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A legal analysis of the efficiency of the AfCFTA dispute settlement system

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ABSTRACT

Article 20 of the African Continental Free Trade Agreement (AfCFTA) establishes a dispute settlement mechanism (DSM) for resolving trade disputes between member states. Its design reflects a move towards transparency, accountability, fairness, predictability and consistency in dispute resolution in Africa's regional trade regime. Like the dispute settlement system at the multilateral level, AfCTA's Dispute Settlement Protocol is formally structured with defined stages and timelines. However, it faces challenges akin to those confronting the World Trade Organization's dispute settlement system. Notably, the DSM's state-to-state nature, state membership of overlapping trade agreements, and lack of capacity are key barriers to ensuring dispute resolution under the AfCFTA. African countries' low levels of participation in trade disputes at the multilateral level and in regional economic communities indicates that, of these challenges, lack of capacity is the main barrier to the use of the dispute settlement system. Effectiveness can be conceptualised as success in attaining the objectives of the dispute settlement in three areas: the inclusiveness of the process, especially in regard to non-state actors; the finality of the process; and the availability of alternative fora of dispute resolution. This article examines the DSM under the AfCFTA Dispute Settlement Protocol to assess its implementation and effectiveness. The enquiry begins by discussing the background to the DSM and its benefits to members before delving into the host of challenges it faces. The article concludes by recommending, among other things, that member states amend the DSM protocol to allow for the inclusive participation of all actors in trade disputes.

Keywords: AfCFTA; dispute settlement mechanism; special and differential treatment; AfCTA Protocol on Dispute Settlement

1 INTRODUCTION

One of the significant features of the African Continental Free Trade Agreement (AfCTA), implemented in 2021, is the Protocol on Rules and Procedures on the Settlement of Disputes ("Dispute Settlement Protocol"), which provides for the rules and procedures for settling disputes within the AfCFTA. Its design reflects a move towards transparency, accountability, fairness, predictability and consistency in dispute resolution in Africa's regional trade regime.[1] Like the dispute settlement system (DSM) at a multilateral level, AfCTA's Dispute Settlement Protocol is formal and structured, with clearly defined stages and timelines.[2] However, it faces challenges akin to those confronting the DSM of the World Trade Organization (WTO).[3] Notably, the state-to-state nature of the DSM, state membership of overlapping trade agreements, and lack of capacity appear to be the main barriers to ensuring dispute resolution under the Agreement Establishing the African Continental Free Trade Area ("AfCFTA Treaty").

A dispute settlement system plays a key role in international economic integration. Any interstate dispute and its settlement, arising within the context of a trade agreement, involves processes that are, to a large extent, addressed by the DSM (DSM) therein.[4] Although the AfCFTA Treaty consolidates and supersedes earlier agreements on dispute settlement – in the process addressing challenges such as overlapping memberships across African regional blocs – African countries still make limited use of dispute settlement mechanisms both at the multilateral level and within their own regional economic communities (RECs).

This low level of participation suggests that capacity constraints remain a primary barrier to effectively using these systems. [5] Recent statistics show that only two African

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1 Article 2 of the Dispute Settlement Protocol.

2 The Protocol obligates parties that have invoked the rules and procedures of the Protocol with regard to a specific matter "not to invoke another forum for dispute settlement on the same matter". See article 3.4 of the Dispute Settlement Protocol. On the timeline, for example, consultations shall be replied to "within ten (10) days after the date of [their] receipt" and entered into in good faith "within a period not exceeding thirty (30) days". See article 7.4 of the Dispute Settlement Protocol.

3 Smith JM "The politics of dispute settlement design: Explaining legalism in regional trade pacts" (2000) 54(1) *International Organization* 137.

4 United Nations Conference on Trade and Development (UNCTAD) *Dispute settlement: State* New York and Geneva: United Nations publication UNCTAD/ITE/IIT/2003/1 (2003).

5 Article 19 of AfCFTA, which relates to "conflict and inconsistency with regional agreements", directly addresses this issue. In the event of conflict or inconsistency between the provisions of the AfCFTA and

countries have participated in the WTO dispute system as complainants[6] and three as respondents,[7] with the majority having been third parties.[8] Such limited engagement raises broader concerns about structural, financial, or political barriers that may inhibit African states from fully utilising formal dispute mechanisms. This raises the question of how effective this system is. If these constraints persist, they could similarly undermine the effectiveness of the AfCFTA's dispute settlement mechanism, calling into question whether it would be used actively in practice.

Against this backdrop, assessing the effectiveness of the AfCFTA's dispute settlement mechanism requires close attention to the factors that have historically limited participation. However, the effectiveness of the AfCFTA's dispute settlement system can be measured by several parameters, such as evaluating utilisation or participation levels in the system, timeframes for settling disputes, and the system's ability to ensure compliance with its rulings. African countries face various challenges that would limit their utilisation of the dispute settlement system. Some include the high-cost implications of participating in the dispute settlement system, the poor enforcement mechanism of the system, and the approach taken by the countries to trade disputes. An effective DSM is a

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any regional agreement, the provisions of the AfCFTA shall prevail in respect of the inconsistency. However, where an REC, customs unions or regional trade arrangement has achieved a higher level of integration than that under the AfCFTA, the higher levels shall prevail among themselves**.**

6 South Africa in one WTO case (DS: 613 – *European Union – Measures concerning the importation of citrus fruit from South Africa)* and Tunisia in two WTO cases (DS: 555 *Morocco – Provisional anti-dumping measures on school exercise books from Tunisia* and DS:578 *Morocco – Definitive anti-dumping measures on school exercise books from Tunisia,* WT/DS578/6).

