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# Dispute Settlement Under the African Continental Free Trade Agreement: What Do Investors Need to Know?

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**Introduction**

On 30 May 2019, the Agreement Establishing the African Continental Free Trade Area ("AfCFTA Agreement") went into effect. Signed on 21 March 2018, the AfCFTA Agreement is a mega-regional trade agreement that creates a pan-African trade bloc that has the potential to unite 1.2 billion people and create a $3.4 trillion economic area. The International Monetary Fund predicts that the AfCFTA could be an economic game-changer for the continent. As of July 2019, 54 states had signed the AfCFTA Agreement and 27 states had both signed and ratified the AfCFTA Agreement. The AfCFTA provides immense opportunity for domestic and foreign investors. With its potential to overcome the historic fragmentation of African economies and open up huge investment and trading opportunities, investors stand to reap rich dividends while contributing to sustainable development. What is the legal framework for investment liberalization and investor protection under the AfCFTA Agreement? What can investors expect in terms of dispute settlement mechanisms in general and investor-State dispute settlement (ISDS) in particular?

**Investment Liberalization and Investor Protection Under the AfCFTA Agreement**

Regarding the legal framework for investment liberalization and investor protection under the AfCFTA Agreement, three points can be made.

*First*, the AfCFTA is more than a traditional free trade area and is more like a comprehensive economic partnership agreement. Investment liberalization is clearly in the works. Article 6 of the AfCFTA Agreement stipulates that

> "*[t]his Agreement shall cover trade in goods, trade in services, investment, intellectual property rights and competition policy*".

The plan is for a single continental market for goods and services, with free movement of business persons and investments. In January 2018, the Protocol to the Treaty Relating to the Free Movement of Persons, Right of Residence and Right of Establishment, opened for signature and

ratification.

*Second*, although investment liberalization and investment protection are in the works, the Investment Protocol of the AfCFTA Agreement is not yet finalized. The AfCFTA negotiations are occurring in phases. Phase I of negotiations produced four legal instruments: the AfCFTA Agreement, the Protocol on Trade in Goods, the Protocol on Trade in Services, and the Protocol on Rules and Procedures on the Settlement of Disputes ("Protocol on the Settlement of Disputes"). Article 7 of the AfCFTA Agreement stipulates that Member States

> "*shall enter into Phase II negotiations in the following areas: (a) intellectual property rights; (b) investment; and (c) competition policy*".

The Protocol on Investment, when in force, shall form an integral part of the AfCFTA Agreement and form part of the single undertaking. AU Ministers of Trade have been directed to conclude negotiations on outstanding instruments and submit the draft legal texts for adoption by January 2021.

*Third*, to boost investment and trade in the AfCFTA, plans are in the works to tackle Africa's infrastructure deficit and fully integrate the continent's infrastructure frameworks. January 2018 saw the launch of the 'Single African Air Transport Market' in line with the Yamoussoukro Decision of 1999 and the Declaration on the Establishment of a Single African Air Transport Market (Assembly/AU/Decl.1(XXIV)) of 2015.

**Dispute Resolution and Investment Arbitration under the AfCFTA Agreement**

What is the framework for dispute settlement under the AfCFTA Agreement? Are there plans for an ISDS mechanism?

Part IV of the AfCFTA Agreement is titled "*Dispute Settlement*" and establishes a Dispute Settlement Mechanism (DSM). Pursuant to Article 20 of the AfCFTA and Article 3(1) of the Protocol on the Settlement of Disputes, the DSM applies only to the settlement of disputes arising between State Parties. Given growing concerns about the ISDS, AfCFTA Member States may decide to opt for an active state-state dispute settlement mechanism as an alternative or strong complement to an ISDS mechanism. State-state dispute settlement mechanism as an alternative to ISDS is gaining in popularity and is increasingly found in BITs (*e.g.*, Brazil–Ethiopia BIT (2018) and Brazil–Malawi BIT (2015)) and in FTAs (*e.g.*, the Japan-Philippines Economic Partnership Agreement (2006) and the Australia-Malaysia FTA (2012)).

The future of ISDS in the architecture of the AfCFTA is presently unclear. The question of whether the Investment Protocol, when finalized, will provide for an ISDS mechanism is likely to prove very controversial. A number of factors work together to muddy the landscape including (1) the existence of numerous in force intra-African BITs that provide for ISDS;[1)] (2) the existence of many unratified intra-African BITs that provide for ISDS;[2)] (3) the existence of numerous '*in force*' BITs between African States and third states that also provide for ISDS; (4) the rise in intra-Africa investment and the fact that African investors are beginning to utilize the ISDS system;[3)] (5) the

retreat from ISDS by some AfCFTA Member States; (6) the retreat from ISDS by some regional economic communities in Africa, coupled with the ghost of the disbanded South African Development Community Tribunal (SADC Tribunal) that continues to hover; and (7) the global crisis in investment arbitration.

