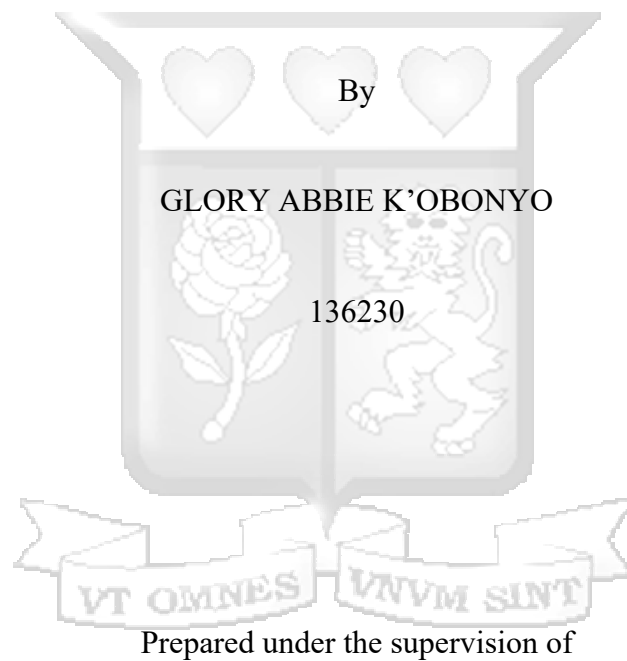


**ASSESSING THE JURISDICTION OF THE AfCFTA DISPUTE SETTLEMENT
MECHANISM: SHOULD PRIVATE PARTIES HAVE A SEAT AT THE TABLE?**

Submitted in partial fulfillment of the requirements of the Bachelor of Laws Degree,
Strathmore University Law School



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DECLARATION

I, GLORY ABBIE K'OBONYO, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed: 
Date: 22/04/2024

This dissertation has been submitted for examination with my approval as University Supervisor.



Signed: 

MS. JANET NJAMBI MACHARIA

ABSTRACT

This study interrogates the African Continental Free Trade Area's dispute settlement mechanism. It is mostly focused on the jurisdiction of this body and assesses whether limiting its jurisdiction to inter-state trade disputes would render the mechanism ineffective. This is because by limiting the jurisdiction of the panels and the Appellate Body to only State Parties, the body risks locking out individuals from seeking remedies at this level, a trend not common within African Regional Economic Blocs. Additionally, it has been recorded that African States rarely litigate against each other in trade-related disputes. They usually opt for alternative means of dispute settlement such as negotiation, mediation and conciliation. This paper argues that this 'new' trend may render the AfCFTA dispute settlement body ineffective.

If the dispute settlement mechanism is ineffective, the AfCFTA may be unable to achieve the goal of continental economic integration. This is because it ideally, plays a central role in enabling the goals of the AfCFTA. It does so by ensuring that State Parties comply with their obligations. Additionally, the intended role of the panels and the Appellate Body is to interpret and apply the provisions of the Agreement, thus bringing harmony and certainty to the system.

A study of the practices of the African Regional Economic Communities, specifically the East African Community and the South African Development Community shows that legal and natural persons play a vital role in ensuring that the dispute settlement body is active and effective. They most often trigger the dispute settlement process by referring matters to the adjudicating body for settlement, thus enabling it to fulfill its role in the community. This has also enabled them to achieve their goals and objectives in Regional Economic Integration.

In light of this, this study recommends that the jurisdiction of the African Continental Free Trade Area's dispute settlement mechanism should include claims raised by legal and natural persons. In doing so, the adjudicating body is guaranteed to effectively play its intended role, thus contributing to Regional Economic Integration.

LIST OF ABBREVIATIONS

TERM	ABBREVIATION
Free Trade Area	FTA
African Continental Free Trade Area	AfCFTA
World Trade Organisation	WTO
Regional Economic Integration	REI
The WTO Dispute Settlement Body	WTO DSB
The Agreement Establishing the AfCFTA	The Agreement
AfCFTA Dispute Settlement Mechanism	AfCFTA DSM
Protocol on Rules and Procedures on the Settlement of Disputes	Dispute Protocol
General Agreement on Tariffs and Trade	GATT
General Agreement on Trade in Services	GATS
Regional Economic Communities	RECs
The African Union	AU
Arab Maghreb Union	UMA
Common Market for Eastern and Southern Africa	COMESA
Community of Sahel-Saharan States	CEN-SAD
Economic Community of Central African States	ECCAS
Economic Community of West African States	ECOWAS
Intergovernmental Authority on Development	IGAD
Southern African Development Community	SADC
East African Community	EAC
East African Court of Justice	EACJ
Treaty Establishing the African Economic Community	Abuja Treaty
European Economic Area	EEA
European Free Trade Association	EFTA
Economic Monetary Union	EMU
African Opportunity and Growth Act	AGOA
Strategic Trade and Investment Partnership	STIP
International Law Association	ILA
International Trade Law Committee	ITLC

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Christopher Ayieko & Another v Attorney General of the Republic of Kenya & Another, EACJ, Reference Number 5 of 2019

East Africa Law Society & 4 Others v. Attorney General of Kenya & 3 Others, 2008, Ref. No. 3 of 2007.

