

Navigating Legal Hurdles: Analyzing Obstacles in African Continental Free Trade Areas (AfCFTA): Regional Trade Integration

Rizowan Ahmed

Lecturer, Department of Law World University of Bangladesh, Dhaka, Bangladesh

(Corresponding Author) rizowan008@gmail.com

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<https://doi.org/10.30489/cifj.2023.408392.1076>

ARTICLE INFO

Article history:

Receive Date: 23 July 2023

Revise Date: 10 October 2023

Accept Date: 07 November 2023

Keywords:

AfCFTA Trade in goods and services, Dispute settlement Mechanism, WTO, African reality

ABSTRACT

African Continental Free Trade Area (AfCFTA) is a free trade agreement among the states of Africa. The primary goal of this agreement is to make a single market for goods and services by removing trade barriers across Africa. AfCFTA has a dispute settlement body, trades in goods and services, intellectual property, investment policy, competition policy and digital trade in its different phases. These things are promising but have some legal barriers that can cause the objectives to fail. This paper aims to discover those legal barriers that can make a difference in this continental trade. Also, this paper will try to show the relationship between African reality and the texts outlined in the agreement. In addition to these aspects, the paper aims to give solutions from the legal perspective of these problems and suggestions to improve regarding upcoming texts related to this agreement.

Introduction

The purpose of the AfCFTA is to make a continental market with capital, goods, services and free movement of persons in Africa. The agreement has the intention to create a dynamic and inclusive environment to improve the economic condition of Africa. (Onyema, 2019) It will be the biggest free trade area in the world after WTO in terms of countries participation. This agreement has ability to increase trade to more than fifty percent in Africa by

eliminating trade barriers. (Simo, 2019) The dream of establishing AfCFTA started in the era of 1980s through the Lagos plan of action for the economic development of Africa. (Kigwiru 2020) Later the Abuja Treaty in 1991 which establish African economic community and AU summit of 2012 take to another level to make an agreement of free trade area in Africa. (Kigwiru 2020) After three years the negotiations went to the table of 25th ordinary session of AU and in 2018 it has

signed by 44 among 55 states in the summit of AU. Finally, by April 29, 2019 the agreement came into force by fulfilling the requirement of 22 states ratification. (Aniche 2020) There are several regional economic communities and custom unions like Community of Sahel-Saharan States (CEN-SAD), Common Market for Eastern and Southern Africa (COMESA), Southern African Customs Union (SACU), West African Economic and Monetary Union (WAEMU) and others are already existing before AfCFTA. In 2011 another agreement TFTA negotiations started and within four years it signed by twenty states but ratified by only four. Still, its negotiation is going on but it gives the way to AFCTA to grow and create appealing to the states. (Gumede,2020) This research paper will show that how AfCFTA can make together these states in one platform apart from other African regional treaties and can raise stronger voice together in the world and also liberalize trade among them. To show this, the study will attempt to address the possibilities and legal barriers of Trade in goods, services, dispute settlement mechanisms, Intellectual property laws, competition policy and investment in AfCFTA.

Literature Review

There are very few scholarly published writings found on this issue. Some of the writings are wonderfully expressed different sides of the AfCFTA, but all of them have some limitations. A principled approach to intellectual property rights and innovation in the African Continental Free Trade Agreement written by Caroline Ncube, Tobias Schonwetter, Jeremy de Beer and Chidi Oguamanam is good writing. This article expressed some of the essential points of intellectual property laws from the agreement. It analyses the substantive and procedural laws of the agreement.

(Schonwetter, Beer and Oguamanam, 2019) As in the upcoming protocol will have an important part on substantive and procedural laws to implement IP mechanism in the member parties, this paper can be kept in mind by the AfCFTA member states to see the possible ways and challenges of applying substantive and procedural laws.

This study also attempts to show the reasons that being aware of IP protection how African people violates them. (Schonwetter et al.,2019) Though this writing has essential value but still added some unnecessary discussion. Like it has discussed the background and opportunities in a broad way but on the other side, it talked very less on the important Ip issues like patent, trademark, traditional knowledge and other things. (Schonwetter et al.,2019) In the matter of traditional knowledge it just say about adopting policy in the upcoming protocol where it can more addresses about the ways to protect traditional knowledge. (Schonwetter et al.,2019) In my paper I will try to address some of them by introducing different methods. Also, I will show the reasons that why upcoming protocol need special and differential responsibility for different countries to implement IP law. Finally, shortly, I will have showed the effect of stronger IP laws and trips plus agreement on small countries which have not been discussed in this article.

The Cooperation on Competition Policy Under African Continental Free Trade Area (AfCFTA), written by Vellah Kedogo Kigwiru, is another good work specifically on Competition policy of AfCFTA. This paper gives clear idea from past to current about African continent situation and opportunities on competition law. It talks about the overlapping membership on regional treaties. (Kigwiru 2020) It shows the soft approach of wording in the agreement. Also, it explained how it gives

benefit to the states through cooperation. (Kigwiru 2020) I have also agreed with the writer and will be also expressed some of them in my writing but I expect more while reading about monopoly business. This article gives idea about option of monopoly business and necessity of informing the authority. (Kigwiru 2020)

Along with this, it should have shown that how monopoly creates problem on different states and their businesses. In this paper I will try to address these issues that the monopoly can use not just for the purpose of trade benefit but can use beyond the trade. Also, I will discover the reasons of states to use monopoly as a weapon and lastly, I will discuss how it harms the small businesses.

