

# To What Extent Will the AfCFTA Impact the Number of ISDS Cases Involving African States?

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Cases involving African parties contribute to a significant number of International Centre for the Settlement of Investment Disputes (ICSID) cases. Indeed, 15% of ICSID cases involve parties from sub-Saharan Africa and 18% of ICSID cases involve parties from Middle East and North Africa. The UNCTAD database of Investor State Dispute Settlement (ISDS) cases records 145 cases in which one of the parties is African, which translates into 13.7% of the total number of ISDS cases.

The express provisions of the dispute resolution clauses under the ICSID and the African Continental Free Trade Agreement (AfCFTA) along with its annexures, suggest that the dispute resolution bodies under both agreements have distinct functions and jurisdictions. ICSID's jurisdiction involves disputes arising directly out of an investment between a contracting state and a national of another contracting state (ICSID, Chapter II, Article 25 (1)), while AfCFTA's jurisdiction involves disputes between member states in relation to the AfCFTA agreement (AfCFTA Article 20 (1) — (3); Protocol on Rules and Procedures on the Settlement of Disputes, Article 3 (1)). This key difference between the nature of the disputes administered under each instrument suggests that the AfCFTA would not have any significant impact on the number of ICSID and ISDS cases in general. However, there are factors

which are uncertain for now, i.e the proposed Investment Protocol (currently undergoing negotiations) and unratified BITs, which may determine the impact that AfCFTA may have on ICSID cases in the future.

This post will discuss the potential impact AFCFTA may have on ISDS cases involving African States.

### **Factors that imply that AfCFTA will not affect the number of ISDS cases**

As mentioned above, the AfCFTA provides for inter-state dispute settlement concerning and in relation to the rights and obligations of the states party to AfCFTA (i.e., trade of goods and services, investments, and intellectual property), while ICSID strictly deals with investment disputes.

Only state parties have access to resolution of disputes under the AfCFTA Dispute Settlement Body (DSB), i.e., the 55 member states of African Union (AfCFTA, Article 20(1)). In this context, member states refer to other member states of the African Union that have ratified or acceded to the AfCFTA and for which the AfCFTA is in force (AfCFTA, Article 1 (v)). Private parties do not, in their own right, have access to AfCFTA dispute settlement mechanisms. However, most trade transactions involve private entities, and home States may be willing to protect their rights in order to ensure certainty and predictability. In this sense, private parties will only be protected if their home State is a party to the AfCFTA, and in cases where the home State is willing to bring a claim.

ICSID, on the other hand, deals with disputes between states and foreign investors. It is also important to note that most of the African ISDS cases were or are being administered by ICSID. As stated above, the ICSID Caseload Statistics show that only 15% of ICSID cases are from sub-Saharan Africa and 18% of ICSID cases are from Middle East and North Africa. The UNCTAD database also records that 127 investor-state dispute claims have been filed against African countries since 1987. However, from the ICSID 2017 Statistics focused on Africa, of the 135 cases which represent cases involving African parties registered in ICSID, as at 31 May 2017, 79% were commenced by investors from States outside Africa. Likewise, from the UNCTAD database on ISDS cases, of the 127 investor claims filed against African countries since 1987, 96.8% were commenced by investors outside Africa. These figures demonstrate that a significant number of disputes submitted to ICSID

and/or ISDS claims in general, involving African parties, were between African parties and . Disputes of this nature will most likely continue to be submitted to the ICSID or other institutions to which African states are parties, as AfCFTA does not currently have jurisdiction to deal with these sorts of disputes. Interestingly, only 21% of cases administered by ICSID involve African investors. Although these figures show that most claims were not brought by African investors, this may change with the introduction of AfCFTA, and we may then begin to see more disputes involving African investors and African states.

### **Factors that imply that the AfCFTA may affect the number of ISDS cases**

The first factor is that, considering the reservations and concerns regarding 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.<sup>[fn]</sup> African countries have, in recent times, raised concerns about the traditional investor-state dispute settlement including lack of legitimacy and transparency, exorbitant costs of arbitration proceedings and arbitral awards as well as inconsistent and flawed decisions. Countries have also complained that the system allows foreign investors to challenge legitimate public welfare measures of host states before international arbitration tribunals.<sup>[/fn]</sup> An example is South Africa, which ratified the AfCFTA on 31 January 2019 and is the only country in Africa that has openly rejected international investment arbitration.<sup>[fn]</sup> 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.<sup>[/fn]</sup>

The use of State-State dispute settlement mechanisms as an alternative to ISDS is becoming popular and is increasingly found in BITs. While it may be argued that this factor may not affect the cases settled by ICSID because ICSID deals with cases involving a foreign investor and an African host state, there are instances where a State may decide to file a claim on behalf of an investor. Also, in cases where both states are African States, there may be a preference to submit disputes to the AfCFTA DSB. The possibility of this happening is likely as the number of intra-African BITs are increasing. For example, Morocco has concluded BITs with seven other countries in Africa, and South Africa has BITs in force with

Zimbabwe, Nigeria, Senegal and Mauritius.

In this instance, where there are disagreements between member states, they will likely be more willing to submit to the dispute resolution body under AfCFTA than ICSID, particularly because there might be an assumption that the former is better suited to handle African cases. This is further strengthened by the fact that although most AfCFTA member states may have signed and ratified the ICSID, dispute resolution under the ICSID only applies where contracting states consent and there is no binding obligation to use dispute resolution under ICSID (ICSID, Chapter II, Article 25). It should however be noted that in instances where the disputes are not covered by the AfCFTA, the AfCFTA DSB will not have the jurisdiction to administer and govern the dispute.

There is however the concern that an arbitral tribunal may interpret dispute resolution clauses in BITs strictly, particularly BITs entered into before the AfCFTA. In this case, arbitrators may hold that the earlier treaty, in this instance, the BITs, and thus ICSID will be applicable. This is supported by the express wording of Article 30(3) of the Vienna Convention on the Law of Treaties, but will only apply where the provisions of the BIT are compatible with the AfCFTA. The provisions of the AfCFTA are also silent on what occurs in relation to conflict issues involving international treaties and only discusses conflict issues involving regional agreements (AfCFTA Article 19).

The second factor is that it has been suggested that most African states may use the AfCFTA Investment Protocol as a basis for future investment agreement negotiations, including for agreements with non-African countries. 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.

Notwithstanding this, the AfCFTA Investment Protocol has the potential to streamline the complex framework of intra-African investment by replacing existing intra-African BITs with a single treaty that would regulate all intra-African investments.

## **Conclusion**

In view of the above, it is clear that once the AfCFTA becomes fully operational, it will introduce changes into the investment landscape. However, how far these changes will go to impact existing ISDS is yet to be seen. It is however hoped that both ICSID and AfCFTA are able to work in parallel to resolve investment disputes without encroaching on each other's jurisdiction, and granting parties the distinct dispute resolution mechanisms needed at a time.

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