East Africa Law Society & 4 Others v. Attorney General of Kenya & 3 Others, Ref. No. 3 of 2007, at 7 (Aug. 31, 2008).

Independent Medical Unit vs. Attorney General of Kenya & 4 Others, 2011, Ref. No. 3 of 2010

Manariyo Desire v. Attorney General of Burundi, 2018, Appeal No.1 of 2017, 34

Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe, 2008, SADCT 2/2007.

LIST OF LEGAL INSTRUMENTS

Agreement Establishing the African Continental Free Trade Area, 2018.

General Agreement on Tariffs and Trade, 1994.

General Agreement on Trade in Services, 1994.

Protocol on Rules and Procedures on the Settlement of Disputes, 2018.

Protocol on The Tribunal in the Southern African Development Community, 2000.

Supplementary Protocol Amending The Preamble And Articles 1, 2, 9 And 30 Of Protocol A/P.1/7/91 Relating To The Community Court Of Justice And Article 4 Paragraph 1, 2005.

Treaty Establishing the African Economic Community, 1991.

Treaty Establishing the Common Market for the Eastern and Southern Africa,

Treaty for the Establishment of the East African Community, 1999.





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ASSESSING THE JURISDICTION OF THE AfCFTA DISPUTE SETTLEMENT MECHANISM: SHOULD PRIVATE PARTIES HAVE A SEAT AT THE TABLE?

CHAPTER 1:

BACKGROUND AND INTRODUCTION

International Trade Law,¹ is generally governed by the World Trade Organization (WTO). The WTO is an international organization that governs trade between nations. Under the WTO multilateral system, members are allowed to establish Regional Free Trade Areas and Customs Unions. This is established in Article XXIV of the General Agreement on Tariffs and Trade (GATT)² as well as Article V of the General Agreement on Trade in Services (GATS).³

At the regional level, Africa has a large number of Regional Economic Communities (RECs).⁴ These include the Arab Maghreb Union (UMA); the Common Market for Eastern and Southern Africa (COMESA); the Community of Sahel-Saharan States (CEN- SAD); the East African Community (EAC); the Economic Community of Central African States (ECCAS); the Economic Community of West African States (ECOWAS); the Intergovernmental Authority on Development (IGAD) and the Southern African Development Community (SADC). These

¹ The law that regulates the flow of goods and services between and across states, regional trade areas or trade regions; See: O'Donoghue A, 'Trade Law' Oxford Bibliographies, 23 May 2012 < https://www.wto.org/english/thewto_e/acc_e/afcfta_negotiations_and_implementation_state_of_play_at_wto_ac_cession_dialogue_addis_ababa_12_1_2020_million.pdf > on 23 September 2023.

² Article XXIV, *General Agreement on Tariffs and Trade* (15 April 1994) 1867 U.N.T.S. 187, 33 I.L.M. 1153.

³ Article V, *General Agreement on Trade in Services* (15 April 1994), 1869 U.N.T.S. 183, 33 I.L.M. 1167.

⁴ The Agreement Establishing the African Continental Free Trade Area defines the RECs to mean Regional Economic Communities recognized by the African Union.

RECs are recognized in The Agreement Establishing the AfCFTA (hereinafter the Agreement).⁵

The African Union, in its Agenda 2063, developed a number of initiatives to promote continental integration. This included the establishment of a Continental Free Trade Area, which was aimed at creating ‘*an integrated, prosperous and peaceful Africa, driven by its own citizens*’.⁶ The African Continental Free Trade Area (the AfCFTA) was established pursuant to this initiative.⁷

The Agreement was adopted on 21 March, 2018, in Kigali, Rwanda, and came into force on 1 January, 2021, after achieving the necessary ratifications by a sufficient number (22) of African Union (AU) member states. Although the AfCFTA Agreement has come into force, the negotiations are still incomplete.⁸ These negotiations are to take place in three phases.⁹ Phase I covered areas on trade in goods and services, and dispute settlement; Phase II negotiations are on intellectual property rights, investment, and competition policy; and Phase III is on digital trade and women, and youth in trade.¹⁰ Phase I of the negotiations was completed, and the Protocols on Trade in Goods, Trade in Services, and Rules and Procedures on the Settlement of Disputes (as well as their annexes and appendices) entered into force on 30 May 2020.¹¹

