provides for the submission of the matter to AFSA for “mediation, conciliation, alternative dispute resolution or such similar terms” (Art. 1(2)).

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[201] Nairobi Centre for International Arbitration (NCIA), “NCIA Virtual Hearing Guidelines.”

[202] International Council for Commercial Arbitration (ICCA), New York City Bar Association, and International Institute for Conflict Prevention and Resolution (CPR), “ICCA-NYC Bar-CPR Protocol on Cybersecurity in International Arbitration (2020 Edition),” 2019, https://www.cpradr.org/resource-center/protocols-guidelines/icca-nyc-bar-cybersecurities/_res/id=Attachments/index=0/ICCA-NYC%20Bar-CPR%20Cybersecurity%20Protocol%20for%20International%20Arbitration%20-%20Print%20Version.pdf.

There are two ways to commence the mediation procedure at AFSA. Where there is a prior agreement to mediate under the Rules, the mediation commences when AFSA accepts in writing the request for mediation submitted by either party. However, if there is no prior agreement to mediate under the Rules, the party that initiates the mediation should file a written request with AFSA, and the latter delivers this request to the other party with an invitation to participate in a mediation process. The mediation process can only start when that other party communicates its acceptance in writing of the invitation to mediate, and AFSA accepts in writing the request for mediation (Art. 2).

The appointment of a mediator is subject to the principles of impartiality and independence: any prospective mediator at AFSA must sign a statement of impartiality and independence. If, in the course of mediation, a mediator becomes aware of any facts or circumstances that might affect his or her independence or impartiality, the mediator must disclose it to the parties in writing and without delay (Art. 4).

The mediator or a mechanism for the appointment of a mediator is designated jointly by the parties; in the event of disagreement or any other obstacle to the appointment of a mediator, AFSA appoints a mediator from the mediators listed in the AFSA Panel of Accredited Mediators.

Generally, there is a single mediator under AFSA Mediation Rules; however, the parties are free to expressly agree otherwise. The parties may also agree to replace the mediator at any time.

The parties attend the mediation in person yet may authorize one or more persons to represent them in the process. More specifically, although legal representatives may accompany a party to the mediation, unless otherwise agreed, the party’s external lawyer cannot represent this party at the mediation (Art. 5). This rule underlines the non-judicial character of dispute resolution by mediation.

Although the mediator is allowed certain discretion during the procedure, he or she has no authority to impose a settlement on the parties. Unless there is

a specific agreement to the contrary, mediation meetings between the parties and the mediator take place on one day.

The mediation terminates on three occasions, namely, when:

1. a party withdraws from or refuses to participate in the mediation;
2. the mediator decides on the impossibility to reach an amicable settlement;
3. the parties conclude a written settlement agreement.

There is also the fourth appropriate basis for the termination of the mediation, *i.e.*, when party refuses or fails to pay its portion of the fee due to the mediator.

The mediator may also adjourn the mediation to allow the parties to consider specific proposals, obtain further information or for any other reason that the mediator regards as helpful. If all parties do not consent to reconvene the mediation after such adjournment, AFSA issues a certificate confirming the termination of the mediation.

If the parties do not reach a settlement of all or part of the dispute, they may request the mediator to make recommendations concerning an appropriate resolution of the dispute. It is apparent that such request does not bind either party to accept the recommendation; the mediator is also free to decline to make any such recommendation.

However, if the parties succeed in reaching a solution, this solution is formalized in the form of a settlement agreement. It is remarkable that, although settlement agreement is not initially legally binding, it becomes binging on the parties after “it has been reduced to writing and signed” (Rule 8).

All documents, information and materials, all proposals and terms of any settlement in connection with the mediation are confidential (Rule 9). There are, however, two exceptions to the rule of confidentiality: a) when the parties expressly agree in writing to the contrary; and b) when a disclosure is required by law or is necessary to enforce the settlement agreement.

