

Investment-Related Dispute Settlement under the African Continental Free Trade Agreement: Promises and Challenges

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1. Introduction

Calls for the unity of African states have been the centre of development discourses as advanced by many African scholars and political leaders.¹ The African continent has for the longest time sought unity of purpose among the African countries especially in matters relating to trade and investments, by coming up with agreements that will facilitate the same through the principle of free movement of people and goods within the continent.² The first real steps towards creation of an African economic community were first crystalized through the *Abuja Declaration of 1991*³.

The agreements are meant to promote regional integration aimed at eliminating tariff and non-tariff barriers across different African regions for ease of regional trading. In addition, the agreements are meant to also to give it bargaining power when it comes to intercontinental trading.⁴ For instance, since its inception, the European Union has acted with a single external voice in international trade negotiations.⁵

One such Agreement that is meant to promote intra-African trade and investment is the *African Continental Free Trade Agreement*⁶ (AfCFTA) whose main objectives are to create a

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¹ Nkrumah, Kwame, Roberta Arrigoni, and Giorgio Napolitano. *Africa must unite*. London: Heinemann, 1963 <<http://feintandmargin.com/wp-content/uploads/2015/04/Africa-Must-Unite.pdf>> accessed 9 June 2020.

² 'How to Boost Trade within Africa | Africa Renewal' <<https://www.un.org/africarenewal/magazine/september-2002/how-boost-trade-within-africa>> accessed 9 June 2020; 'Africa Set for a Massive Free Trade Area | Africa Renewal' <<https://www.un.org/africarenewal/magazine/august-november-2018/africa-set-massive-free-trade-area>> accessed 9 June 2020.

³ Declaration A/DCL.1/7/91 of the Authority of Heads of State and Government.

⁴ 'Time to Reset African Union-European Union Relations' (*Crisis Group*, 17 October 2017) <<https://www.crisisgroup.org/africa/255-time-reset-african-union-european-union-relations>> accessed 9 June 2020.

⁵ 'Free Trade Agreements: Corporate Law Powers of the EU and Member States, and a Way Forward' (*Oxford Law Faculty*, 10 October 2019) <<https://www.law.ox.ac.uk/business-law-blog/blog/2019/10/free-trade-agreements-corporate-law-powers-eu-and-member-states-and>> accessed 11 June 2020.

⁶ African Union, Agreement Establishing the African Continental Free Trade Area. March 21, 2018. (entered into force May 30, 2019) <https://au.int/sites/default/files/treaties/36437-treaty-consolidated_text_on_cfta_-_en.pdf> accessed 9 June 2020.

***Investment-Related Dispute Settlement under the African Continental Free Trade Agreement:
Promises and Challenges***

single continental market for goods and services, with free movement of business persons and investments, and thus pave the way for accelerating the establishment of the Customs Union; expand intra-African trade through better harmonization and coordination of trade liberalization and facilitation and instruments across the Regional Economic Communities (RECs) and across Africa in general; and also expected to enhance competitiveness at the industry and enterprise level through exploitation of opportunities for scale production, continental market access and better reallocation of resources.⁷ Currently, the African countries trade in terms of blocks, with States forming RECs such as the East African Community (EAC), Economic Community of West African States (ECOWAS) and Southern African Development Community (SADC). All these are geared towards promoting regional markets integration but the AfCFTA is meant to work towards achieving economic integration of major African markets with the smaller markets and enhance competitiveness at the industry and enterprise level by exploiting opportunities for scale production, continental market access and better reallocation of resources.⁸

All these trading and investment activities are expected to come with disputes which, if not well handled, would derail the above listed objectives of AfCFTA. While the Agreement provides for a dispute settlement body and the procedures to be followed, it presents a potential challenge where dealing with an investment dispute that is intercontinental. Normally, when investors and regional unions from out of Africa such as the European Union have disputes, they may prefer to use investment-related dispute settlement mechanisms such as investor-state dispute arbitration, which they may perceive as neutral. Notably, the African Union does not currently have a specialized forum to hear trade related disputes.⁹

The Agreement provides that each State Party shall promptly publish or make publicly available through accessible mediums its laws, regulations, procedures and administrative rulings

⁷ TRALAC Trade Law Centre, 'African Continental Free Trade Area (AfCFTA) Legal Texts and Policy Documents' (*tralac*) <<https://www.tralac.org/resources/our-resources/6730-continental-free-trade-area-cfta.html>> accessed 9 June 2020.