With regard to dispute settlement, Article 20 of the Agreement establishes the AfCFTA Dispute Settlement Mechanism (hereinafter the AfCFTA DSM) which is to be administered by the Protocol on Rules and Procedures on the Settlement of Disputes (hereinafter the Dispute Protocol). The Dispute Protocol is modeled after the WTO’s Dispute Settlement Understanding.

⁵ Article 1(j), *Agreement Establishing the African Continental Free Trade Area* 21 March 2018.

⁶ African Union, ‘Agenda 2063: The Africa We Want Framework Document’ September 2015 < https://au.int/sites/default/files/documents/33126-doc-framework_document_book.pdf > on 12 October 2023.

⁷ Preamble, *Agreement Establishing the African Continental Free Trade Area*.

⁸ Trade Unions and the AfCFTA, ‘Where Does the AfCFTA Stand in December 2022?’ 30 December 2022 < <https://www.tradeunionsinafcfta.org/where-does-the-afcfta-stand-in-december-2022/> > on 12 October 2023.

⁹ Takefman, ‘Breaking Down the AfCFTA: What You Need to Know About Africa’s Latest Trade Initiative’ 7 March 2023 <https://researchfdi.com/resources/articles/breaking-down-the-afcfta-what-you-need-to-know-about-africas-latest-trade-initiative/> on 12 October 2023.

¹⁰ Habte M, ‘African Continental Free Trade Area Negotiations and Implementation: State Play’, African Union Department of Trade and Industry, February 2020 https://www.wto.org/english/thewto_e/acc_e/afcfta_negotiations_and_implementation_state_of_play_at_wto_acc_cession_dialogue_addis_ababa_12_1_2020_million.pdf on 12 October 2023.

¹¹ Chidede T, ‘AfCFTA II and III Negotiations-Update’ 10 February 2021 < <https://www.tralac.org/blog/article/15090-afcfta-phase-ii-and-iii-negotiations-update.html> > on 12 October 2023.

Thus, much like the WTO's Dispute Settlement Body (hereinafter the WTO DSB), the DSM aims to provide for the settlement of disputes in a manner that is fair, transparent, and predictable.¹²

There is concern, however, as to whether the AfCFTA DSM would be successful in fulfilling its role of dispute settlement. This is due to the fact that African States are reluctant to resolve inter-state trade disputes through adjudication.¹³ This is evident from a study of Africa's history of inter-state litigation in the WTO DSB, as well as the African Regional Courts. With regard to the WTO DSB, African countries have had a history of non-participation in the system.¹⁴ In fact, in the last 20 years, the WTO has had just but one such instance, in which Tunisia issued a request for consultations with Morocco with regard to its alleged violation of anti-dumping measures, in 2019.¹⁵ The matter did not proceed to the panel stage.¹⁶

At the Regional level, the African Regional Courts adjudicate on disputes arising from their respective Agreements and Treaties.¹⁷ A number of regional judicial bodies, for example, the East African Court of Justice (EACJ),¹⁸ COMESA Court of Justice,¹⁹ and ECOWAS Court of Justice,²⁰ were initially established to primarily adjudicate on disputes arising from the establishing treaties. They have the jurisdiction to not only adjudicate on disputes instituted between State Parties, but also cases involving private parties (legal and natural persons).²¹ This



¹² Article 2, *Protocol on Rules and Procedures on the Settlement of Disputes*, 2018.

¹³ Akinkugbe O, 'What the African Continental Free Trade Area Agreement Protocol on Dispute Settlement Says About the Culture of African States to Dispute Resolution'.

¹⁴ Simo R, 'Tunisia/Morocco Scuffle at the WTO: A missed Opportunity to Establish a Record of Regional Interstate Dispute or a Chance to Contribute to Shaping WTO Jurisprudence' *AfonomicsLaw* 4 April 2019 <<https://www.afonomicslaw.org/2019/04/03/the-tunisia-morocco-scuffle-at-the-wto-a-missed-opportunity-to-establish-a-record-of-regional-interstate-trade-disputes-or-a-chance-to-contribute-to-shaping-wto-jurisprudence/>> on 12 October 2023.

¹⁵ Morocco - Definitive Anti-Dumping Measures on School Exercise Books from Tunisia - Request for consultations by Tunisia, 2019 G/ADP/D131/1; G/L1297; WT/DS578/1.