South Africa has ratified the AfCFTA (on 31 January 2019) and is the only country in Africa that has openly and formally rejected international investment arbitration. Following a multi-year review of its BIT framework, the South African Government terminated some of the country's 'first generation' BITs, decided to refrain from concluding new BITs in future unless warranted by compelling economic and political reasons, and put in place a domestic policy framework for resolving investment disputes. The Protection of Investment Act, 2015 (Act No. 22 of 2015) which entered into force in 2018, makes no provision for ISDS and only provides for dispute settlement in domestic courts and state-state arbitration. Article 13(4) of Act No. 22 of 2015 provides that an investor

> "*is not precluded from approaching any competent court, independent tribunal or statutory body within the Republic for the resolution of a dispute relating to an investment*".

Subject to the exhaustion of domestic remedies, the South African government

> "*may consent to international arbitration*" but "*[s]uch arbitration will be conducted between [South Africa] and the home state of the applicable investor*".

ISDS remains a viable option for investors with regards to those BITs involving South Africa that are still in force and have not been terminated.

The ghost of the now defunct (SADC) Tribunal is likely to complicate discussions about a possible ISDS mechanism in the AfCFTA's legal architecture. Although validly established pursuant to Article 9(g) of the Treaty Establishing the South African Development Community, the SADC Tribunal had a troubled and very short existence that was marked by jurisdictional challenges and threats from some SADC Member States. Under Article 18 of the Protocol on Tribunal and the Rules of Procedure, natural and legal persons had standing to file claims with the SADC Tribunal. Trouble started when White farmers in Zimbabwe initiated claims challenging Zimbabwe's land reform program and compulsory acquisition of agricultural lands. The SADC Tribunal's decision, in 2008, in favor of the applicants in the case of *Mike Campbell (Pvt) Ltd. and others v. Republic of Zimbabwe* proved to be the straw that finally broke the camel's back. In 2010, the SADC Summit of Heads of State and Government (SADC Summit) effectively suspended the SADC Tribunal when it decided not to renew the terms of the serving Judges or to appoint new Judges.

In 2014, the SADC Summit adopted and signed a new Protocol which explicitly limits the Tribunal's jurisdiction to state-state disputes (Article 33). The Protocol is yet to gather the ratification it needs to enter into force. In August 2019, South African President, Cyril Ramaphosa, officially withdrew South Africa's signature from the Protocol (Communique of the 39th SADC Summit (paragraph 20)). South Africa's Constitutional Court had ruled, in 2018, in the case of *Law*

*Society of South Africa and Others v President of the Republic of South Africa and Others* that former President Jacob Zuma's signing of the protocol was unconstitutional, unlawful, and irrational. In sum, although the SADC Tribunal was never formally abolished, it is dead for all intents and purposes. And the dispute settlement dimension of the SADC remains in limbo. Whether South Africa will fight for the revival of the SADC Tribunal is a question that many are now asking.

Regional economic communities are an essential building block of the AfCFTA. Consequently, the position of the different RECs on the issue of whether an ISDS mechanism should be included in the Investment Protocol is likely to be given considerable weight. Significantly, several members of the SADC have ratified the AfCFTA Agreement including, Eswatini (21 June 2018), Namibia (25 January 2019), South Africa (31 January 2019), and Zimbabwe (25 April 25).

**Conclusion**

There are many good reasons for and against the inclusion of an ISDS mechanism in AfCFTA's legal framework. At least five themes are likely to drive and shape discussions surrounding the AfCFTA's Investment Protocol:

> '*predictability*', '*sustainable development*', '*the right to regulate*', '*policy coherence*', '*balance of rights and obligations'*.

All five themes are recognized in continental policy instruments. In the AfCFTA Agreement, Member States acknowledge

> "*the need to establish clear, transparent, **predictable** and mutually-advantageous rules*" and the need to "*resolv[e] the challenges of multiple and overlapping trade regimes to achieve **policy coherence**, including relations with third parties*".

Regarding the right to regulate, in the draft Pan-African Investment Code (2015), African Union Member States

> "*RECOGNIZ[E] their **right to regulate** all the aspects relating to investments within their territories with a view to meeting national policy objectives and to promoting sustainable development objectives*"; "*SEEK[] to achieve an overall **balance of the rights and obligations** between Member States and the investors …*"; and are "*DESIROUS of the need to ensure national and continental coherence in investment policymaking*". Regarding sustainable development, one of the general objectives of the AfCFTA is to "*promote and attain **sustainable and inclusive socio-economic development**, gender equality and structural transformation of the State Parties*".

Presently, the future of ISDS in the AfCFTA's legal and institutional architecture is anyone's

guess. Whatever the outcome, it is important that negotiations are conducted in a transparent manner, that there is plenty of opportunities for all stakeholders to participate in discussions, and that the costs and benefits of all dispute settlement options are weighed very carefully.

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References

**?1** *See e.g.* Mauritius – South Africa BIT (1998).

**?2** *See e.g.* Morocco-South Sudan BIT (2017).

**?3** *See e.g. LTME Mauritius Limited and Madamobil Holdings Mauritius Limited v. Republic of Madagascar*, ICSID Case No ARB/17/28.

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