⁸ 'Preparing for Trade under the AfCFTA Agreement' (*ECDPM*) <<https://ecdpm.org/great-insights/african-continental-free-trade-area-agreement-impact/preparing-trade-afcfta-agreement/>> accessed 15 June 2020; Gayathri Iyer and Gayathri Iyer, 'AfCFTA: Need for Integrating the African Continental Infrastructure Framework' (*ORF*) <<https://www.orfonline.org/expert-speak/afcfta-need-for-integrating-the-african-continental-infrastructure-framework-51507/>> accessed 15 June 2020; Marcia Tavares, 'The African Continental Free Trade Area Agreement – What Is Expected of LDCs in Terms of Trade Liberalisation?' By Trudi Hartzenberg, Executive Director, Trade Law Centre (Tralac) and Member of the Committee for Development Policy (CDP) | LDC Portal' <<https://www.un.org/ldcportal/afcfta-what-is-expected-of-ldcs-in-terms-of-trade-liberalisation-by-trudi-hartzenberg/>> accessed 15 June 2020.

⁹ TRALAC Trade Law Centre, 'African Continental Free Trade Area (AfCFTA) Legal Texts and Policy Documents' (*tralac*), p. 1.

***Investment-Related Dispute Settlement under the African Continental Free Trade Agreement:
Promises and Challenges***

of general application as well as any other commitments under an international agreement relating to any trade matter covered by this Agreement.¹⁰

It is also worth pointing out that AfCFTA provides that laws, regulations, procedures and administrative rulings of general application as well as any other commitments under an international agreement relating to any trade matter covered by this Agreement adopted after the entry into force of this Agreement shall be notified by State Parties in one (1) of the African Union working languages to other State Parties through the Secretariat.¹¹ AfCFTA however provides that the Agreement shall not nullify, modify or revoke rights and obligations under pre-existing trade agreements that State Parties have with Third Parties.¹² This provision raises the question of the place of dealings of two member states that are also bound by international legal instruments especially in dispute settlement. This raises the question whether such countries can freely pick such a foreign mechanism if they both agree to the same.

In the event of any conflict and inconsistency between the afCFTA and any regional agreement, the Agreement provides that its provisions shall prevail to the extent of the specific inconsistency, except as otherwise provided in the Agreement.¹³ In addition, notwithstanding the provisions of Paragraph 1 of Article 19, State Parties that are members of other regional economic communities, regional trading arrangements and custom unions, which have attained among themselves higher levels of regional integration than under the Agreement, shall maintain such higher levels among themselves.¹⁴

This paper offers a critical discussion on the African Continental Free Trade Agreement and evaluates the effectiveness of investment dispute settlement provisions under the Agreement.

2. Overview of the African Continental Free Trade Agreement: Scope, Objectives and Principles

The *African Continental Free Trade Area Agreement* (“the AfCFTA”), unveiled in March, 2018 in Kigali, Rwanda, was put in place to establish the African Continental Free Trade Area

¹⁰ Article 16 (1), *African Continental Free Trade Area Agreement*.

¹¹ *Ibid*, Article 17 (1).

¹² *Ibid*, Article 18 (3).

¹³ *Ibid*, Article 19 (1).

¹⁴ *Ibid*, Article 19 (2).