7 Egypt in five WTO cases, namely DS:205 *Egypt – Import prohibition on canned tuna with soybean oil* G/L/392 G/SPS/GEN/203 WT/DS205/1; DS:211 *Egypt – Definitive anti-dumping measures on steel rebar from Turkey* WT/DS211/7/Add.3; DS:305 *Egypt – Measures affecting imports of textile and apparel products* – G/L/667/Add.1 WT/DS305/4; DS:327 Egypt – *Anti-dumping duties on matches from Pakistan* – G/ADP/D61/2 G/L/731/Add.1 WT/DS327/3; DS:609 *Egypt – Registration requirements relating to the importation of certain products* WT/DS609/3; Morrocco in three WTO cases, namely DS:513 *Morocco – Anti-dumping measures on certain hot-rolled steel from Turkey* WT/DS513/10; DS:555 *Morocco – Provisional anti-dumping measures on school exercise books from Tunisia;* DS:578 *Morocco – Definitive Anti-dumping measures on school exercise books from Tunisia* WT/DS578/6; and South Africa in five, namely DS:168 *South Africa -Anti-dumping duties on certain pharmaceutical products from India* – G/ADP/D17/1 G/L/303 WT/DS168/1; DS:288 *South Africa -Definitive anti-dumping measures on blanketing from Turkey* –G/ADP/D48/1 G/L/621 WT/DS288/1; DS:374 *South Africa -Anti-dumping measures on uncoated wood free Paper* WT/DS374/2; DS:439 *South Africa -Anti-dumping duties on frozen meat of fowls from Brazil* – G/ADP/D92/1 G/L/990 WT/DS439/1; DS:500 *South Africa -Provisional anti-dumping duties on Portland cement from Pakistan* – G/ADP/D112/1 G/L/1139 WT/DS500/1.

8 Sixteen countries have participated as third parties: Benin, Cameroon, Chad, Cote d'Ivoire, Eswatini, Ghana, Kenya, Madagascar, Malawi, Mauritius, Namibia, Nigeria, Senegal, Tanzania, Zambia and Zimbabwe.

vital component of trade governance, as it ensures security for investors and traders.[9] African countries' under-utilisation of a rule-based DSM for trade dispute does not guarantee traders and investors protection of their interests.[10] Unpredictability in the regime can be a deterrence essentially working against the objective of the AfCFTA, which is to promote intra-Africa trade.[11]

This article's general objective is to ascertain the legal effectiveness of the AfCFTA dispute settlement system for African countries; the specific objective is to analyse the dispute settlement process, identify its challenges, and assess the effectiveness of a similar model of dispute settlement contained in the AfCFTA Protocol in regard to rules and procedures in the settlement of dispute. Effectiveness is conceptualised as success in three main areas: the inclusiveness of the dispute settlement process, especially as it concerns non-state actors' participation; the finality of the process; and the availability of alternative fora of dispute resolution. On the basis of a discussion of this three-pronged approach, the article recommends measures that African countries can adopt to ensure effective utilisation of the DSM under the AfCFTA framework. Africa's desire for an effective DSM is captured in article 4(f) of the AfCFTA Treaty. The article provides that "[f]or purposes of fulfilling and realizing the objectives set out in Article 3, State Parties shall establish a mechanism for settlement of disputes concerning their rights and obligations".

The applicability of dispute settlement mechanisms to the AfCFTA is also subject to the adoption of a decision by the parties to each agreement setting out the terms for application of the Dispute Settlement Protocol to the individual agreement,[12] including any special or additional rules or procedures for inclusion. An interpretation of these provisions is that the Dispute Protocol establishes an integrated DSM that applies to all of the agreements listed in article 8 of the Treaty, which in WTO terms would be referred to as "covered agreements".[13] Article 4(g) of the Treaty amplifies Africa's desire for an

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[9] See article 3.2 of World Trade Organization *Understanding on rules and procedure governing the settlement of disputes (DSU)* (1 January 1995) available at https://www.wto.org/english/docs e/legal e/14-ag.pdf (accessed 13 April 2024)

[10] Article 3.2 of the DSU.

[11] Article 3 of the AfCFTA Treaty.

[12] See article 25 of the Protocol on Trade in Services; article 30 on the Protocol on Trade in Goods.

[13] In *Appellate Body Report, Brazil – Desiccated coconut* 13, the Appellate Body defined the term "covered agreements" as including "the WTO Agreement, the Agreements in Annexes 1 and 2, as well as any

effective dispute settlement mechanism by imposing an obligation on state parties to establish various institutions for effective dispute resolution.[14] In addition, article 20 of AfCFTA establishes the DSM to assist members in resolving trade disputes that may arise between them.[15] It further provides that "the DSM shall be administered in accordance with the Protocol on Rules and Procedures on the Settlement of Disputes".[16]

Like many other regional DSMs on the continent, the AfCFTA Dispute Settlement Protocol is modelled after the procedural text of the WTO, that is, the Understanding on Rules and Procedures Governing the Settlement of Disputes, or the Dispute Settlement Understanding (DSU).[17] This a rule-based DSM the aim of which is to provide security and predictability to the regional trading system. Article 4.1 of the Dispute Settlement Protocol states that the "dispute settlement mechanism of the AfCFTA is a central element in providing security and predictability to the regional trading system".

Although the AfCFTA Dispute Settlement Protocol is based on WTO practice which has evolved over more than 30 years since 1995, it builds upon and develops the means for resolving disputes in the regional trading system that existed previously under the various regional trading agreements. While the AfCFTA DSM co-exists seamlessly with other similar mechanisms, a major lacuna that remains is the tendency for the AfCFTA DSM to place wholesale reliance on the WTO without capitalising on the growing experience of member states at the regional level. This is not the first time that African states have adopted a WTO-styled dispute resolution. At the regional level, African states have drawn inspiration from the WTO dispute settlement system. Examples include the Southern African Development Community (SADC), the Common Market for Eastern Africa and Southern Africa (COMESA), and the Tripartite Free Trade Area (TFTA) Agreements.[18]

Plurilateral Trade Agreement in Annex 4 where its committee of signatories has taken a decision to apply the DSU. In a dispute brought to the DSB, a panel may deal with all the relevant provisions of the covered agreements cited by the parties to the dispute in one proceeding."

[14] Article 4(g) of the AfCFTA Treaty.

[15] Article 20.1 of the AfCFTA Treaty; article 3 of the Dispute Settlement Protocol.

[16] Article 20.2 of the AfCFTA Treaty.

[17] See Annex 2 World Trade Organization (1 January 1995).

[18] The TFTA Agreement establishes a free trade area among the member states of COMESA, SADC and the EAC.