Trade in Services in the African Continental Free Trade Area: Prospects, Challenges and WTO Compatibility written by Regis Y. Simo. This Article focuses on the services feature on AfCFTA and make comparison with WTO compatibility. (Simo, 2020) Also, it talks about Most Favored Nation and National treatment policy of both mechanisms. Not just this it has briefly talked on modalities of GATS and shows the similarity approach AfCFTA on these modalities. (Simo, 2020) Then it talks about the contradiction Articles of the agreement and the bar on nullify, modify or revoke rights and obligation. (Simo, 2020)

Here an unnecessary thing seemed to me that the paper has discussed economic theory where the whole paper based on the legal concept, loopholes and comparisons. It may look better by avoiding the economic part because the sudden discussion bar the flow of reading and feel the reader irrelevant. Also, the economic discussion does not give broad idea and may fit in a separate article.

This Article had scope to discuss more on national treatment rather just giving some

idea to treat products with national treatment. Also, it could do the important discussion of the tendency of AfCFTA on not doing rapid liberalization. In this paper I will have addressed the rapid liberalizations and its reason. Also, I will talk about the reciprocity principle which can use as a discrimination. Also, I will try to find out the TBT, SPS legal effect on the small businesses and informal cross border trade with AfCFTA which have not discussed in this Article.

International Economic Law in Africa: Is the African Continental Free Trade Area Viable Project? by Alex Ansong is another writing on AfCFTA. It has mainly focused in three areas named legislative decision making, dispute settlement mechanism and the utility of the provisions on rules of origin with respect to goods. (Ansong, 2018) The writing has showed the decision-making procedure in the AfCFTA in a very well way. (Ansong, 2018, p.2-4) The good thing is it shows the problem of achieving consensus and another mechanism of voting to make decisions on different matters. (Ansong, 2018) The paper also tries to show the dispute settlement mechanism, where it talks about the state-state dispute settlement. (Ansong, 2018,p.6)

The disappointing thing is that it totally ignored another important part of settlement which is known as arbitration. As the article covers settlement and disputes, it should have discussed about arbitration. In Arbitration there are several problems which I will try to show in my paper specially the problem of investors to go with state-state arbitration and government option of interfere in investors business matters. Sadly, it has not discussed much about the problem of fully adopting a Western model and avoiding of African reality. It has just touched this issue in its discussion. In my paper significantly, I will try to show the

ignorance of substantial interest of third party and option of having interference by DSB to protect the interest. Also, I will have tried to the problem of overlapping membership and the connection between western model and African reality.

Structure and Principles of the Agreement

The AFCTA has been divided into three layers and different phases. The first layer refers is a framework that consists with the purpose, primary definition, and the scopes of the agreement. It makes the institutional framework and procedures to do managerial activities. (United Nation Economic Commission Africa, African Union, & United Nation Conference on Trade and Development, 2019) The second layer consisted with the different protocols on trade in goods, trade in services and settlement of disputes. The last layer gives detail of these protocols through annexes, schedules and guidelines. (United Nation Economic Commission Africa, African Union, & United Nation Conference on Trade and Development, 2019) In the second phase of negotiation will be consisted with competition policy, investment and intellectual property. (Agreement Establishing African Continental Free Trade Area, 2018) The negotiation will result in protocol with rights, obligation, and objectives with substantive and operative components of the agreement. (United Nation Economic Commission Africa, African Union, & United Nation Conference on Trade and Development, 2019) Also, the Agreement has featured with several principles like variable geometry, flexibility, special and differential treatment preservation of *acquis*, most favored nation treatment, national treatment and many more. (Michael 2019)

First Phase of the AfCFTA

The first phase covered trade in goods and services and dispute settlement. (Simo, 2019)

Dispute Settlement Mechanism

The dispute settlement of the AfCFTA is similar to the WTO mechanism. (Akinkugbe,2020) Article 20 of the AfCFTA permits establishing a dispute settlement mechanism that will administrate with the protocol on Rules and Procedures for the settlement of Disputes. (Agreement Establishing African Continental Free Trade Area, 2018) The Dispute Settlement Body (DSB) has the power to establish different dispute settlement panels and an appellate body. (Protocol on Rules and Procedures on the Settlement of Dispute, Article 5) It will have a chairperson who will be elected through state parties and with all of the power DSB will maintain the application of rulings and recommendations of those panels and appellate body. The settlement of disputes will happen with the consultations, good office, conciliation, mediation, panels and appellate body. (Simo, 2019)

The disputing parties has an option to go for consultations before going other formal way of settlement under Article 7. In the process of consultation, a party who has substantial interest can request to join it with only approval of original parties. (Protocol on Rules and Procedures on the Settlement of Dispute)

Here, the power also should have been in the panel body to determine the substantial interest of a third party. The disputing parties sometimes have the tendency to avoid the third party. It can be argued as it is a consultation process the authority should not enter, and parties should have only the power to decide but as more reliable and trustworthy DSB should have some power to determine it.