***Investment-Related Dispute Settlement under the African Continental Free Trade Agreement:
Promises and Challenges***

Agreement,¹⁵ and so far is considered the world's largest free trade area: 55 countries merging into a single market of 1.2 billion people with a combined GDP of \$2.5 trillion.¹⁶

Generally, the Agreement is expected to: create a single market for goods, services, facilitated by movement of persons in order to deepen the economic integration of the African continent and in accordance with the Pan African Vision of “An integrated, prosperous and peaceful Africa” enshrined in Agenda 2063; create a liberalised market for goods and services through successive rounds of negotiations; contribute to the movement of capital and natural persons and facilitate investments building on the initiatives and developments in the State Parties and RECs; lay the foundation for the establishment of a Continental Customs Union at a later stage; promote and attain sustainable and inclusive socio-economic development, gender equality and structural transformation of the State Parties; enhance the competitiveness of the economies of State Parties within the continent and the global market; promote industrial development through diversification and regional value chain development, agricultural development and food security; and resolve the challenges of multiple and overlapping memberships and expedite the regional and continental integration processes.¹⁷

In order to achieve the foregoing general objectives, AfCFTA is expected to specifically achieve the following objectives: progressively eliminate tariffs and non-tariff barriers to trade in goods; progressively liberalise trade in services; cooperate on investment, intellectual property rights and competition policy; cooperate on all trade-related areas; cooperate on customs matters and the implementation of trade facilitation measures; establish a mechanism for the settlement of disputes concerning their rights and obligations; and establish and maintain an institutional framework for the implementation and administration of the AfCFTA.¹⁸

The implementation of AfCFTA is to be governed by the following principles: driven by Member States of the African Union; RECs' Free Trade Areas (FTAs) as building blocs for the AfCFTA; variable geometry; flexibility and special and differential treatment; transparency and disclosure of information; preservation of the *acquis*; Most-Favoured-Nation (MFN) Treatment; National Treatment; reciprocity; substantial liberalisation; consensus in decision-making; and

¹⁵ Article 2, *African Continental Free Trade Area Agreement*.

¹⁶ 'Africa Set for a Massive Free Trade Area | Africa Renewal' <<https://www.un.org/africarenewal/magazine/august-november-2018/africa-set-massive-free-trade-area>> accessed 9 June 2020.

¹⁷ Article 3, *African Continental Free Trade Area Agreement*.

¹⁸ Article 4, *African Continental Free Trade Area Agreement*.

***Investment-Related Dispute Settlement under the African Continental Free Trade Agreement:
Promises and Challenges***

best practices in the RECs, in the State Parties and International Conventions binding the African Union.¹⁹

Notably, the scope of AfCFTA shall cover trade in goods, trade in services, investment, intellectual property rights and competition policy.²⁰

Member States were to enter into Phase II negotiations in the following areas: intellectual property rights; investment; and competition policy, which negotiations were to commence after the adoption of the Agreement by the Assembly and were to be undertaken in successive rounds.²¹

The Agreement is designed to work hand in hand with the Protocols on Trade in Goods, Trade in Services, Investment, Intellectual Property Rights, Competition Policy, Rules and Procedures on the Settlement of Disputes and their associated Annexes and Appendices, upon adoption, and shall form an integral part of the Agreement.²²

The institutional framework for the implementation, administration, facilitation, monitoring and evaluation of the AfCFTA consists of the following: the Assembly; the Council of Ministers; the Committee of Senior Trade Officials; and the Secretariat,²³ with the Assembly, as the highest decision-making organ of the AU, providing oversight and strategic guidance on the AfCFTA, including the Action Plan for Boosting Intra-African Trade (BIAT).²⁴

Decisions of the AfCFTA institutions (namely the Assembly, the Council of Ministers and the Committee of Senior Trade Officials) on substantive issues are to be taken by consensus.²⁵

The Agreement and the Protocols on Trade in Goods, Trade in Services, and Protocol on Rules and Procedures on the Settlement of Disputes were to enter into force thirty (30) days after the deposit of the twenty second (22nd) instrument of ratification.²⁶ It is worth mentioning that AfCFTA entered into force on 30th May, 2019 after achieving the required minimum number of

¹⁹ Article 5, *African Continental Free Trade Area Agreement*.