2 STRUCTURE OF THE AFCFTA-DSM

The Dispute Settlement Protocol is one of the integral mechanisms provided by the AfCFTA Treaty for ensuring that its objective is met by creating a framework for dispute resolution. Its purpose is to ensure that dispute settlement process is transparent, accountable, fair, predictable and consistent with the provisions of the Agreement.[19] This Protocol is made according to article 20 of the AfCFTA Treaty. It reads:

> 1.A Dispute Settlement Mechanism is hereby established and shall apply to the settlement of disputes arising between State Parties.
>
> 2. The Dispute Settlement Mechanism shall be administered in accordance with the Protocol on Rules and Procedures on the Settlement of Disputes.
>
> 3. The Protocol on Rules and Procedures on the Settlement of Disputes shall establish, inter alia, a Dispute Settlement Body.

According to article 1(e) of the Dispute Settlement Protocol, a dispute "means a disagreement between State Parties regarding the interpretation and/or application of the Agreement in relation to their rights and obligations". The "Agreement" here includes the AfCTA Treaty, its protocols, annexes and appendices. Thus, disputes could arise from an infringement of the rights provided for in any of these instruments. The DSM preserves and clarifies the rights and obligations of state parties under the Agreement.[20] It is robust, as it allows for every possible means of resolving disputes between member states. However, this holistic dispute resolution framework might not be effective in practice.

This article presents the background to the structure of the DSM by discussing the process of dispute resolution stipulated in the Protocol and pointing out its strengths and weaknesses. To avoid the risk of conflicting rulings, the Protocol leaves the choice of forum up to the complaining party but prohibits parallel or subsequent proceedings in another forum.[21] It empowers the parties in a dispute to have control over the dispute

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[19] Article 2 of the Dispute Settlement Protocol.

[20] Article 4.1 of the Dispute Settlement Protocol.

[21] Article 3.3 and 3.4 of the Dispute Settlement Protocol. This is amplified in article 27.2 of the Protocol which provides that "[p]arties to a dispute who may have referred a dispute for arbitration pursuant to this Article shall not simultaneously refer the same matter to the DSB".

resolution process and outcome. Within the AfCFTA framework, the parties can decide how to resolve their dispute.

The Protocol provides various options,[22] including consultation,[23] mediation,[24] adjudication through a Dispute Settlement Panel, or independent arbitration. This flexibility allows the parties to choose the most suitable method. When exercising this autonomy, the party initiating the dispute must notify the other party and indicate a DSM of its preference.[25] The parties may opt for alternative methods, such as mediation or arbitration, as long as they have attempted to settle the dispute amicably through consultation and – in the case of arbitration – provided that both parties have consented to arbitration and the arbitration rules.[26] The AfCFTA's dispute settlement forum ("the forum") is designed to ensure neutrality, impartiality, and fairness in dispute resolution. One of the fundamental characteristics of this forum is its commitment to providing "a self-contained" and independent dispute resolution system.

As noted, any state party invoking the Protocol with regard to a specific matter is precluded from engaging with the same matter in a different forum,[27] a measure that helps ensure the finality of the process. The panellists are selected with a view to ensuring their independence and integrity.[28] Nationals of the disputing state parties are prevented from serving on the panel concerned with a dispute unless the parties to the dispute otherwise agree to it.[29] Parties to a dispute must be informed promptly of the composition of the panel.[30] In addition, the selected panellists are required to serve in their individual

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[22] Article 6 of the Dispute Settlement Protocol.

[23] Under the AfCFTA, "consultation" is a first and informal step towards peaceful settlement of disputes among member states. The AfCFTA provides that consultation shall be confidential and without prejudice to the rights of any state party in any further proceedings. In other words, state parties agree to use consultation as a means of dispute settlement. See article 7.7 of the Dispute Settlement Protocol.

[24] Article 8 of the Dispute Settlement Protocol provides an avenue for state parties to a dispute to enter mediation. Like consultation, mediation is meant to foster the amicable resolution of disputes.

[25] Article 6.2 of the Dispute Settlement Protocol.

[26] Article 6.6 of Dispute Settlement Protocol.

[27] Articles 3.4 and 27.2 of the Dispute Settlement Protocol.

[28] Article 10.4 of the Dispute Settlement Protocol.

[29] Article 10.5 of the Dispute Settlement Protocol.

[30] Article 9.1 of the Dispute Settlement Protocol.

capacity and not as government representatives or members of non-governmental organisations.[31]

Still in regard to the finality of the process, if a party feels aggrieved by the Dispute Settlement Panel's decision, it may (as of right) appeal it to the Appellate Body. However, the Protocol limits the scope of the appeal to only issues covered in the panel report and legal interpretation.[32] Only the disputing parties have the right to appeal (a third party with substantial interest may also be joined if the disputing parties agree that the claim of significant interest is well founded).[33] The Appellate Body's decision is final, binding, and subject to no appeal.[34]

Unlike the WTO system, the new AfCFTA dispute resolution system is not a single-sided dispute resolution method. According to article 3(2) of the AfCFTA Protocol, any unique supplementary rules and procedures created in other areas of the AfCFTA for resolution of disputes have precedence over the regulations in the Dispute Settlement Protocol. The non-tariff barriers (NTBs) section of Annex 5 to the AfCFTA Treaty offers an example of such supplementary norms and processes given that it calls for the creation of a system for locating, disclosing, resolving, monitoring, and removing NTBs.[35]

This mechanism makes it accessible to state parties' economic operators, national focal points, REC Secretariats, academic researchers, and other interested parties, unlike the AfCFTA's Protocol on the Rules and Procedures for Dispute Settlement. The AfCFTA NTB Coordination Unit is in charge of detecting, reporting, resolving, monitoring, and eliminating NTBs.[36] In addition, the NTB Annex provides a number of non-judicial mechanisms, such as an independent expert or person agreed upon by the parties.

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[31] Article 10.10 of the Dispute Settlement Protocol.

[32] Article 21.3 of the Dispute Settlement Protocol.

[33] Article 21.1 of the Dispute Settlement Protocol.

[34] Article 22.9 of the Dispute Settlement Protocol. The Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute. This adoption procedure is, however, without prejudice to the right of the state parties to express their views on an Appellate Body report.

[35] Article 8 of Annex 5 to the AfCFTA Treaty on non-tariff barriers.