There are several regional economic communities settlement mechanism where same states are the parties and this creates overlapping of membership. AfCFTA gives the solution in Article 19 where it says, in case of any inconsistency with any regional agreements, the provision of AfCFTA will prevail in respect of that specific inconsistency. Latter it says, if that RECs, customs union or regional trade achieved higher level of integration than the higher level will prevail. This Article can be relatable to the problem of DSB of AfCFTA. (Akinkugbe, 2020, p.-11) This means the higher level of integration in another mechanism can make AfCFTA an optional forum to resolve disputes. (Akinkugbe, 2020)

Another thing is that it has adopted similar approach of WTO mechanism which is a problem in African context. The socio-economic, historical, geographical, political and other scenarios of African continent are different. (Akinkugbe, 2020)

There are states who have been colonized for a long time and as a result their regional legal systems and way of solving disputes are different. Making AfCFTA as a settlement forum, it should have taken these considerations more rather than just copying WTO mechanism. It should have not be forgotten that previous RECs settlement mechanisms have almost same system like WTO and not much succeed. (Akinkugbe, 2020, pp.-11-12)

Another thing African have culture of avoiding court in the matters of economics. . (Akinkugbe,2020, p.7) In that situation with similar mechanism of WTO, it will difficult to take them to the AfCFTA mechanism. (Akinkugbe,2020, pp.7-8)

Another problem lies In Article 3(1) of this protocol where says, the protocol will apply to disputes arising between State Parties

concerning their rights and obligations under the provisions of the Agreement. (protocol on Rules and Procedures on the Settlement of Dispute) It means a private entity or an individual cannot sue directly without go through the state. The principle of direct effect has not been given to protect them. In domestic court, a suit can happen if the government actions violate AFCTA provision which is not protecting individual or private entity in a direct way. If the rights have been given to them, the government will be benefited in terms of reducing logistical burden. (Ansong, 2018)

Trade in Goods & Services

The trade in services of Africa has increased in last few decades. There are some new services have introduced between 2002 to 2012 but at the same time some old services went fall in the market.

The protocol *on Trade in service* operates in two levels. The first level consists of general rules and the second one is sector-specific commitments made by the state parties. (Simo,2020) An important feature of this protocol, it reduces the barriers and give scope to enter in another state's market through commercial presence. Article 1(A) of the Protocol on Trade in Services says that establishment is necessary to supply the service in another state. The commercial presence includes not just a juridical person or body specified in Article 1(c), 1(D) but also joint ventures, partnerships, representative offices and branches as it uses the word "any" in the Article 1(A). (Protocol on Trade in Services) Also, they will be considered as legal personality even they do not operate in this state but are established in other states. (Protocol on Trade in Services)

This also allows natural person to do same activity where the person can leave his home state but can participate in economic activities of another state. This thing is

clears in Article 1(p) (iv) where it says natural person of a state party can give service to another state party. (Simo, 2020) To be treated under national treatment mentioned entity and individuals need to be constituted under the law of a state party and engaged with substantive business operations in the community. The commercial presence will create more businesses, provide money, and reduce discrimination among the continental people. (Simo, 2020)

In AfCFTA Article 18 adopted continental preferences which direct MFN obligation and later Article 4 of Protocol on Trade in goods take it to detail. If we read them carefully, we understand that within these states trade will make liberalize through RECs by allowing better treatment than AfCFTA. As previously discussed, Article 19 with higher integration allow this treatment. It can do most favourable treatment with AFCTA state party or a non-AfCFTA state party. The definition of third country is confusing. It creates inequality and discrimination within the member parties. The reason is it has imposed conditionality which is a reciprocal basis. (United Nation Economic Commission Africa, African Union, & United Nation Conference on Trade and Development, 2019) It also means if a state fails then there will be discrimination with the member party. The imposition of conditionality which creates discrimination is against of MFN principle rather consider it as an exception. In future there is a possibility that non-member countries get more benefit than a member party for this. (United Nation Economic Commission Africa, African Union, & United Nation Conference on Trade and Development, 2019)

Also, Article 18 (2) contradicts with Article 4(4) of the Protocols on Trade in Services.

In Article 18(2) refers state parties can afford the opportunity to other state parties to negotiate preferences granted to third parties before entry into force of AfCFTA and on the other side Article 4(2) the same state is not obliged to extend these preferences. (Simo,2020) Even Article 18(3), which says that a state party cannot nullify, modify or revoke the rights and obligation of previous trade agreements with third parties also making confusion with mentioned other Articles. (Simo,2020)

In Africa, there is lack of formal opportunities and as a result informal cross border trade (ICBT) plays a great role to create employment, food security and income generate for African people. (United Nation Economic Commission Africa, African Union, & United Nation Conference on Trade and Development, 2019) The micro, small, medium enterprise and officially unemployed persons are related to the ICBT and it is more responsive to the problem of food crisis than formal trade. (United Nation Economic Commission Africa, African Union, & United Nation Conference on Trade and Development, 2019) AfCFTA has not adopted ICBT explicitly but will indirectly benefits because after commencing AfCFTA the trade between states will be increased. As the agreement provides more flexibility to the free movements people will cross the border more often but at the same time these informal trades can consider illegal as there are many unregistered businesses relate with ICBT. (United Nation Economic Commission Africa, African Union, & United Nation Conference on Trade and Development, 2019) The bribe will be increased for giving validation to these activities. Though in the protocol on trades in goods did not adopt ICBT but in further possibilities, AfCFTA should consider this. The upcoming protocols have limitations to address these problems unless it is related to