²⁰ Article 6, *African Continental Free Trade Area Agreement*.

²¹ Article 7, *African Continental Free Trade Area Agreement*.

²² Article 8, *African Continental Free Trade Area Agreement*.

²³ Article 9, *African Continental Free Trade Area Agreement*.

²⁴ Article 10 (1), *African Continental Free Trade Area Agreement*.

²⁵ Article 14 (1), *African Continental Free Trade Area Agreement*.

²⁶ Article 23 (1), *African Continental Free Trade Area Agreement*; Hogan Lovells, 'Report on the African Continental Free Trade Agreement 2019: Implications for the continent,' November 2019 <<https://www.hoganlovells.com/en/knowledge/topic-centers/~/-/media/2e3f5059b0c44b3c84d8e5bc375abbf8.ashx>> 15 June 2020.

Investment-Related Dispute Settlement under the African Continental Free Trade Agreement: Promises and Challenges

ratifications, that is, 22 countries ratifying the same.²⁷ The Agreement is also categorical that no reservations shall be made to the Agreement.²⁸

2.1 Disputes Settlement Provisions under AfCFTA

As highlighted above, the scope of AfCFTA includes goods, trade in services, investment, intellectual property rights and competition policy. This also comes with the need for provision for settlement of disputes relating to these areas. Notably, the Agreement provides for establishment of a Dispute Settlement Mechanism which shall apply to the settlement of disputes arising between State Parties.²⁹ The Dispute Settlement Mechanism shall be administered in accordance with the Protocol on Rules and Procedures on the Settlement of Disputes.³⁰ In addition, the Protocol on Rules and Procedures on the Settlement of Disputes is to establish, inter alia, a Dispute Settlement Body.³¹

The *Protocol on Rules and Procedures on the Settlement of Disputes* (the Protocol) applies to disputes arising between State Parties concerning their rights and obligations under the provisions of the Agreement.³² The Protocol provides that a State Party which has invoked the rules and procedures of this Protocol with regards to a specific matter shall not invoke another forum for dispute settlement on the same matter.³³

The Protocol provides for the use of consultations, mediation, Dispute Settlement Board (DSB) and arbitration to settle disputes arising from the Agreement.³⁴ Notably, the Protocol provides that the DSB will only hear disputes from State Parties to the AfCFTA Agreement.³⁵ Despite the foregoing provisions, the Protocol provides for arbitration as an elective process that State

²⁷ 'AfCFTA Agreement Secures Minimum Threshold of 22 Ratification as Sierra Leone and the Saharawi Republic Deposit Instruments. | African Union' <<https://au.int/en/pressreleases/20190429/afcfta-agreement-secures-minimum-threshold-22-ratification-sierra-leone-and>> accessed 15 June 2020.

²⁸ Article 25, *African Continental Free Trade Area Agreement*.

²⁹ Article 20 (1), *African Continental Free Trade Area Agreement*.

³⁰ Article 20 (2), *African Continental Free Trade Area Agreement*.

³¹ Article 20 (3), *African Continental Free Trade Area Agreement*; TRALAC TRADE LAW CENTRE, 'The Dispute Settlement Mechanism under the African Continental Free Trade Area' (tralac) <<https://www.tralac.org/blog/article/13529-the-dispute-settlement-mechanism-under-the-african-continental-free-trade-area.html>> accessed 15 June 2020.

³² Article 3 (1), *Protocol on Rules and Procedures on the Settlement of Disputes*.

³³ Article 3 (4), *Protocol on Rules and Procedures on the Settlement of Disputes*.