[36] UNCTAD "Expert meeting on non-tariff barriers (NTB) reporting, monitoring and elimination under the African Continental Free Trade Area (AfCFTA)" (14 February 2019) available at https://unctad.org/meeting/expert-meeting-non-tariff-barriers-ntb-reporting-monitoring-and-elimination-under-african (accessed 9 May 2024).

For the purpose of assessing the effectiveness of the AfCFTA's dispute resolution mechanism, this article now considers the procedures under the AfCFTA DSM, the effectiveness of the DSMs, and their shortcomings.

3 PROCEDURES UNDER THE DISPUTE SETTLEMENT PROTOCOL

As noted, the AfCFTA DSM Protocol offers four dispute resolution options: consultation,[37] mediation,[38] adjudication by panels and an Appellate Body,[39] and arbitration.[40]

3.1 Consultation

Consultation is an informal means of dispute settlement under the AfCFTA. It is the first step towards peaceful settlement of disputes among the member states within the AfCFTA framework.[41] The AfCFTA provides that consultation shall be confidential and without prejudice to the rights of any state parties in any further proceedings.[42] In other words, state parties agree to employ consultations as a means of dispute settlement. However, when a dispute is submitted, especially for adjudication, the parties undertake to participate in consultation in good faith in an attempt to resolve the dispute amicably.[43]

Although consultations also feature in the WTO DSM,[44] their inclusion as a preliminary and mandatory step in the AfCFTA DSM emphasises the prioritisation of amicable settlement over disagreement.[45] This also increases the efficiency of the AfCFTA DSM. The Protocol specifies timelines for consultations, and if the process fails, the matter may be referred by the Dispute Settlement Board (DSB) to a panel for adjudication.[46] Irrespective of the outcome, consultations must be concluded within 60 days of the

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[37] Articles 6.1 and 7 of the Dispute Settlement Protocol.

[38] Article 8 of the Dispute Settlement Protocol. Mediation, good offices and conciliation are the three diplomatic methods of dispute resolution contained in the AfCFTA.

[39] Articles 6.2, 7 and 9–23 of the Dispute Settlement Protocol.

[40] Article 27 of the Dispute Settlement Protocol.

[41] Article 6.1 of the Dispute Settlement Protocol.

[42] Article 7.7. of the Dispute Settlement Protocol.

[43] Article 7.4. of the Dispute Settlement Protocol.

[44] See Annex 2 World Trade Organization (1 January 1995).

[45] In the DSU, members just affirm their resolve to strengthen and improve the effectiveness of the consultation procedures employed by other members. This is different to the AfCFTA DSM, which provides that "[w]here a dispute arises between or among the State Parties, in the first instance, recourse shall be had to consultations, with a view to finding an amicable resolution to the dispute".

[46] Articles 7.4., 7.5, 7.6 and 7.9 of the Dispute Settlement Protocol.

receipt of the request for them.[47] The flexibility of the Protocol allows the DSB to establish a panel in a shorter timeframe of 20 days in urgent cases, for example where the dispute involves perishable goods.[48]

The prescribed procedure for using consultation as a form of dispute settlement is as follows:

- The request for consultation shall be made to the DSB in writing, with the secretariat detailing the reasons for it including the issues to be deliberated on and the legal basis of the complaint.[49]
- Where a request is made to a state party, the party has 10 days within which to reply and is also required to enter into consultation in good faith within a period of not more than 30 days from the receipt of the request, doing so with a view to reaching a mutually satisfactory solution.[50]
- If a state party to which a consultation request was made does not respond within 10 days after the date of the receipt of request or fails to enter into consultation in good faith within a period of 30 days from the receipt of the request with a view to reaching a mutually satisfactory solution, the state party that made the request may refer the matter to the DSB and request that a panel be constituted.[51]
- If the consultations are not concluded within 60 days or the parties are not able to reach a settlement via consultation, the state party that requested the consultation may refer the matter to the DSB and ask for a panel to be constituted.[52]

3.2 Mediation

"Mediation" refers to mediation, good offices and conciliation, which are the three diplomatic methods of dispute resolution jointly contained in the AfCFTA. Article 8 of the Dispute Settlement Protocol provides an avenue for state parties to a dispute to enter

[47] Article 7.4 – 7.6 of the Dispute Settlement Protocol.

[48] Article 7.9(b) of the Dispute Settlement Protocol.

[49] Article 7.3 of the Dispute Settlement Protocol.

[50] Article 7.4 of the Dispute Settlement Protocol.

[51] Article 7.5 of the Dispute Settlement Protocol.

[52] Article 7.8 of the Dispute Settlement Protocol.

mediation. Occasionally, it is possible for parties to a disagreement to come to an amicable resolution with the aid of an independent third party which is not connected to any of the disputing parties.

As with the consultation process, mediation is thus meant to foster the amicable resolution of disputes among state parties.[53] However, the process in article 8 differs from consultations in two key ways. First, unlike consultations, which must take place whenever a dispute has been submitted to the DSB, mediation is entirely voluntary.[54] A party to a dispute may opt in or out at any time.[55] Furthermore, while consultations always precede adjudication, mediation can run concurrently with panel proceedings, if the state parties to the dispute so agree.[56] Thus while the Protocol specifies a time limit of 60 days for consultations, no such restriction applies to mediation.[57] Similar to consultations, mediation procedures are private and do not affect the rights of the state parties in other proceedings.[58]

The parties to the dispute may initiate and end good offices, conciliation, and mediation at any time, but not before a request for consultations.[59] However, if good offices, conciliation, and mediation are requested after a request for consultation, the complaining party must wait for the good offices, conciliation, and mediation to complete their 60-day course before asking for the establishment of a panel, unless both parties agree that mediation failed to resolve the dispute.[60] In some circumstances, the state parties may concur that the mediation processes should continue while the panel process takes place.[61] Unlike WTO mediation, AfCFTA mediation can start at any moment and is not dependent on prior discussions.[62]

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53 Article 8.1 of the Dispute Settlement Protocol.