IP and competition policy but will get scope in the future. (United Nations Economic Commission Africa, African Union, & United Nations Conference on Trade and Development, 2019)

The technical barriers to trade (TBT) and Sanitary and phytosanitary measures (SPS) will increase the price of the product which is a problem for small African countries because they are less efficient to fulfil the requirements with low cost. (United Nations Economic Commission Africa, African Union, & United Nations Conference on Trade and Development, 2019, p.106) The small companies of these countries can be hampered because of the higher measure of non-tariff barriers. The framers of AfCFTA should adopt the non-tariff barriers in a way that small countries can do trade in a wider space. (United Nations Economic Commission Africa, African Union, & United Nations Conference on Trade and Development, 2019)

Second Phase of the Agreement

The second negotiation phase consisted of intellectual property, investment and competition policy. (AJIBO,2020)

Intellectual Property Law

Intellectual Property Law rights are negotiating with competition policy and investment. In Africa some of the states have Intellectual property rights (IPR) but most of them are not up to the date. These countries have a colonial history and still their IP protections stand the IPR laws which had been introduced in that period. (Ncube 2019)

Apart from this Africa has two sub-regional IP organizations named African Regional IP organizations (ARIPO) and Organizations Africaine de la propriete Intellectuel (OAPI). There are differences in IP frameworks and structures between the

organizations. The English-speaking countries are primarily members of ARIPO, and French-speaking countries are members of OAPI. (Ncube,2019,p.180) These differences allow AfCFTA to take all the countries under one umbrella. (Ncube,2019) Also, there are several RECs who are introducing or planned to take IP initiatives with their member countries. (Ncube,2019) AfCFTA needs to include procedural and substantive positions by considering African daily life and other circumstances. On the other side, In Africa lack of awareness make people violate but in many places of the continent where people are concern of IP nature but violating them because of their socio-economic reality. (Ncube,2019) The innovation and creativity are different in Africa, here a huge number of innovations happens in informal sectors and this needs to be considered. (Ncube,2019, p.182) Most of the trades happen Africa in informal sectors and have no records. (Mupangavanhu,2018) Innovation happens from these informal trades without protection like trade secrets, confidentiality, and other IP protections. (Mupangavanhu,2018) Another thing needs to be inserted in protocol is special and differential treatment as Africa has large number of LDCs. The countries have huge economic, institutional, and other developmental differences. That is the reason the protocol needs to come with principle of flexibility and as well as special and differential responsibility. (Mupangavanhu,2018) So all the states can execute and develop IP laws in their capacity. The protocol should consist of different implementation periods depending on the country's circumstances. LDCs should be given longer periods than the developed countries. Also, the protocol should have provisions which balance the IP protection, development, mercantilism and public good. Among with them, the traditional knowledge should get include in

the provision of the protocol. (Mupangavanhu,2018)

AfCFTA needs to introduce traditional knowledge registries, clear system of patent of indigenous community's invention and mandatory disclosure requirements to protect indigenous people and their traditional knowledge. (Agutu,2020) The demand of very strong IP law should not be applied as it will make difficult to access medicines for weak countries. (Mupangavanhu,2018) As we have discussed the protocol should avoid just copying other international treaties but having it on the mind it should not go beyond them. Being more ambitious AfCFTA should not go Trips plus protection which cannot afford by most of the African countries and should focus only the African reality. (Mupangavanhu,2018) To address all of them AfCFTA should need to learn from the past mistakes of other RECS and IP organizations regarding the protection of IP and also ensure fair, balance and widely accepted IP policy which reflect the values and experience of African people. (Schonwetter, Beer and Oguamanam, 2019)

The Competition Policy

In the past, the competition law in Africa has not developed much but at the end of nineteen and beginning of twenty century, countries have been started adopting competition laws. Between 1990 to 2010 twenty-eight countries have introduced competition law in their states. (Kigwiru,2020) Currently more than half of the states have competition law in Africa. (Kigwiru,2020) There are some states who are in the process of adopting competition laws in their states. Apart from it, there are several RECs and regional trade arrangements where competition regimes have established. (Kigwiru,2020)

AfCFTA Article 4(c) says state parties will do cooperate on investment, intellectual property law and investment law to fulfil the main objectives of the agreement. (Kigwiru,2020, p.9) As mentioned, many countries have no competition law and under this Article, states get the opportunity to seek help and get benefits. In the negotiation part, they need to negotiate so that the policy will be taken by keeping them in the minds and ensuring things like infrastructure, training, enforcement mechanisms, capacity building and other necessary things to adopt competition laws in their territories. The final protocol expects to have provisions that allow all the countries to do business with states outside of Africa with a better voice. The mentioned Article also indicates so. (Kigwiru,2020, p.12) The African developing countries have no enforcement power against international cartels. Also, the lack of binding forum on competition in international law cannot do anything against big companies which birth anti-competitive conduct. A provision like Article 4 in the protocol on more focus on co-operation, sharing information and other things can make together of African countries and raise voice against big companies and countries. (Kigwiru, 2020,p.13) Article 11 of *Trade in Services* allow monopoly business in a particular state. It allows supplier of service to enjoy monopoly by notifying secretariat three months before allowing it. (Protocol on Trade in Services)

The purpose is to inform other states inform that they can get sufficient time to make strategy to do business in that particular area. In my opinion the problem with the Article, it contradicts the value of the principles and purpose of AfCFTA. At the same time, it does not protect small businesses. If any states give monopoly power to any small service sector, then other states service suppliers in the host states will be harmed.