³⁴ Articles 4-27, Protocol On Rules And Procedures On The Settlement Of Disputes.

³⁵ Article 3 (1), Protocol on Rules and Procedures on the Settlement of Disputes; TRALAC Trade Law Centre, 'The Dispute Settlement Mechanism under the African Continental Free Trade Area' (tralac) <<https://www.tralac.org/blog/article/13529-the-dispute-settlement-mechanism-under-the-african-continental-free-trade-area.html>> accessed 15 June 2020.

***Investment-Related Dispute Settlement under the African Continental Free Trade Agreement:
Promises and Challenges***

Parties may opt for. It specifically provides that ‘where the parties to a dispute consider it expedient to have recourse to arbitration as the first dispute Settlement Avenue, the parties to a dispute may proceed with arbitration as provided for in Article 27 of this Protocol.³⁶ Article 27 of the Protocol provides that Parties to a dispute may resort to arbitration subject to their mutual agreement and shall agree on the procedures to be used in the arbitration proceedings.³⁷ Such referral of a dispute for arbitration pursuant to this Article shall bar Parties from simultaneously referring the same matter to the Dispute Settlement Mechanism.³⁸ The Parties to an arbitration proceeding shall abide by the arbitration award and the award shall be notified to the DSM for enforcement.³⁹ However, such arbitration seems to be only on trial basis since the Protocol provides that in the event of a Party to a dispute refusing to cooperate, the Complaining Party shall refer the matter to the DSB for determination.⁴⁰

Where arbitration awards are not contested, the same shall be enforced in accordance with the provisions of Articles 24 and 25 of this Protocol *mutatis mutandis*.⁴¹

3. Investment-Related Dispute Settlement under the African Continental Free Trade Agreement: Promises and Challenges

Notably, neither the Agreement nor the Protocol defines what is meant by the use of the term ‘arbitration’ therein. It has rightly been pointed out that while investment disputes can sometimes be resolved in local courts, or through state-state dispute settlement, the most common way in which breaches of an investment treaty are enforced is via investor-state arbitration.⁴²

It is therefore unclear if the same would entail state-state arbitration under international arbitration panels as well. The question is whether a party may choose an international arbitral body or expert to carry out arbitration. In addition there is a question as to whether, where two states agree on an international body, Dispute Settlement Board under the Agreement can overrule this parties’ agreement in favour of regional expertise. This is important because where

³⁶ Article 6(6), *Protocol on Rules and Procedures on the Settlement of Disputes*.

³⁷ Article 27(1), *Protocol on Rules and Procedures on the Settlement of Disputes*.

³⁸ Article 27(2), *Protocol on Rules and Procedures on the Settlement of Disputes*.

³⁹ Article 27(5), *Protocol on Rules and Procedures on the Settlement of Disputes*.

⁴⁰ Article 27(6), *Protocol on Rules and Procedures on the Settlement of Disputes*.

⁴¹ Article 27(7), *Protocol on Rules and Procedures on the Settlement of Disputes*.

⁴² ‘How International Investment Dispute Settlement Works’ (*WHO FCTC Secretariat’s Knowledge Hub on legal challenges*, 20 March 2017) <<https://untobaccocontrol.org/kh/legal-challenges/investment/dispute-settlement/>> accessed 11 June 2020.

***Investment-Related Dispute Settlement under the African Continental Free Trade Agreement:
Promises and Challenges***

Parties elect to use arbitration and opt to use state-state arbitration before international arbitration bodies in cases involving investments, with binding procedural rules from bodies being used, and one Party opts out, the question that would arise is whether by seeking audience before international arbitration bodies, the jurisdiction of the DSB is ousted so that Parties would not go back for the determination of their dispute by the DSM. This would especially be important where two African States had included a state-state arbitration clause in their investment agreement.