Moreover, the confidentiality requirement can be waived if the mediator considers that there is serious risk of significant harm to the life or safety of any person if the information is not disclosed.

There are two types of expenses borne by the parties in relation to the mediation: administration costs and fees of the mediation.

AFSA always charges the referring party, at the time when the request for mediation is submitted, a single fee for the administration of each mediation.

As for the fees of the mediation, unless agreed otherwise, each must pay an equivalent pro rata share of the mediator's fees to AFSA at the time that the mediator is appointed. The mediator's fees are held by AFSA and paid to the mediator after the conclusion of the mediation meeting.

In principle, each step of the procedure of the mediation is conditioned upon a prior receipt of full payment. This approach evidences the contractual and commercial nature of mediation, as opposed to State-run and, at least to some extent, budget-based judicial proceedings.

At the end of each mediation, the mediator is requested to complete the AFSA certificate form and submit it to AFSA. Unlike all the other mediation-related materials, the content of the certificate is not confidential. In their turn, each party is requested to complete a survey form as part of the AFSA quality control process; the content of each form is confidential.

On 1 June 2021, the AFSA International Arbitration Rules became effective. The Rules apply to all international arbitrations commenced at AFSA on or after that date, unless: (a) the parties have specifically chosen the AFSA Commercial Rules, or (b) AFSA concludes that the dispute falls under the category of domestic ones. The Rules provide a set of rules that reflect the latest trends in international arbitration, which consolidates South Africa's position as a leading arbitration seat in Africa. The adoption of the Rules followed the increase in AFSA's international case load, which more than doubled since the enactment in 2017 of South Africa's International Arbitration Act that is based on the UNCITRAL Model Law.

The most significant change brought about by the Rules is the introduction of the AFSA International Court, together with the AFSA International Secretariat

responsible for the Court's day-to-day administration. It is notable that the Court does not itself decide on the merits of disputes; rather, the function of the Court is to supervise the administration of arbitral disputes by the Arbitral Tribunal, including the appointment of arbitrators and determining issues of jurisdiction. The decisions of the Court are final and binding upon the parties, unless otherwise determined by the Court.

On arbitration proceedings, the Rules generally reiterate many well-established norms and practices of arbitral tribunals, namely: the parties' opportunity to present documentary and witness evidence; the Tribunal's power to appoint experts and to order interim measures at the request of either party *etc.*

An arbitral award is final and binding on the parties, subject to the possibility of its correction and interpretation. A party may also request the Tribunal to deliver an additional award regarding those claims that were presented within the arbitral proceedings but were not addressed in the original award. All awards together with all relevant materials are confidential, subject to a few exceptions, notably: a party may have to disclose information by legal duty; disclosure may be required to protect or pursue a legal right; disclosure may be required to enforce or challenge an award before a state court or other legal authority.

The parties bear joint and several liability with respect to AFSA and the Arbitral Tribunal for the arbitration costs. The Arbitral Tribunal may decide by an award that all or part of the legal or other expenses incurred by a party in relation to the arbitration (*i.e.,* "legal costs") must be paid by another party.

At the same time, the Rules contain the provisions that are not yet common for all arbitration institutions.

The Rules contain the guidelines on the use of *electronic means of communication*: any written communication by the Court, the Secretariat or any party may be delivered by, *inter alia*, by facsimile or email; the preference is given to electronic means of delivery or transmission. More importantly, a hearing may take place in person or "by any other means" which the Tribunal deems appropriate, including video or telephone conference. When the

procedural details of a remote hearing are in use, reference should be made to the AFSA *Remote Hearing Protocol*, which is discussed below.