In my understanding, services like mobile operator can be given monopoly status as that service holds huge number of money. The situation may occur where other states operator business come and take the money outside of the host country through doing business. Many home states may not afford this, so they may turn into protectionist to keep those money in its own territory. Another problem may arise that states may use this provision to negotiate with other states to achieve their other agendas unrelated to trade. Suppose a state's particular business sector is doing good in another state and many people employment depends on that sector. In that case, the host state may want something in exchange of not being monopoly on that sector. Seeing the dependency of many people, a state may accept that offer. This kind of situation may arise where diplomacy can occur by using this provision of being monopoly.

The problem of conflict between regional and national law is also here like other protocols but must find a solution to them. (Kigwiru,2020)

The word co-operate in Article 4(c) indicates the soft approach of competition policy may also be adopted in the protocol. It is understood that many states have no competition law and at a first instance it would be difficult for them to apply and follow the law. (Kigwiru,2020) At the same time, it creates problem to follow other states who are already familiar with competition law. The soft approach will give them scope to avoid AfCFTA competition mechanism. (Kigwiru,2020)

The developing countries have tendency to copy laws from other places. In upcoming protocol there is a possibility to follow EU mechanism but need to remember that time in EU treaty only Germany has domestic laws and that is the reason other states are easily follow and adopt its regional

competition law. (Nkomo,2019) In here, the scenario is different because many states have competition law already. Also, the special needs, political, social and cultural things are different, so it is difficult to make a regional law for everyone to follow and all the states may not feel flexible. (Nkomo,2019)

The dispute settlement and competition authority is another important part of this protocol. It can be supranational, co-operation and sequence approach or combination of both. (United Nation Economic Commission Africa, African Union, & United Nation Conference on Trade and Development, 2019) In the supranational mechanism, it should not impose one side fit rules to all the member countries. The rules and process should be de-centralized structure, otherwise it may interfere many things of the state that may consider against sovereignty. (United Nation Economic Commission Africa, African Union, & United Nation Conference on Trade and Development, 2019)) The decentralization will provide information between agencies and enterprise. The problem is the enterprises can give false information and here national competition authority can solve this problem. The member states should include national authority in AfCFTA or give obligations to create national authority to states, so that the verification of information can be done through co-operation and provide other states business people on the authority of AfCFTA. (United Nation Economic Commission Africa, African Union, & United Nation Conference on Trade and Development, 2019,p.165) In the co-operation approach, AfCFTA provides states maintain to their regional rules and collaborating with each other. The main advantage is it provides complete sovereignty to maintain their policy but problem arise when states start to protect

only their interest. (United Nation Economic Commission Africa, African Union, & United Nation Conference on Trade and Development, 2019) Lastly in sequence approach which is combination of both give states obligation to make laws by implanting principles of AfCFTA. Also, in this mechanism African competition network can be established for co-operation and a supranational authority can be formed. (United Nation Economic Commission Africa, African Union, & United Nation Conference on Trade and Development, 2019) Whatever the model but must need to address the drawbacks. Also, it should come with the provision of merger, acquisition and cartel. (United Nation Economic Commission Africa, African Union, & United Nation Conference on Trade and Development, 2019)

Investment Policy

In investment, there are several reasons like lack of ability to preserve policy, host state's right to regulate, rules and procedures which favour foreign investor more than the domestic investors can ruin the economy. (Schonwetter, Beer and Oguamanam, 2019)

In the protocol mentioned rights should be included. This already have been seen in the other intra agreements to make balance of the rights between foreign and domestic investors through applying MFN exceptions, national treatment. This applies by states to exercise their rights to protect public in environment, public health and other issues. The preamble of AfCFTA also indicating to adopt this by saying that state parties will regulate within their territories to achieve legitimate policy in the area of public health, safety, environment and others. (Schonwetter, Beer and Oguamanam, 2019)

Apart from this, sustainable development with trade should be included in the provision which will give scope states to

adopt national legislations. Previously discussed, in Africa a huge number of people engage with informal and small medium sized enterprises, the protocol should include them in the provisions for overall development. (Naud, Desplats & Divoy, 2020) AfCFTA already has a Dispute Settlement body and there is possibility that the protocol will not include investor states dispute settlement and the investment disputes will be dealt by the DSB procedures. Though, if states agree then other mechanisms of investment settlement can be introduced in upcoming protocol where investors may direct file suit. (Muigua,2020)

