

Dispute Resolution Protocols in African Continental Free Trade Agreement (AFCFTA); Reviewing Existing Protocols and Rules

By;

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Introduction

- International corporate and commercial trade is prone to serious disputes and disagreements. In the world of trade and commerce, disputes are eventual and almost always inevitable
- It follows therefore that resolution of disputes must be effective to normalise, repair and restore relationships and restore parties' rights.
- Dispute resolution mechanisms and protocols vary depending on the nature of trade, commerce or transactions involved. They are also based on the specific provisions of the agreement of parties.

Intro..... (Contd.)

- The Agreement establishing the African Continental Free Trade Area (AfCFTA Agreement) was signed on On 21 March, 2018 and came into force on 30 May, 2019
- The Agreement aims to increase intra-African trade while creating a large single African market for goods, services and movement of persons, investment, intellectual property and competition (Art 6)
- The impact of the creation of the African continental trade area is the deconstruction of the regional economic communities and diffusion of the continent into a possible economically gigantic block. (Art. 3 & 4)
- Nigeria has signed the AfCFTA and only recently ratified same, finally making us a state party
- Three protocols are in force - Protocol on Trade in Goods, Protocol on Trade in Services and the Protocol on the Settlement of Disputes while negotiations are on-going for the three other Protocols – Investment, Intellectual Property and Competition

The African Continental Free Trade Area

- African heads of government agreed to establish a continental free trade area in 2012 and started negotiations in 2015. By February 2020, 54 of the AU's 55 member states had signed the AfCFTA Agreement.
- The free-trade area is the largest in the world in terms of the number of participating countries since the formation of the World Trade Organization.
- Accra, Ghana serves as the Secretariat of continental trade area and was commissioned and handed over to the AU by the President of Ghana

The African Continental Free Trade Area.....

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- Other than the AfCFTA, Nigeria is a member of the World Trade Organisation (WTO), and Economic Community of West African States (ECOWAS)
- The agreement initially requires members to remove tariffs from 90% of goods, allowing free access to commodities, goods, and services across the continent.
- The United Nations Economic Commission for Africa estimates that the agreement will boost intra-African trade by 52 percent by 2022.

The African Continental Free Trade Agreement (AfCFTA).....Cont'd

- The Agreement Establishing the African Continental Free Trade Area entered into force on 30 May 2019 for the 24 countries that had deposited their instruments of ratification. This date marked 30 days after 22 countries had deposited their ratification instruments with the African Union Commission (AUC) Chairperson – the designated depositary for this purpose, as stipulated in Article 23 of the Agreement.
- The agreement was brokered by the African Union (AU) and was signed on by 44 of its 55 member states in Kigali, Rwanda on March 21, 2018.

Objectives of The AFCFTA

The general objectives of the agreement are to;

- create a single market,
- deepen the economic integration of the continent;
- establish a liberalised market through multiple rounds of negotiations;
- aid the movement of capital and people, facilitating investment;
- move towards the establishment of a future continental customs union;

Objectives of The AFCFTA (Contd.)

- achieve sustainable and inclusive socio-economic development,
- gender equality and structural transformations within member states;
- enhance competitiveness of member states within Africa and in the global market;
- encourage industrial development through diversification and regional value chain development,
- agricultural development and food security; resolve challenges of multiple and overlapping memberships.

Dispute Resolution Protocol Under AFTCTA

- Article 20 the AfCFTA provides for the establishment of a Dispute Settlement Mechanism to be administered in accordance with the Protocol on Rules and Procedures on the Settlement of Disputes (PRPSD).
 - **“A Dispute Settlement Mechanism is hereby established and shall apply to the settlement of disputes arising between State Parties”**
- Art 1. of the PRPSD describes a dispute as a disagreement between STATE PARTIES.....
- Article 2 of the PRPSD projects a dispute settlement system that is transparent, accountable, fair, predictable and consistent with the provisions of the Agreement