54 Article 8.1 of the Dispute Settlement Protocol.

55 Article 8.2 and 8.4 of the Dispute Settlement Protocol.

56 Article 8.5 of the Dispute Settlement Protocol.

57 Article 8.3 of the Dispute Settlement Protocol.

58 Articles 7.5, 7.8 and 8.1 of the Dispute Settlement Protocol.

59 Article 8.2 and 8.4 of the Dispute Settlement Protocol.

60 Article 8.3 of the Dispute Settlement Protocol.

61 Article 8.5 of the Dispute Settlement Protocol.

62 Article 8.2 of the Dispute Settlement Protocol.

3.3 Adjudication by panels and the Appellate Body

Adjudication is the most formal of the AfCFTA DSM options. It involves the submission of a dispute to a DSB panel for the purpose of resolving it. The AfCFTA DSM is reserved solely for disputes between state parties. Article 20.1 of AfCFTA, which establishes the DSM, expressly provides that the DSM so established "shall apply to the settlement of disputes arising between State Parties". In paragraph 1(h), the AfCFTA DSM Protocol defines a party to a dispute or proceeding as "a State Party to a dispute or proceedings". The same is amplified in article 3.1 of the AfCFTA DSM Protocol, which provides that "the Protocol shall only apply to disputes arising between state parties concerning their rights and obligations under the provisions of the AfCFTA Treaty". The implication of this provision is that non-state entities lack legal standing to institute proceedings, regardless of what justiciable grievances they may have. This impacts on the effectiveness of the DSM (to be discussed later).

The constitution of a Dispute Settlement Panel ensures that a dispute is settled.[63] Indeed, panels are used where consultations have failed to resolve the dispute.[64] The DSM provides for the use of the panel as the second level of dispute settlement.[65] The panel sets in motion the process of a formal resolution of the dispute.[66] However, in constituting the panel, the Protocol requires disclosure as to whether full consultations were held and if not, the reasons for their failure and for resorting to the panel.[67]

According to article 10 of the AfCFTA DSM Protocol, AfCFTA disputes are heard before a panel constituted by the DSB in consultation with the parties to the dispute. The Protocol gives nine conditions for establishment of a panel:

i) the DSB meeting must be convened within 15 days upon receipt of the request;[68]

[63] Article 6.2 of the Dispute Settlement Protocol.

[64] Article 9.1 of the Dispute Settlement Protocol.

[65] Article 9.2 of the Dispute Settlement Protocol.

[66] Article 6.4 of the Dispute Settlement Protocol.

[67] Article 8.1 of the Dispute Settlement Protocol.

[68] Article 9.4 of the Dispute Settlement Protocol.

ii) the panel must be constituted within 10 days after the DSB meeting;[69]

iii) the Secretariat gives members of the panel from its list or roster;[70]

iv) the parties agree on membership of the panel;[71]

v) where parties have not agreed on membership of the panel, the Head of the Secretariat, in consultation with the Chairperson of the DSB and with the consent of the disputing state parties, is empowered to determine the composition of the panel;[72]

vi) a DSB panel may consist of either three members (in the case of a bilateral dispute) or five members (in the case of a multilateral dispute);[73]

vii) only members with expertise and experience in law, international trade or other areas as provided by the AfCFTA DSM Protocol are selected;[74]

viii) objectivity, reliability and sound judgement are exercised in choosing the members of the panel;[75] and

ix) the panel is impartial, independent, and not affiliated to or taking instructions from any party.[76]

To avoid conflicts of interest, persons who are nationals of the disputing state parties cannot serve on a panel concerned with that dispute unless the parties to the dispute otherwise so agree.[77] If consultation fails to settle the disagreement amicably, a disgruntled state party may submit a written request to the DSB asking for the creation of a panel.[78] The DSB will meet to form a panel after receiving a request, and the panel

[69] Article 9.5 of the Dispute Settlement Protocol.

[70] Article 10.1 of the Dispute Settlement Protocol.

[71] Article 10.6 of the Dispute Settlement Protocol.

[72] Article 10.7 of the Dispute Settlement Protocol.

[73] Article 10.9 of the Dispute Settlement Protocol.

[74] Article 10.3(a) of the Dispute Settlement Protocol

[75] Articles 10.3(b) and 10.10 of the Dispute Settlement Protocol

[76] Articles 10.3(c) of the Dispute Settlement Protocol

[77] Article 8 of the Dispute Settlement Protocol.

[78] Articles 9 and 12(1)–(3) of the Dispute Settlement Protocol.

must be formed within 10 days of the DSB meeting.[79] The panel shall consist of three members when there are only two disputing state parties and five when there are more than two.[80] Following the formation of the panel, the parties will submit their arguments and submissions to it in accordance with predetermined deadlines. If a third party has a significant stake in the outcome, it must inform the DSB and may also participate by submitting written arguments to the panel.[81]

The panel's primary responsibility is to conduct an unbiased evaluation of the issue at hand, evaluate the facts of the case, and determine whether the provisions of the Agreement are applicable and complied with. The panel also makes findings to support the DSB's recommendations and decisions. A meeting of the DSB will be called for the purpose of considering, adopting, and signing the final panel report.[82] In the event that either state party appeals, the DSB shall create a permanent Appellate Body to hear the appeal from a panel case.[83] The body shall consist of seven members, three of whom shall serve on each case.[84] People who work on the Appellate Body typically rotate shifts. Members of the Appellate Body will refrain from taking sides in any conflicts of interest whether direct or indirect. It is crucial to remember that the Appellate Body's processes are private and only parties to a dispute may appeal a panel report.[85]

An important aspect of the AfCFTA is the provision for reverse consensus in article 19(4). The latter states that the report must be considered, adopted, and signed at a meeting of the DSB called for that purpose within 60 days of the date the final panel report is circulated to the state parties, unless a party to the dispute formally notifies the DSB of its decision to appeal or the DSB decides by consensus not to adopt the report. This means that the DSB will still approve the report until there is consensus not to do so, even if an aggrieved party votes against doing so. It is crucial to remember that the DSB's judgments are final. The Secretariat is required to create and maintain an indicative list or roster of people who are willing and qualified to serve as panellists for the purposes of assembling

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[79] Article 9.5 of the Dispute Settlement Protocol.

[80] Article 10.9 of the Dispute Settlement Protocol.

[81] Article 13 of the Dispute Settlement Protocol.