In Article 27 of the Protocol on *Rules and Procedures on the Settlement of Disputes* talks about Arbitration. It says parties can go for the arbitration by their mutual agreements and can agree on the procedures for the arbitration proceedings but imposed a condition under Article 27(2) of the same agreement that the parties cannot send the dispute to DSB, if the matter previously referred for arbitration. Here the agreement gives responsibility to the parties to inform DSB about their resort for Arbitration under Article 27(3). Also, after completion of Arbitration parties will inform the arbitration award for the enforcement to DSB under Article 27(5). Muigua,2020) In here some vague can found in the provisions which has not cleared yet. Like if one country invests in another country and they have a separate agreement on business where investor-state arbitration clause have given or they are parties to international investor state arbitration then what would happen because the agreement does not clear about investor-state and state-state Arbitration. Though from the mechanism of DSB, there is an indication of state-state Arbitration but not enough to clear it. (Muigua,2020) Here, the government of any of these two countries can go or influence

investors to go for state- state arbitration by the power of implied interpretation of the Agreement. (Protocol on Rules and Procedures on the Settlement of Dispute)

Though it can say that the protocol gives permission parties to go for Arbitration, so how the government can come in the arbitration and the answer is as DSB permits state representation and completely avoid investor representation, so as it has not clearly mentioned about investor-state Arbitration or investor-state representation in the DSB mechanism. So there is scope for government to interfere with the Arbitration and also with the representation as a party of the Arbitration which can call state-state Arbitration. If a state wants to do this, then for an investor that will be difficult to stop. (Protocol on Rules and Procedures on the Settlement of Dispute)

Nowadays most of the treaties have option of state-state and investor-state arbitration considering the investors' flexibility and the investors of Africa have also the same necessity. The arbitration clause can clarify in the upcoming protocol that the protocol would cover both areas of arbitration or not. (Protocol on Rules and Procedures on the Settlement of Dispute) Another problem is the foreign investors that there are many businesses where directly and indirectly foreigners are related and at that situation how it would deal because AfCFTA is the agreement between the African countries and only concern about their rights and obligations. The things cannot be denied that many foreigners have shares and offices with African investors and their territories. For that their interest would also be the problem for AfCFTA. (Muigua,2020) Also, the questions need to be cleared about the jurisdiction of AfCFTA that can it give bar on choosing international body or not. Also needs to be cleared that which body would

get jurisdiction and whose decision would be granted. (Muigua,2020)

Lastly, another problem that investors of small countries would feel difficulties to include governments in their matters. In the developed countries investors get more benefits from the state and state takes care about their issues related to business and other things but in small countries investors do not get that incentives or help from the state government. In Africa most of the countries are developing and least developed, here they would face the same problems by including governments and for that they will not go happily in the state-state Arbitration. Even it also gives option to state government to interfere in the business and know the secrets. Moreover, it may use politically in some places.

The Decision-Making Process

In coming days states will seat often on different matters to take decisions on AfCFTA. In Article 14 gives direction of taking decision. Article 14(1) of the agreement says the decisions will be taken on the substantive issues by consensus. On the other side, Article 14(3) allows the single majority vote which will be taken only on the matter of questions of procedure. On the other side, In Article 15 allows three fourth majority vote on waiver of obligations if the consensus fails. (Ansong,2018)

The discussion on these Articles shows the agreement gives different approach on decision taking but moreover the agreement give importance to the consensus in the matter of decision. (Ansong,2018) Even if we look at the Article 1(c) where consensus showed as an important principle of the agreement. The Protocol Rules and Procedures on the Settlement of Disputes says the consensus will be achieved when there is no objection by a member of the

dispute settlement body at the time of decision-making. (Ansong,2018)

The problem with this approach is if one member gives a formal objection on the matter then the consensus will be not achieved and the decision will not be taken. On the other side, every member of the legislative has a veto power which can stop to take a decision. Apart from this, AfCFTA have provision to send the matter in superior body for decision. (Ansong,2018) In a situation where subordinate body cannot reach any decision, it can send the matter to the superior body. (Ansong,2018) Like in Article 14(2) says, the committee of senior trade officials can send the matter council of ministers if it failed to get consensus. If they again fail to reach a consensus then that would again send to assembly for its consideration. (Ansong,2018)

The thing is, the whole process is time consuming and cannot take a decision with a reasonable time. Also, a matter which have opposed by the different states representative and by this time they inform their government about the matter. Also, when it comes to superior body, they will have already informed about not getting consensus. (Ansong,2018) Also, it is not a surprising thing to find people from the states in that superior body whose state has taken an opposition in the former decision-making process and will have the possibility of same result which has given in the subordinate of the decision. (Ansong,2018)

If we see the process of decision making, we can find the similarities procedures between wto and AfCFTA. The process in WTO is also criticized and people aware about the flaws but still the framer of AfCFTA adopted it which shows their tendency of adopting a western formula in their continent. (Ansong,2018)

In the future there will be many problems regarding above mentioned features and will need to seat to resolve and that is the reason this decision-making procedure will have impact on the betterment of AfCFTA.