The other scenario where a challenge would arise would be where an investor from African Country A, in the spirit of the AfCFTA, invests in African Country B and they agree to refer any investment disputes to investor-state arbitration, on the strength of the fact that Countries A and B are State parties to an international investor-state arbitration agreement or against the background of a Bilateral Investment Treaty between the two countries. It is not yet clear what would happen if Government of Country B responds by invoking the State-State arbitration procedure of the same treaty or the implied broad interpretation of AfCFTA.⁴³ The difficulty in determining the above potential disputes is further aggravated by the fact that whereas state–state dispute settlement predates investor–state arbitration, and was the norm in the early Friendship, Commerce and Navigation (FCN) treaties and some early investment treaties, today, most investment treaties include both state–state and investor–state dispute settlement mechanisms.⁴⁴ AfCFTA notably defines “Member States” to mean the Member States of the African Union. The implication of this is that the Agreement and the related Protocols only envisage that it is for the states to bring disputes before the dispute settlement body either on behalf of their governments or the individual investors. It may therefore be assumed that it only provides for state-state dispute settlement and not investor-state dispute settlement.

⁴³ For instance, see, J Seifi, ‘Investor-State Arbitration v State-State Arbitration in Bilateral Investment Treaties’ (2004) 1 Transnational Dispute Management (TDM) <<https://www.transnational-dispute-management.com/article.asp?key=112>> accessed 11 June 2020.

“...following the decision by a Chilean firm, Lucchetti, to institute investor-State arbitral proceedings against the Peruvian Government under the terms of the Chile-Peru Bilateral Investment Treaty, the Peruvian Government responded by invoking the State-State arbitration procedure of the same treaty. Both the investor-State dispute and the State-State dispute were officially registered with the Secretariat of the ICSID.”

⁴⁴ Bernasconi-Osterwalder, N., "State-state dispute settlement in investment treaties." *Rethinking Bilateral Investment Treaties* (2014): 253, p.1 < <https://www.iisd.org/sites/default/files/publications/best-practices-state-state-dispute-settlement-investment-treaties.pdf> > accessed 11 June 2020.

Investment-Related Dispute Settlement under the African Continental Free Trade Agreement: Promises and Challenges

Investor-State arbitration and state-state arbitration have traditionally been carried out by international arbitral tribunals such as the International Centre for the settlement of Investment Disputes (ICSID), the United Nations Commission on International Trade Law (UNCITRAL), the International Chamber of Commerce (ICC), the International Court of Arbitration (ICA), the Permanent Court of Arbitration (PCA), the International Court of Justice (ICC), the Arbitration Institute of the Stockholm Chamber of Commerce (SCC), or the London Court of International Arbitration (LCIA).⁴⁵ However, most African countries and indeed many countries in the developing world the world over have complained about lack of legitimacy and transparency, exorbitant costs of arbitration proceedings and arbitral awards as well as inconsistent and flawed decisions, with developing countries that are mostly dragged before these bodies also getting concerned about the violation of their sovereignty.⁴⁶

With African countries alive to these concerns, there is a need to streamline the dispute settlement mechanisms under AfCFTA in order to enhance their effectiveness.

4. Streamlining Investment Disputes Settlement under AfCFTA

Some commentators have observed that the AfCFTA Agreement will hopefully include an investment protocol, which is likely to include substantive investment protections and a separate set of rules for the resolution of investment disputes, during African Union's Phase II negotiations.⁴⁷ It is recommended that such an investment protocol will consider the issues discussed under this section.

4.1 Clarification of Definition of Arbitration and the Arbitration Body under AfCFTA

It is necessary for the AfCFTA to be reviewed and clarify whether arbitration as provided for under the Agreement and the relevant protocol covers state-state arbitration, investor-state arbitration or both. It is also necessary to make it clear as to which body would be charged with conducting the arbitration process whose decision is then adopted as the decision of the Dispute

⁴⁵ 'Arbitration Centres | United Nations Commission on International Trade Law'

<<https://uncitral.un.org/en/texts/arbitration/contractualtexts/arbitration/centres>> accessed 15 June 2020.