[82] Article 18.6 of the Dispute Settlement Protocol.

[83] Article 20 of the Dispute Settlement Protocol.

[84] Article 20.2 of the Dispute Settlement Protocol.

[85] Article 21 of the Dispute Settlement Protocol.

panels under the DSM.[86] Each state party designates two people to the Secretariat for the list, noting their areas of competence in the Agreement. The DSB is then presented with the indicative list or roster of individuals by the Secretariat for review and approval.

The principal function of the panel is to assist the DSB in discharging its responsibility under the Agreement. This should be done through an objective assessment of the matter before it.[87] Another important issue regarding the use of the panel for dispute settlement within the AfCFTA is flexibility, which ensures timely dispute settlement.[88] The parties need to determine their terms of reference and fix the timetable for deliberations and proceedings within seven days.[89] Under ordinary circumstances, the period in which the panel conducts its business shall not exceed five months from the date of establishment of the panel to the date of issuance of the final report to the parties; in cases of emergency, including cases of perishable goods, the period shall not exceed one and a half months.[90] However, the panel should not exceed a period of nine months in issuing its report, provided that it informs the DSB of the reason for the delay and its inability to meet the timetable.[91]

It is also important to note that, at the request of both parties to a dispute, the panel may suspend its work for an agreed period that shall not exceed 12 months; it shall then resume its work after the expiry of the agreed time.[92] Within 60 days from the date the final panel report is circulated to the state parties, the report shall be considered and adopted.[93] Parties can still object to the report. A party may include in its objection newly discovered facts that by their nature will have a decisive influence on the decision.[94] The panel's report is reviewed by the DSB before it is adopted. Similar to article 16.3 of the Understanding on Rules and Procedures Governing the Settlement of Disputes, the "parties are entitled to participate fully in the consideration of the panel Reports by the

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[86] Article 10.1 of the Dispute Settlement Protocol

[87] Article 12.2 of the Dispute Settlement Protocol.

[88] Article 15.1 of the Dispute Settlement Protocol.

[89] Article 15.2 of the Dispute Settlement Protocol.

[90] Article 15.4 of the Dispute Settlement Protocol.

[91] Article 15.7 of the Dispute Settlement Protocol.

[92] Article 15.11 of the Dispute Settlement Protocol.

[93] Article 19.4 of the Dispute Settlement Protocol.

[94] Article 19.2 of the Dispute Settlement Protocol.

DSB, and their views shall be recorded".[95] A party which has participated in the DSB consideration can still appeal, provided that it notifies its intention to appeal before the panel report is adopted.

Once the report has been adopted, the decision of the DSB becomes final and the right of appeal abates.[96] Where there is no appeal, the decision of the DSB is final and must be accepted by the parties. If there is an appeal against the panel's report, the appeal shall be lodged with the DSB within 30 days from the date of communication of the decision.[97] An Appellate Body is established by the DSB and comprises seven persons, with three forming the quorum for hearing any issue for which the body is formed.[98] Furthermore, each Appellate Body judge serves a four-year term, with the possibility of reappointment.[99] In a fashion similar to the procedure for panels, the Appellate Body has 60 days in which to complete proceedings and produce its report;[100] where it is not able to keep to the timeline, it must not take more than 90 days to finalise and produce its report to the DSB.[101] The Appellate Body is required to produce a single report that reflects the views of the majority members.[102] An Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the state parties.[103]

3.4 Arbitration

According to article 27.1 of the Protocol, disputing parties may choose to arbitrate their differences and, if so, they must agree on the arbitration's rules of procedure. Parties to the issue may go to arbitration immediately if they determine that it is a better method of conflict settlement than the installation of a panel, which contemplates that parties may

[95] Article 19.3 of the Dispute Settlement Protocol.
[96] Article 19.4 of the Dispute Settlement Protocol.
[97] Article 19.6 of the Dispute Settlement Protocol
[98] Article 20.2 of the Dispute Settlement Protocol.
[99] Article 20.4 of the Dispute Settlement Protocol.
[100] Article 21.2 of the Dispute Settlement Protocol.
[101] Article 22.3 of the Dispute Settlement Protocol.
[102] Article 22.8 of the Dispute Settlement Protocol.
[103] Article 22.9 of the Dispute Settlement Protocol.

have undertaken consultations.[104] This is also true according to article 25 of the WTO DSU.[105] If arbitration is chosen, the parties cannot simultaneously resolve their differences through the panel – only in the event that one of the parties fails to cooperate will the panel be used.[106] It is significant to note that article 4.4 of the Protocol requires that any decisions made in connection with formal disputes governed by the DSM, including arbitral judgments, shall be in accordance with the AfCFTA. The DSB must be informed of the arbitration award before it can be implemented.[107]

If the parties are unable to come to an agreement on an acceptable timeframe for compliance, the matter will be decided by binding arbitration;[108] the arbitrator will be chosen by the mutual consent of the parties. When a state party objects to the degree of suspension proposed, or claims that the principle and procedure for suspending concessions and obligations has not been followed, arbitration may also be employed under articles 24.3(c) and 25.8 of the Protocol. The arbitrator is comparable to a private judge and arbitration, comparable to litigation before national courts. Therefore, much like in litigation, the arbitral tribunal renders a final judgment on the parties' dispute under arbitration. This provides a certain degree of assurance and closure. Despite the fact that most arbitration rulings have *res judicata* effect, there are some grounds for enforcement and annulment actions.[109] Parties can resort to arbitration subject to their mutual agreement; they also need to agree on the procedures to be used in the arbitration proceedings.[110]

This recognises the principle of party autonomy in dispute resolution. It should also be noted that a dispute referred to arbitration shall not simultaneously be referred to the DSB.[111] Accordingly, the arbitration process is at the behest of the parties involved and is not controlled by the DSB. However, the DSB is to be notified of such dispute, as well as

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[104] Article 27 of the Dispute Settlement Protocol.

[105] Under the DSU, arbitration is an alternative DSM for selected issues.

[106] Article 9 of the Dispute Settlement Protocol.

[107] Article 27.5 of the Dispute Settlement Protocol.

[108] Article 27.5 and 27.6 of the Dispute Settlement Protocol.