¹⁶ Simo R, 'Tunisia/Morocco Scuffle at the WTO: A missed Opportunity to Establish a Record of Regional Interstate Dispute or a Chance to Contribute to Shaping WTO Jurisprudence'.

¹⁷ International Justice Resource Centre, *Courts and Tribunals of Regional Economic Communities* - <<https://ijrcenter.org/regional-communities/>> on 12 October 2023.

¹⁸ Article 30, *Treaty for the Establishment of the East African Community*, 30 November 1999.

¹⁹ Article 26, *Treaty Establishing the Common Market for the Eastern and Southern Africa*, 5 November 1993.

²⁰ Article 4, *Supplementary Protocol Amending The Preamble And Articles 1, 2, 9 And 30 Of Protocol A/P.1/7/91 Relating To The Community Court Of Justice And Article 4 Paragraph 1* (19 January 2005) A/Sp.1/01/05.

²¹ International Justice Resource Centre, *Courts and Tribunals of Regional Economic Communities*'.

broadens the courts' jurisdiction, by allowing non-state actors access to these courts.²² It has been noted that the regional courts have never recorded any case in which both of the parties in the case are states (i.e. states instituting proceedings against each other).²³ Rather, cases heard in these regional courts are usually instituted by private parties against the member state.²⁴ These courts have been able to retain function by allowing non-state actors access to them. For example, Article 30 of the EAC Treaty allows legal and natural persons to refer matters to the EACJ for determination.²⁵ If their jurisdiction were to be limited to disputes between states, the courts would not function.

This is seen by observing the fate of the SADC Tribunal.²⁶ The SADC Summit of Heads of State recently enacted a new protocol on dispute settlement which confines its jurisdiction to claims raised by State Parties. By doing so, the new protocol precludes private parties from accessing it.²⁷ It has since heard no disputes. Given that no disputes have been referred to it, the tribunal has faced a '*slow death*', due to its inutility.²⁸

The AfCFTA DSM could arguably face a similar fate as that of the SADC tribunal. This is because the Dispute Protocol only allows State Parties to have access to the DSM.²⁹ Additionally, the Dispute Protocol bars a State Party that has instituted a proceeding at the DSM, from instituting a claim on the same matter at another court,³⁰ and vice versa.³¹ This further limits the AfCFTA tribunal's jurisdiction. Additionally, in limiting the jurisdiction of the DSM to state parties only, the Dispute Protocol undermines the progress that the Regional

²² Tsighe M, 'Can the Dipute Settlement Mechanism of the Crown Jewel of the African Continental free Trade Area?' AfonomicsLaw 8 April 2019 < <https://www.afonomicslaw.org/2019/04/08/can-the-dispute-settlement-mechanism-be-a-crown-jewel-of-the-african-continental-free-trade-area/>> on 12 October 2023.

²³ Simo R, 'A Future Court without Cases? On the Question of Standing in the AfCFTA Dispute Settlement Mechanism' AfonomicsLaw 19 August 2019 < <https://www.afonomicslaw.org/2019/08/19/a-future-court-without-cases-on-the-question-of-standing-in-the-afcfta-dispute-settlement-mechanism> > on 4 November 2023.

²⁴ Tsighe M, 'Can the Dipute Settlement Mechanism of the Crown Jewel of the African Continental free Trade Area?'

²⁵ Article 30, *Treaty for the Establishment of the East African Community*.

²⁶ It should be noted that the Agreement recognizes the RECs as a significant part of the AfCFTA. Thus, it establishes RECs as the building blocs of the AfCFTA.

²⁷ Art. 33, *Protocol on The Tribunal in the Southern African Development Community* (18 August 2014).

²⁸ Simo R, 'A Future Court without Cases? On the Question of Standing in the AfCFTA Dispute Settlement Mechanism'.

²⁹ Article 20, *Agreement Establishing the African Continental Free Trade Area*.

³⁰ Article 3.4, *Protocol on Rules and Procedures on the Settlement of Disputes*.

³¹ Erasmus, G, 'REC Courts and the AfCFTA' tralacBlog, 24 January 2022 <https://www.tralac.org/blog/article/15479-rec-courts-and-the-afcfta.html> on 12 October 2023.

Courts have made by allowing non-state actors standing. It is arguable that based on the current practice, the system may be underutilized, if at all used.