Findings & Discussions

There are many observations on this Agreement but some of them are very important to discuss here. One of the common problems is Article 18 and 19 on overlapping of membership and higher integrity. This makes weak the AfCFTA because there are Agreements which are already in higher level and this can make states feel the forum as optional in terms of trades in goods, service, ip, competition and rest of things as these two articles apply in all of them. Also, the MFN provision does not satisfy its objective as it has option of creating discrimination in all of these sectors. Here, it is understood the Articles are flexible because of giving states comfort-zone to enter and also, AfCFTA cannot get higher integrity instantly but the approach can be little bit binding. Then the soft approach of laws which I have shown in the competition policy which may be misused by many states in the name of protectionism. Also, the different culture of states and rigid decision-making procedure may also make problem and may be difficult to make consensus on matters. Still, some protocols are upcoming, the negotiator can make a difference in approaches on those segments. Lastly, AfCFTA is similar western model but to be successful, it needs to adopt a model which will be balance of western model and African reality. Not just upcoming protocol but in future through amendments and other meetings AfCFTA will get more chances to adopt it.

Conclusion

AfCFTA can potentially change African people's lives and make a strong position in

world trade. The issues that can make this forum an optional place must be well addressed. Also, the other phases need to be finished by reflecting African people and their realities. The problem left in phase one and the agreement should not be repeated in the upcoming protocols and should try to cover their mistakes as much as possible through the provision of the upcoming protocol. Also, one needs to remember that the upcoming protocols are not the end of negotiations or the end of the mistakes. There will be scopes of states to seat repeatedly, and at that time, we need to rectify the previous mistakes again. The successful implementation of AfCFTA will not just boost the trade of Africa but also make a strong position in the global economy.

Funding: This research did not receive any specific grant from funding agencies in the public, commercial, or not-for-profit sectors.

Declarations of interest: The authors declare none.

CONFLICT OF INTEREST

The author (s) declares that there is no conflict of interest regarding the publication of this manuscript. In addition, the ethical issues, including plagiarism, informed consent, misconduct, data fabrication and/or falsification, double publication and/or submission, and redundancy, have been completely observed by the authors.

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REFERENCES

Books

Buhlungu, S., & Tshoaedi, M. (Eds.). (2013). *COSATU'S Contested Legacy: South African trade unions in the second decade of democracy* (Vol. 28). Brill.

Odularu, G., & Alege, P. (2019). *Trade Facilitation Capacity Needs*. Palgrave Pivot, Cham. <https://link.springer.com/book/10.1007/978-3-030-05946-0>.

Journal Articles

Ajibo, C. C. (2019). African continental free trade area agreement: the euphoria, pitfalls and prospects. *Journal of World Trade*, 53(5), 871-894. <https://doi.org/10.54648/trad2019035>

Akinkugbe, O. D. (2020). Dispute settlement under the African continental free trade area agreement: a preliminary assessment. *African Journal of International and Comparative Law*, 28(Supplement), 138-158. <https://www.eupublishing.com/doi/abs/10.3366/ajicl.2020.0335>

Aniche, E. T. (2020). African continental free trade area and African Union Agenda 2063: The roads to Addis Ababa and Kigali. *Journal of Contemporary African Studies*, 116. <https://doi.org/10.1080/02589001.2020.1775184>

Ansong, A. (2018). International Economic Law In Africa: Is the African Continental

Free Trade Area a Viable Project?. Available at SSRN 3285290. <http://dx.doi.org/10.2139/ssrn.3285290>

Barry, D. (2019). The road to NAFTA. In *Toward A North American Community?* (pp. 3-14). Routledge.

Ciuriak, D. (2019). From NAFTA to USMCA and the Evolution of US Trade Policy. *Verbatim*, CD Howe Institute. <https://dx.doi.org/10.2139/ssrn.3369291>

Destà, M. G., & G erout, G. (2018). The challenge of overlapping regional economic communities in Africa: lessons for the continental free trade area from the failures of the tripartite free trade area. *Ethiopian Yearbook of International Law* 2017, 111-141.

Haiyun, L., Yahia, Y. E., Hossain, M. I., & Shah, S. S. H. (2023). The effect of integration processes of the Common Market for Eastern and Southern Africa on the economic growth of the member states. *International Journal of Finance & Economics*, 28(1), 93-111. <https://doi.org/10.1002/ijfe.2407>

Kigwiru, V. K. (2020). The cooperation on competition policy under the African continental free trade area. *Manchester J. Int'l Econ. L.*, 17, 98.

Kuhlmann, K., & Agutu, A. L. (2019). The African Continental Free Trade Area: Toward a new legal model for trade and development. *Geo. J. Int'l L.*, 51, 753.

Le Pere, G. L. (2021). US-China Geoeconomic Tensions: Implications for the African Continental Free Trade Area. *Asian Perspective*, 45(1), 147-156.