⁴⁶ TRALAC Trade Law Centre, 'Investor-State Dispute Settlement in Africa and the AfCFTA Investment Protocol' (*tralac*) <<https://www.tralac.org/blog/article/13787-investor-state-dispute-settlement-in-africa-and-the-afcfta-investment-protocol.html>> accessed 13 June 2020.

⁴⁷ Hogan Lovells, 'Report on the African Continental Free Trade Agreement 2019: Implications for the continent,' November 2019, p.9.

Investment-Related Dispute Settlement under the African Continental Free Trade Agreement: Promises and Challenges

Settlement Board. This is especially important considering that the Agreement and the Protocol on dispute settlement omitted any reference to the international arbitration bodies such as the International Centre for Settlement of Investment Disputes (ICSID) and the Permanent Court of Arbitration.

Defining the body charged with arbitration may save parties considerable time and resources as opposed to the current position where parties have the right to appoint such arbitrator (s), failing which the Board would appoint them on the parties' behalf.

4.2 Inclusion of Judicial Mechanisms to Settle State–State Disputes?

Notably, a number of African states subscribe to the ICSID system as a way of attracting foreign investments. This is because most of the foreign investors do not have confidence in the local frameworks on investment disputes settlement.⁴⁸ For instance, the Investment Agreement for the COMESA Common Investment Area requires that its Member States should, where they have not done so, endeavour to accede to: the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards; the International Convention on Settlement of Investment Disputes between States and Nationals of Other States; the Convention Establishing the Multilateral Investment Guarantee Agency; the Agreement Establishing the African Trade Insurance Agency; and any other multilateral agreement designed to promote or protect investment.⁴⁹

The creation of a new dispute settlement system under AfCFTA creates new challenges as to how disputes with foreigners on matters falling under this Agreement will be dealt with. This is because the AfCFTA is an agreement among African Union member states and cannot therefore

⁴⁸ 'The Evolution of Investment Arbitration in Africa'

<https://globalarbitrationreview.com/print_article/gar/editorial/1169359/the-evolution-of-investment-arbitration-in-africa?print=true> accessed 15 June 2020; Engela C Schlemmer, 'An Overview of South Africa's Bilateral Investment Treaties and Investment Policy' (2016) 31 ICSID Review - Foreign Investment Law Journal 167; Charles N. Brower and Michael P. Daly, 'A Study of Foreign Investment Law in Africa: Opportunity Awaits,' https://www.arbitration-icca.org/media/7/82088225980224/brower__daly_a_study_of_foreign_investment_law_in_africa.pdf 15 June 2020.

⁴⁹ Article 6, Investment Agreement for the COMESA Common Investment Area <<https://www.iisd.org/toolkits/sustainability-toolkit-for-trade-negotiators/wp-content/uploads/2016/06/rei120.06tt1.pdf>> accessed 13 June 2020.

***Investment-Related Dispute Settlement under the African Continental Free Trade Agreement:
Promises and Challenges***

create any rights or obligations for foreign (non-African) investors.⁵⁰ However, most African national courts have been associated with lack of impartiality and independence from their governments and may also not have expertise investment-related arbitrations.⁵¹ This may therefore not be viable as at now and will take time to equip them properly and also have them shed the notions of lack of impartiality and independence. There is however a need for national courts to work towards enhancing their independence and impartiality.