[109] Blackaby N et al. *Redfern and Hunter on international arbitration* 6th ed Oxford: Oxford University Press (2015) at 559–560.

[110] Article 27.1 of the Dispute Settlement Protocol.

[111] Article 27.2 of the Dispute Settlement Protocol.

the resultant award for enforcement.[112] Parties are also required to abide by the award,[113] and if a party refuses to be subjected to the award, the complaining party shall refer the matter to the DSB for determination.[114]

4 THE EFFECTIVENESS OF THE AFCFTA DSM

The dispute resolution mechanism of the AfCFTA is robust, as it allows for every possible means of resolving disputes between member states. However, this holistic framework might not necessarily translate into effective practical application, given that the DSM faces a host of challenges impacting on its effectiveness. This section assesses the legal effectiveness of the Protocol, with "effectiveness" conceptualised as success in attaining the objectives of dispute settlement in three areas: the inclusiveness of the dispute settlement process, especially in terms of non-state actors' participation; the finality of the process; and the availability of alternative fora of dispute resolution.

4.1 Inclusiveness of the dispute settlement process

One of the biggest defects of the DSM is that it does not cater for private businesses inasmuch as private personnel cannot institute a dispute claim before the DSB. The dispute resolution processes "shall apply to the settlement of disputes arising between the State Parties", according to article 20 of the AfCFTA. This raises two questions:

- What happens to a grievance by a private entity?
- Must cross-border commercial disputes arising from relations between private commercial entities trading under the AfCFTA be resolved using the complainant's domestic courts?

If the answer to the latter is yes, then resort to the domestic courts may face a variety of challenges, including language barriers, multiplicity of legal systems, and bureaucratic bottlenecks that discourage trade (given that investors who are non-state actors would shy away from markets where they do not enjoy the protection of the law and cannot enforce their rights). The jurisdiction of the AfCFTA DSM should thus be expanded to

[112] Article 27.3 of the Dispute Settlement Protocol.

[113] Article 27.5 of the Dispute Settlement Protocol.

[114] Article 27.6 of the Dispute Settlement Protocol.

accommodate private parties' involvement, as is the case with some of the RECs.[115] As to the question of whether individuals residing in member states have an enforceable right under the COMESA Treaty, the court cited article 26 of the latter and held that

> the content of this rule shows the extent the signatories of the COMESA Treaty have committed themselves to give some space in the COMESA territory not only to the Member States but also to individuals. By giving the residents of any Member State the right to challenge the acts thereof on grounds of unlawfulness or infringement of the Treaty, the Member States have in some areas limited their sovereignty. The proper functioning of the Common Market is, therefore, not only a concern of the Member States but also that of the residents. The Treaty is more than an agreement which merely creates obligations between Member States. It also gives enforceable rights to citizens residing in the Member States.[116]

A private entity's grievance can be submitted only by its home state party to the AfCFTA DSM, which is an arrangement that weakens the effectiveness of the system. Another shortcoming of the AfCFTA DSM is the fact that article 15(9) stipulates that the panel shall produce a single report reflecting the views of the majority of the panellists – in other words, if taken literally, this provision does not require that minority views, if any, be included in the report. Clearly, this hinders minority participation in dispute resolution.

By contrast, in many national judicial systems, judgments may include dissenting or concurring opinions, which enriches legal reasoning and enhance transparency. This is something that article 15(9) tries to limit. It is better for the DSB, as well as the Appellate Body (if convened), to have the benefit of the minority view, even though the majority view is the predominant one.

Lastly, although the AfCFTA Treaty recognises the principle of flexibility and special and differential treatment (SDT), the Dispute Settlement Protocol is silent on it in that the

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[115] See *Polytol Paints & Adhesives Manufacturers Co. Ltd v The Republic of Mauritius* 2012, where a private entity successfully sued a state party before the COMESA Court of Justice to enforce aspects of the COMESA Treaty relating to trade. See also *British American Tobacco Uganda Limited v Attorney-General of Uganda* 2019, where the East African Court of Justice held that an additional excise duty Uganda imposed on cigarettes imported into East Africa violated the EAC Common Market Protocol.

[116] *Polytol Paints & Adhesives Manufacturers Co. Ltd v The Republic of Mauritius* 2012.

avenues of dispute resolution formally recognised in it do not include any SDT provision. The closest the Protocol comes close to it is in article 15.1, where it provides that the "procedures of the Panel shall provide sufficient flexibility to ensure an effective and timely resolution of disputes by the Panels".[117]

4.2 Finality of the process

The main objective of international dispute adjudication is the attainment of justice. Ensuring the finality of the relevant processes hence supports the attainment of justice and legal certainty by warding against endless challenges; conversely, finality without justice undermines the legitimacy of a dispute settlement system. Thus, in instances where the subject matter of a dispute can be heard by more than one DSM, the AfCFTA allows a complainant to choose an appropriate forum for adjudicating such a dispute; however, once that forum is chosen, the complainant may not bring that dispute to any other forum.[118]

In addition, the recommendations and rulings of the DSB should aim at providing a satisfactory resolution without restricting the rights and duties of members.[119] Consequently, if a party feels aggrieved by the Dispute Settlement Panel's decision, the party may (as of right) appeal it to the Appellate Body. However, the Protocol imposes limitations on the scope of the appeal by confining it to matters of legal interpretation and issues covered in the panel report. Furthermore, only the disputing parties have the right to appeal (a third party with substantial interest may also be joined if the disputing parties agree that the claim of significant interest is well founded). A party which has participated in the DSB consideration can still appeal, provided that it notifies its intention to appeal before the panel report is adopted; once the report has been adopted, the decision of the DSB becomes final and the right of appeal abates. The Appellate Body's decision is final, binding, and not subject to appeal.[120]

[117] Article 4.6 of the Dispute Settlement Protocol.

[118] Articles 3.4 and 27.2 of the Dispute Settlement Protocol.

[119] Article 4.6 of the Dispute Settlement Protocol.

[120] Article 6.5 of the Dispute Settlement Protocol.