To promote the expeditious resolution of disputes, Article 10 of the Rules provides for an *expedited arbitration procedure* when the quantum of any claim (or counterclaim) does not exceed the amount of USD 500 000. The parties may also agree to submit their dispute to an expedited procedure, notwithstanding the amount of the claim. In case the arbitral proceeding is conducted in accordance with the Expedited Procedure, certain entitlements and waivers come into force, *e.g.*: the Secretariat may abbreviate any effective time limits; the Court may, regardless of any contrary provision of the arbitration agreement, appoint a sole arbitrator; the Arbitral Tribunal, in principle, decides on the merits of the case on the basis of documentary evidence only.

Article 11 of the Rules allows for the appointment of the *Emergency Arbitrator* when urgent relief is required prior to the constitution of the Tribunal. The Emergency Arbitrator may conduct the emergency proceedings in any manner that he or she deems appropriate, and shall decide the claim for Emergency Measures as soon as possible, but no later than 14 days after his or her appointment. The provisions on the appointment of an emergency arbitrator under the Rules replicate the provisions adopted by the International Chamber of Commerce (ICC) and the London Court of International Arbitration (LCIA), two leading European arbitral institutions. By contrast, for example, the Cairo Regional Centre for International Commercial Arbitration (CRCICA) Rules contain no provision for the appointment of an emergency arbitrator, which makes the position of a party seeking urgent relief prior to the constitution of the tribunal much stronger when submitting a dispute to an arbitration with the AFSA instead of the CRCICA.

Article 12 of the Rules provides for the *early dismissal of a claim or defence* if that claim or defence is manifestly without legal merit, or the claim or defence is manifestly outside the Tribunal's jurisdiction. Applications for early dismissal must be made within 30 days after the constitution of the Tribunal. The possibility of early dismissal is intended to ensure that unsustainable

arbitrations are terminated in an efficient manner at the outset, so that the parties do not incur substantial costs relating the proceedings on the merits.

Article 29 of the Rules introduces the mechanisms of *joinder and intervention* to ensure the effective process and the involvement of all relevant parties to a dispute in its resolution, either on condition of all parties' consent, or if the additional party is *prima facie* bound by the arbitration agreement upon which the pending arbitration is made.

Article 27 provides for the possibility for a third party, who is any natural or legal person who is not either a party to the arbitration or a Party Representative, to enter into an agreement either with a party, an affiliate of that party, or a Party Representative to provide *material or financial support for all or part of the cost of the arbitration*. Such support can be provided through a donation, grant, or in exchange for remuneration or reimbursement wholly or partially dependent on the outcome of the arbitration.

The Claimant may also request to consolidate *multiple arbitrations* where there are multiple disputes arising out of or in connection with more than one contract.

The AFSA *Remote Hearing Protocol* is recommended for the use in all remote hearings and hybrid-remote hearings in accordance with the various AFSA Rules. The Protocol is not part of any the Rules of AFSA but constitutes a guideline which parties to AFSA arbitrations may adopt. The purpose of the Protocol is to provide guidance to parties on the efficient conduct of Remote Hearings in respect of AFSA arbitrations, with a view to ensuring fairness of the proceedings.

The Guidelines establish some of the due process guarantees in case of remote arbitration. Notably, the parties to e-arbitration must have the opportunity to effectively and equally participate in the hearing, including a stable internet connection, appropriate remote hearing venues and suitable devices. It is the duty of the Tribunal to ensure that, when using the hearing platform, each party enjoys the fair, equal and reasonable right of access without any unfair advantage of one party over the other; the Tribunal may

adjourn a remote hearing because of technical difficulties that may render the proceedings unfair.

In principle, the remote hearing should be conducted via those remote hearing platforms that comply with the minimum required technical, technological and security requirements. Various remote venue rooms and remote hearing breakaways rooms can be created, with the provision of restricted access to the Tribunal, parties, party representatives and participants. When necessary, third neutral parties could be granted access to remote hearing party venues, or to remote venue rooms particularly designed for this purpose.

All participants in the remote hearing must have simultaneous access to all shared materials by means of screen sharing on the remote hearing platform. The identity and identification details of each person present in the remote hearing witness room must be recorded and further made available to all parties. To ensure the transparency of witness testimony, the Tribunal may also ask a witness to orientate their camera to provide a 360-degree view of the remote venue.