- Leshoele, M. (2020). AfCFTA and Regional Integration in Africa: Is African Union Government a Dream Deferred or Denied?. *Journal of Contemporary African Studies*, 1-15. <https://doi.org/10.1080/02589001.2020.1795091>
- Mapondera, M. (2014). Prioritising an inclusive and equal trade liberalisation policy in the Continental Free Trade Area. *Africa Law Today*, (1).
- Marere, M. (2019). African Continental Free Trade Area: A Dream or Reality?. Available at SSRN 3469430.
- Mupangvanhu, Y. (2018). The protection of intellectual property rights within the continental free trade area in Africa: Is a balance between innovation and trade possible?. *International Journal of Business Economics and Law*, 15(4), 14-22.
- Nwankwo, C. M., & Ajibo, C. C. (2020). Liberalizing regional trade regimes through AfCFTA: challenges and opportunities. *Journal of African Law*, 64(3), 297-318.
- Onyejekwe, C., & Ekhaton, E. (2021). AfCFTA and lex mercatoria: reconceptualising international trade law in Africa. *Commonwealth Law Bulletin*, 47(1), 93-112.
- Onyema, E. (2020). Reimagining the framework for resolving intra-African commercial disputes in the context of the African Continental Free Trade Area Agreement. *World Trade Review*, 19(3), 446-468.
- Pasara, M. T. (2020). An overview of the obstacles to the African economic integration process in view of the African continental free trade area. *Africa Review*, 12(1), 1-17.
- Pasara, M. T., & Diko, N. (2020). The effects of AfCFTA on food security sustainability: an analysis of the cereals trade in the SADC region. *Sustainability*, 12(4), 1419.
- Payosova, T., Hufbauer, G. C., & Schott, J. J. (2018). *The dispute settlement crisis in the World Trade Organization: causes and cures* (No. PB18-5).
- Payosova, T., Hufbauer, G. C., & Schott, J. J. (2018). *The dispute settlement crisis in the World Trade Organization: causes and cures* (No. PB18-5).
- Pere, Garth L. le, 'US-China Geoeconomic Tensions: Implications for the African Continental Free Trade Area. *Asian Perspective* (2019)45
- Rashid, Z., & Hilali, A. Z. (2020). Geopolitics of Most Favoured Nation (MFN) status under the WTO and future of trade between India-Pakistan. *Liberal Arts and Social Sciences International Journal (LASSIJ)*, 4(1), 54-65.
- Rustamli, V. (2023). Alternative Dispute Resolution in Azerbaijan: Comparative Analysis on Main Problems. *CIFILE Journal of International Law*, 4(8), 36-58.
- Simo, R. Y. (2019). The African Continental Free Trade Area in a Decaying Multilateral Trading System: Questioning the Relevance of the Enabling Clause. Available at SSRN 3501539.
- Zwolankiewicz, A. (2021). The Brave New World of Foreign Investment in the Wake of

Covid-19 Pandemic: Current Situation and Potential Disputes. *CIFILE Journal of International Law*, 2(4), 1-25.

Laws

Companies Act 2008

Treaties

Agreement Establishing a Common Market for Eastern and Southern Africa (COMESA), signed on 11 may 1993 (entered into force 123 August 1994)

Agreement Establishing African Continental Free Trade Area, signed on 21 march 2018 (entered into force 30 May 20190)

Southern African Development Community, signed on 17 August 1992 9entered into force 2005)

Conference and Analogous Papers

"Next steps for the African Continental Free Trade Area: Assessing Regional Integration in Africa – Aroa ix next steps for the African continental free trade area" (2019).

Gumede, V,(2020)Examining the African Continental Free Trade Area in the Context of a Political Federation for Africa–Towards a United African States. UNISA Working Paper

Lunenburg, P. (2019) Phase 1B of the African Continental Free Trade Area (AfCFTA) negotiations. Policy Brief 69, South Center

Newspaper Articles

Diaz, Chris, (2019, September,) 'New pact a game changer for intra-Africa trade' *Nation*, (Africa) <<https://nation.africa/kenya/blogs-opinion/opinion/new-pact-a-game-changer-for-intra-africa-trade-206032>>

Thesis

Bakkar, Sadia (2020) 'MFN in service Trade: A comparative analysis of General Agreement on Trade in Services and African Continental Free Trade Area' LL.M Thesis, Submitted to Central European University.

Charity, Nkomo, 'A discussion on the African continental free trade area and competition' (2019), LL.M dissertation, submitted to University of Cape town.

Dipholo, Thabo 'The potential impact of the African Continental Free Trade Area agreement on a regional service provider' (2019) M.P Thesis, Submitted to University of Pretoria, 2019
<<https://repository.up.ac.za/handle/2263/74834>>

Muigua, Kariuki' Investment-Related Dispute Settlement under the African Continental Free Trade Agreement: Promises and Challenges' (2020), Ph.d Thesis.
<https://scholar.google.com/scholar?hl=en&as_sdt=0%2C5&q=Investment-Related+Dispute+Settlement+under+the+African+Continental+Free+Trade+Agreement%3A+Promises&btnG=>>

Electronic Sources

Erasmus, Gerhard' *Dispute Settlement in the African Continental Free Trade Area'* Retrieved July 11 2019 from
<<https://www.tralac.org/blog/article/14150-dispute-settlement-in-the-african-continental-free-trade-area.html>>

Erasmus, Gerhard 'What is the AfCFTA Approach to the Regulation of Trade in Services?' Retrieved from October 26, 2019
<<https://www.tralac.org/blog/article/14289-what-is-the-afcfta-approach-to-the-regulation-of-trade-in-services.html>>

Viljoen, Willemin' Rules of origin, tariffs
and the AfCFTA' Retrieved May 17, 2019
from
<[https://www.tralac.org/blog/article/14063-
rules-of-origin-tariffs-and-the-afcfta.html](https://www.tralac.org/blog/article/14063-rules-of-origin-tariffs-and-the-afcfta.html)>