4.3 The availability of alternative fora of dispute resolution

Allowing a complainant to choose a forum for adjudicating a dispute from a range of avenues enables the parties to participate actively and autonomously in the dispute resolution process and facilitates a cooperative, consensual approach to resolving disputes. The parties tailor the process to their needs, preferences, and priorities, all of which fosters ownership of and fairness in the process. This contributes to the efficiency and effectiveness of the overall dispute resolution system within the AfCFTA framework. However, the same is curtailed by article 3.4 of the Protocol, given that once the forum is chosen, the complainant may not bring that dispute to any other forum.

Finally, the AfCFTA adopted all of the enforcement mechanisms used in the WTO dispute settlement system. However, retaliation will not be feasible under AfCFTA DSM. Since African countries have small economies and are generally importers, they will not have the leverage to force the responding party to comply with the decisions of the AfCFTA DSM. This remedy makes the system less than effective in the African context.

5 CONCLUSION

While the AfCFTA DSM has provided the roadmap for dispute settlement, its effectiveness will be compromised if the identified drawbacks are not addressed. It is certainly possible to improve the Protocol, seeing as article 31 provides for its amendment. This is crucial in view of the need to enhance the DSM's effectiveness. In particular, a number of measures should be undertaken to address the shortcomings noted above. These are each discussed below.

5.1 Extending the scope of the protocol to allow non-state actors

Allowing private parties to access the system will help them to represent themselves and participate actively in the proceedings. This is essential for attaining justice, as shown in the COMESA case of *Polytol Paints* and the East African Court of Justice case of *British American Tobacco Uganda Limited,* and can be effected by amending articles 1(h),3.1 and 3.4 of the Protocol as suggested below:

> 1(h) "Party to a dispute or proceedings" means a State Party to a dispute or proceedings or its citizens.

> 3.1. This Protocol shall apply to disputes arising between State Parties or its citizens concerning their rights and obligations under the provisions of the Agreement.
>
> 3.4. A State Party or its citizen which has invoked the rules and procedures of this Protocol with regard to a specific matter shall not invoke another forum for dispute settlement on the same matter.

5.2 Inclusion of SDT provision in the Protocol

The inclusion of an SDT provision in the Protocol would encourage Least Developed Countries (LDCs) to use the system. The suggested provision should read as follows:

> In conformity with the objective of the AfCFTA in ensuring international security, State Parties shall provide flexibilities to other State Parties at different levels of economic development or that have individual specificities as recognised by other State Parties in dispute resolution. These flexibilities shall include, among others, special consideration and an additional transition period in the implementation of this Protocol on a case-by-case basis.

5.3 Clear guidelines and procedures for mediation

Providing clear guidelines on and procedures for mediation under the Protocol – including detail on initiating mediation, the role of mediators, and the timeframe for completion – would increase the effectiveness of the DSM in the Protocol. The suggested provision should read as follows:

> Where a request for mediation is made pursuant to this Protocol, the parties to which the request is made shall, unless otherwise mutually agreed, reply to the request within ten (10) days after the date of its receipt and enter into mediation in good faith within a period not exceeding thirty (30) days after the date of receipt of the request, with a view to reaching a mutually satisfactory solution.

Finally, without amendment, the Dispute Settlement Protocol cannot establish a vigorous DSM that encourages African countries to claim their rights under the AfCFTA. If the Dispute Settlement Protocol were amended with a view to avoiding the limitations of the WTO dispute settlement system and employing some creativity, it would improve its

effectiveness by making the AfCFTA enforceable as well as making it beneficial to African countries in general and African LDCs in particular to use the system.

BIBLIOGRAPHY

Books

Blackaby N, Partasides C, Redfern A & Hunter M *Redfern and Hunter on international arbitration* 6th ed Oxford: Oxford University Press (2015)

United Nations Conference on Trade and Development (UNCTAD) *Dispute settlement: State* New York and Geneva: United Nations publication UNCTAD/ITE/IIT/2003/1 (2003)

Journal articles

Smith JM "The politics of dispute settlement design: Explaining legalism in regional trade pacts" (2000) 54(1) *International Organization* 137

International instruments

Agreement Establishing the African Continental Free Trade Area (AfCFTA)

Protocol on Rules and Procedures on Settlement of Disputes (AfCFTA)

Case law

British American Tobacco Uganda Limited v Attorney-General of Uganda, 2019

Egypt – Definitive anti-dumping measures on steel rebar from Turkey WT/DS211/7/Add.3

Egypt – Import prohibition on canned tuna with soybean oil G/L/392 G/SPS/GEN/203 WT/DS205/1

Egypt – Measures affecting imports of textile and apparel products G/L/667/Add.1 WT/DS305/4

Egypt – Registration requirements relating to the importation of certain products WT/DS609/3

European Union – Measures concerning the importation of citrus fruit from South Africa

Morocco – Anti-dumping measures on certain hot-rolled steel from Turkey WT/DS513/10

Morocco – Definitive anti-dumping measures on school exercise books from Tunisia

Polytol Paints & Adhesives Manufacturers Co. Ltd v The Republic of Mauritius, 2012

South Africa – Anti-dumping duties on certain pharmaceutical products from India G/ADP/D17/1 G/L/303 WT/DS168/1

South Africa – Anti-dumping duties on frozen meat of fowls from Brazil G/ADP/D92/1 G/L/990 WT/DS439/1

South Africa – Anti-dumping measures on uncoated wood free paper WT/DS374/2

South Africa – Definitive anti-dumping measures on blanketing from Turkey G/ADP/D48/1 G/L/621 WT/DS288/1

South Africa – Provisional anti-dumping duties on Portland cement from Pakistan G/ADP/D112/1 G/L/1139 WT/DS500/1

Egypt – Anti-dumping duties on matches from Pakistan G/ADP/D61/2 G/L/731/Add.1 WT/DS327/3

Internet sources

UNCTAD "Expert meeting on non-tariff barriers (NTB) reporting, monitoring and elimination under the African Continental Free Trade Area (AfCFTA)" (14 February 2019) available at https://unctad.org/meeting/expert-meeting-non-tariff-barriers-ntb-reporting-monitoring-and-elimination-under-african (accessed 9 May 2024)

World Trade Organization *Understanding on rules and procedure governing the settlement of disputes (DSU)* (1 January 1995) available at https://www.wto.org/english/docs e/legal e/14-ag.pdf (accessed 13 April 2024)