All documentation relating to the hearing must be made available in electronic format, particularly PDF with the use of optical character recognition (OCR) technology. The default view setting for all pages in the documents must be at 100%. The Tribunal may require presenting some or all documentation in hardcopy format as well.

In general, the parties need to agree on the use of consecutive or simultaneous interpretation services; absent such an agreement, the Tribunal decides on the use of these services as well as on the suitable location of the interpreter. The same rule applies to the physical presence of an independent legal representative whose task is to observe the production of witnesses' oral evidence.

There are certain rules to ensure the confidentiality, privacy and security of the remote proceedings, *inter alia*: remote venue access restriction; automatically generated meeting IDs for each remote hearing; password-protection; identification of the exact physical location from where the

participants join the remote hearing; disabling of a “private” chat feature of the remote hearing platform *etc.*

The Guidelines also stipulate the technical requirements for conducting remote hearings. Such requirements include: high-speed internet, preferably *via* the Internet data cable; sufficient quality and speed of the connection; screen sharing availability. The Tribunal and parties may optionally agree on more specific technical requirements as to the needed quality of video and sound transmission.

Only the host to the remote hearing can receive and distribute the remote hearing recording. By default, the participants agree on the use of the platform recording features; absent such an agreement, the Tribunal decides on the matter. In any event, all recordings must be made available to the parties and to the Tribunal. No recording other than the platform recording of can be made without the authorisation of the Tribunal.

Annex 6: List of Persons Interviewed

Region	Country	Name	Organization/Position
Eastern Africa	Uganda	**Mr. Phillip Aliker**	Tanfield Chambers (Barrister and Chartered Arbitrator – London, England), Advocate & Chartered Arbitrator (Arbitration Chambers – Kampala, Uganda)
	Kenya	**Ms. Ndanga Kamau**	Member of the AFSA International Arbitration Rules Drafting Committee, Ndanga Kamau Law (Founding Partner)
Southern Africa	South Africa	**Mr. Clement Mkiva**	Bowmans (Partner)
	South Africa	**Prof. Brian Ganson**	University of Stellenbosch Business School (Professor & Head of the Africa Centre for Dispute Settlement)
	South Africa	**Mr. Michael Kuper**	Arbitration Foundation of Southern Africa (AFSA) (Chairman)
Western Africa	Nigeria	**Mr. Ike Ehiribe**	SOAS University of London (Visiting Professor for International Legal Studies), Accredited Mediator
	Nigeria	**Ms. Emilia Onyema (written questionnaire)**	SOAS University of London (Visiting Professor for International Legal Studies), Accredited Mediator, Solicitor in England & Wales, Chartered Institute of Arbitrators (Fellow), HEA (Senior Fellow)
	Nigeria	**Ms. Olusola Adegbonmire**	Kigali International Arbitration Centre (KIAC) (Member of Board of Directors), Sola Ajijola & Co. (Senior Managing Partner)
	Nigeria	**Dr. Adewale Olawoyin**	Lagos Court of Arbitration (President), Olawoyin & Olawoyin Legal Practitioners & Consultants (Managing Partner)
	Ghana	**Mr. Nene Amegatcher**	The Supreme Court of Ghana (active judge), Ghana Bar Association (Former President), Sam Okudzeto & Associates (Managing Partner)
Northern Africa	Egypt	**Dr. Mohamed Abdel Raouf**	Board of Trustees of the Cairo Regional Centre for International Commercial Arbitration (Vice Chairman), Advisory Committee of the Cairo Regional Centre for International Commercial Arbitration (Member), Abdel Raouf Law Firm (Partner and Head of Arbitration Group).

	United States	**Prof. Jeswald Salacuse**	Fletcher School of Tufts University (Dean Emeritus)