4.3 Use of Regional Courts for State-State Arbitration?

Currently, the place of regional courts in settlement of disputes especially through arbitration as far as disputes arising under the AfCFTA Investment Protocol are concerned is not clear. The courts, such as the East African Court of Justice (EACJ) have not been expressly mentioned in the Agreement. This is unlike the provisions in the *Investment Agreement for the COMESA Common Investment Area* which expressly provides that ‘any dispute between Member States as to the interpretation or application of this Agreement not satisfactorily settled through negotiation within 6 months, may be referred for decision to either: (i) an arbitral tribunal constituted under the COMESA Court of Justice in accordance with Article 28(b) of the COMESA Treaty; or (ii) an independent arbitral tribunal; or (iii) the COMESA Court of Justice sitting as a court’.⁵²

As for Investor-State disputes, the *Investment Agreement for the COMESA Common Investment Area* provides that ‘in the event that a dispute between a COMESA investor and a Member State has not been resolved pursuant to good faith efforts in accordance with Article 26, a COMESA investor may submit to arbitration under this Agreement a claim that the Member State in whose territory it has made an investment has breached an obligation under Part Two of this Agreement and that the investment has incurred loss or damage by reason of, or arising out of that breach by submitting that claim to any one of the following fora at a time: to the competent court of the Member State in whose territory the investment has been made; to the COMESA Court of Justice in accordance with Article 28(b) of the COMESA Treaty; or to

⁵⁰ TRALAC Trade Law Centre, ‘Investor-State Dispute Settlement in Africa and the AfCFTA Investment Protocol’ (*tralac*) <<https://www.tralac.org/blog/article/13787-investor-state-dispute-settlement-in-africa-and-the-afcfta-investment-protocol.html>> accessed 13 June 2020.

⁵¹ Ibid.

⁵² Article 27 (1), Investment Agreement for the COMESA Common Investment Area.

***Investment-Related Dispute Settlement under the African Continental Free Trade Agreement:
Promises and Challenges***

international arbitration: (i) under the International Centre for the Settlement of Investment Disputes (ICSID) Convention, provided that both the home state of an investor and Member State in whose territory the investment has been made are parties to the ICSID Convention; (ii) under the ICSID Additional Facility Rules, provided that either the non-disputing Party or the respondent is a party to the ICSID Convention; (ii) under the UNCITRAL Arbitration Rules; or (iv) under any other arbitration institution or under any other arbitration rules, if the both parties to the dispute agree.⁵³

Such clarity is needed under AfCFTA. While the Agreement may leave out the inclusion of international arbitral bodies, there is a need for clarity on the place of local national courts and regional courts/dispute settlement bodies in the implementation of AfCFTA. There is also a need to clearly differentiate between state-state disputes and investor-state disputes and how they are to be settled.

There may be a need to consider having such courts working closely with the inter-state disputes settlement body provided for under the AfCFTA Investment Protocol especially in handling the state-state arbitrations. This would not only build the capacity of these regional courts but would also enhance the efficiency of arbitration as provided for under AfCFTA Protocol.

5. Conclusion

While the African Continental Free Trade Agreement is well meaning in its objectives, the provisions on dispute settlement are unclear. It is not clear as to what type of disputes would be submitted to particular dispute settlement settlements and whether the arbitral process provided for under the Agreement would allow parties to go for international arbitrators or arbitral bodies. This is especially important when it comes to investment disputes which may prove challenging to some of the regional dispute settlement bodies in Africa. There is a need to clarify the issues raised in this paper as they may determine the success of the implementation of AfCFTA. Africa must acknowledge that while economic integration is an idea whose time has come, the potential disputes must be settled in a clear and unambiguous manner that creates confidence for the member states and other investors dealing with matters provided for under the Agreement. For African countries to achieve their economic independence as envisaged under AfCFTA, they

⁵³ Article 28(1), Investment Agreement for the COMESA Common Investment Area.

Investment-Related Dispute Settlement under the African Continental Free Trade Agreement: Promises and Challenges

must be willing to invest in local expertise in dispute settlement by not only encouraging and supporting individual local dispute settlement experts but also strengthening the national and regional dispute settlement bodies in order for them to win the confidence of local investors, state parties and international investors as well.

Investment-related dispute settlement is an area that requires attention. It has its challenges but holds a future promise of free trade within Africa and beyond.

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