Dispute Resolution Protocol Under AFTCTA.... Cont'd

- The Protocol provides strictly for State-State dispute Settlement.
- The Protocol applies to disputes between State Parties relating to “*their right and obligations thereunder*” subject to such special and additional rules and procedures on dispute settlement contained in the AfCFTA.
- It proclaims dispute settlement to be “a central element in providing security and predictability to the regional trading system”

Dispute Resolution Protocol Under AFTCTA

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- The AfCFTA Dispute Settlement Mechanism (AfCFTA-DSM) is modelled after the World Trade Organization Dispute Settlement Understanding, with outlined steps for dispute resolution;
 - ❖ Consultations – Art. 7
 - ❖ Good offices, Conciliation and Mediation – Art. 8
 - ❖ Establishment of Panel – Art. 9
 - ❖ Appellate Body – Art. 20
 - ❖ Arbitration – Art. 27

Dispute Resolution Protocol Under AFTCTA

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- To guard against forum shopping, where a State Party has initiated a proceeding under the Dispute Protocol regarding a specific matter, the State Party shall not invoke another forum for dispute settlement on the same matter. Art. 3(4)
- Explicit timelines are set by the Protocol for each step along the dispute resolution process

Comparison; AfCFTA and OHADA Dispute Settlement

- OHADA is an international organization comprised of 17 West and Central African countries whose goal is to promote regional economic development through the harmonization of its Member States' business laws.
- On the 17th of October 1993, the OHADA treaty was signed in Port-Louis by 14 heads of States from French speaking Africa
- On 23 and 24 November 2017, the Council of Ministers of OHADA (*"L'Organisation pour l'Harmonisation en Afrique du Droit des Affaires"* – **OHADA**) adopted three major tools aimed at favouring alternative dispute resolution mechanisms in African countries.
 - (i) a new Uniform Act on Mediation;
 - (ii) a revised Uniform Act on Arbitration; and
 - (iii) updated rules of arbitration of the Common Court of Justice and Arbitration (the CCJA).

Comparison; AfCFTA and OHADA Dispute Settlement

- OHADA very recently adopted a Uniform Act on Mediation where the Common Court of Justice and Arbitration (CCJA) is the court of final jurisdiction over all matters falling within the OHADA Uniform Acts.
- Article 1 of the Uniform Act on Arbitration (UAA) states that:
 - « the Uniform Act shall apply to any arbitration where the seat of the arbitral tribunal is located in one of the member states».
- The intention of Article 1 of the OHADA UAA is that the Uniform Act should apply to all arbitrations where the seat of the tribunal is located in a member state.

Comparison; AfCFTA and OHADA Dispute Settlement

- Dispute Resolution under OHADA has a completion timeframe of 6 months from constitution of the Arbitral Panel to the publication of the award
- The arbitration award must be exequatuated. The decision on the application for exequatur is obtained before the competent court of the relevant jurisdiction within 15 days. It is deemed acquired in the case of silence of the court.
- It is likely to provide cessation only before the CCJA when it is only negative.
- The sentence rendered is not subject to opposition, appeal or judicial review. It may, however, be the subject of a review or an action for annulment before the competent court in the relevant jurisdiction whose decision is subject to review proceedings only before the CCJA.

Comparison; AfCFTA and OHADA Dispute Settlement

- The flexibility of the OHADA arbitration procedure results from the fact that waiver clauses to the action for annulment may be provided by the parties, provided that they are not in conflict with international public policy.

Criticisms of OHADA

- No uniform exequatur under the Uniform Act
- Potential conflicts of interest in the CCJA
- Potential state influence
- Immunity from Execution

Comparison; AfCFTA and ECOWAS Dispute Settlement

- The last decade has seen both an exponential growth and increasing and widespread criticism of investor–State dispute settlement (ISDS) through arbitration.
- Despite various attempts at reform, criticism has not abated and a number of States have sought to terminate treaties into which they have entered and which provide for ISDS or, at least, have resolved not to enter into new ones.
- The European Union (EU) and Canada re-negotiated their Comprehensive Economic and Trade Agreement (CETA) to permit an investment court system for the settlement of investor–State disputes under the treaty’s investment chapter.
- As reflected in CETA and in the EU–Singapore and EU–Vietnam investment protection agreements, the EU’s policy now is to establish a permanent Multilateral Investment Court to replace the various bilateral dispute settlement procedures in its current and future trade and investment agreements.

Comparison; AfCFTA and ECOWAS Dispute Settlement..... Cont'd

- The Protocol makes provision more for Investor-State dispute resolution.
- Under Article 9 of its amended Protocol, the Court now has jurisdiction to act as the Arbitration Tribunal of the Community, at least until the Member States establish such a tribunal as envisaged in the ECOWAS Revised Treaty.
- The Arbitration Tribunal of the Community currently remains a dead letter, because no steps have been taken to activate it.
- Article 9(5) of the Court's Revised Protocol provides that: 'Pending the establishment of the Arbitration Tribunal provided for under Article 16 of the Treaty, the Court shall have the power to act as arbitrator for the purpose of Article 16 of the Treaty.'

Comparison; AfCFTA and COMESA Dispute Settlement..... Cont'd

- The Common Market of Eastern and Southern Africa (COMESA) Treaty entered into force on 8 December 1994, with full implementation in 2010.
- The COMESA Treaty mainly focuses on the trade liberalisation of goods. As in the WTO, COMESA included principles of non-discrimination (Article 57) and of most favoured nation (MFN) (Article 56.1).
- COMESA seeks to eliminate the import duties and other charges and the non-tariff barriers to trade on common market goods.

Comparison; AfCFTA and COMESA Dispute Settlement..... Cont'd

- COMESA also aims to strengthen the co-operation between signatory parties in different fields of trade. This is the case of:
 - Co-operation in the Development of Transport and Communications
 - Co-operation in Industrial Development
 - Co-operation in the Development of Energy
 - Co-operation in the Development of Science and Technology
 - Co-operation in Agriculture and Rural Development
 - Co-operation in Tourism¹², and Development of the Private Sector.
 - There is also a protocol that deals with Transit Trade and Transit Facilities

Comparison; AfCFTA and COMESA Dispute Settlement..... Cont'd

- Institutional provisions are contained in Chapter Four of the COMESA Treaty. The Chapter establishes 8 Institutions responsible for the the functioning of COMESA.
- The main institution involved in the binding settlement of, inter alia trade disputes, is the Court of Justice (COJ), as established (in 1994) in Article 31.1 of the COMESA Agreement.
- Chapter five makes reference to the means of solving disputes within COMESA Member States. Specifically it mentions that: “The Court of Justice shall ensure the adherence to law in the interpretation and application of the Treaty”. The Court of Justice has compulsory jurisdiction
- The Court will hear matters from anyone who is a resident of any member state

Comparison; AfCFTA and COMESA Dispute Settlement..... Cont'd

- Furthermore, it has forum exclusion, as established in Article 34.1 of the COMESA Agreement:
 - “Any dispute concerning the interpretation or application of this Treaty or any of the matters referred to the [COJ] ... shall not be subjected to any method of settlement other than those provided for in th[e] Treaty.
- The COMESA Treaty establishes that its judgements are final, and no appeal is possible, therefore they are binding on the parties. Moreover, the Court may impose sanctions if a party does not implement its decision. It is also specified that proceedings “should be either written or oral”. (Art 31.1)

Conclusion

- To realize these benefits most urgently, member states need to be encouraged to ratify the AfCFTA in earnest to achieve the requisite numbers. This dispute settlement mechanism could perhaps dissolve some existing inter-state conflicts like that between Uganda and Rwanda, Rwanda and Burundi as it would offer an alternative but a much broader context involving other third parties outside the regional levels. Perhaps, the necessity and credibility of such a body is most required now than ever. What then would add credence to such a dispute resolution mechanism?

Thank you

Questions?