In conclusion, given the history of African states in dispute settlement (with the SADC tribunal as an example), limiting jurisdiction to disputes arising between states, would result in the inutility of the DSM. This is because, it would be unable ensure that State Parties are compliant with the provisions of the Agreement. It would also be unable to build jurisprudence, thus hampering its goal of promoting security and predictability by exercising its interpretive role.³² Without an effective DSM, the AfCFTA legal framework would be ineffective in promoting a unified African continental trade system, given that the underlying rights and obligations would not be upheld and enforced.³³

1.1.Problem Statement

The AfCFTA DSM is only accessible to States, either as parties to the dispute or as third parties. Consequently, the only entities with standing and the ability to actively participate in proceedings, are the State Parties. This would result in an underutilized system. Negotiated regulations mean little, if there is no mechanism in place to enforce them and resolve any disputes regarding the interpretation of the covered legal instruments. Thus, in order to boost trade among African States, it is necessary for the negotiated protocols to be supported by an effective dispute settlement mechanism, which is responsible for enforcing the states' obligations and interpreting the provisions in the covered agreements.

This study proposes to evaluate whether the limitation of the DSM's jurisdiction to inter-state trade disputes would impact the role it plays in promoting REI. It also aims to assess the impact of such a limitation on the effectiveness of the DSM, and whether expanding the DSM's jurisdiction to claims raised by non-state actors is a suitable solution.

³² Ansong A 'Addressing Possible Institutional Bottlenecks in the Agreement Establishing the African Continental free Trade Area' AfronomicsLaw, 18 February 2019 < <https://www.afronomicslaw.org/2019/08/19/a-future-court-without-cases-on-the-question-of-standing-in-the-afcfta-dispute-settlement-mechanism>> on 12 October 2023.

³³ Nangolo O, 'Development Community Tribunal through the eye(s) of the WTO's Dispute Settlement Mechanism' Afronomicslaw 16 November 2022 < <https://www.afronomicslaw.org/category/analysis/looking-southern-africa-development-community-tribunal-through-eyes-wtos-dispute> > on 4 November 2023.

1.2. Research Objectives

- 1) To assess the relationship between the DSM and REI.
- 2) To assess whether limiting the jurisdiction of the DSM would be of detriment to it, given the current practices in the existing African Regional Economic Communities: EAC and SADC.
- 3) To analyze whether expanding the jurisdiction of the AfCFTA DSM to include claims made by private parties is a suitable solution.

1.3. Research Questions

- 1) What is the relationship between the AfCFTA DSM and REI?
- 2) What would be the effect of limiting the jurisdiction of the DSM to inter-state trade disputes, in light of the current practices in the existing African Regional Economic Communities (specifically EAC and SADC)?
- 3) What would be the effect of expanding the jurisdiction of the DSM to include claims made by private parties?

1.4. Hypothesis

My hypotheses are that the limitation of the DSM's jurisdiction to inter-state trade disputes would:

- i. Affect the effectiveness of the DSM.
- ii. Impact its role in achieving REI.

1.5. Justification

The AfCFTA DSM is mandated to adjudicate on disputes instituted by states. However, this would render it ineffective. This is because, limiting its jurisdiction to state disputes means that the already-established practice within the RECs is undermined. Within dispute settlement frameworks under the RECs, such as within the EACJ, non-state actors are allowed to approach the courts. Given that the goal of the AfCFTA is to build on the already established practices within the RECs, it follows that the AfCFTA DSM should give room for individuals to approach the Dispute Settlement Body of the AfCFTA. This is also combined with the practice of states at REC level, which is that they often resolve disputes outside of the dispute settlement

established frameworks within the various regions. It is arguable that this would be the practice even at the AfCFTA level, which would render the system ineffective.

This study is important from both an International Trade Law perspective, as well as in understanding African REI. This is because, the AfCFTA DSM has been designed to mirror the WTO DSB. This includes limiting its jurisdiction to claims raised by states against each other. However, this design is in contradiction with the practices of African states in the regional and international sphere, with regard to instituting claims against each other. Thus, this oversight would result in an ineffective DSM. There have been various studies critiquing the design of the AfCFTA in light of the fact that African States do not litigate against each other in the regional and international sphere.³⁴ However, no studies have assessed whether the limitation of the AfCFTA's jurisdiction to inter-state trade disputes would actually limit the DSM's role in REI. There are also no studies that have assessed whether expanding the DSM's jurisdiction to include private parties would remedy such a limitation.

This study is, therefore, useful to policy makers by guiding them on how they can amend the Agreement Establishing the AfCFTA and the Dispute Protocol to ensure that the DSM effectively fulfills its role of dispute settlement. This study also assesses whether extending the jurisdiction of the DSM to include claims instituted by private parties is a suitable solution, and whether there are any other viable solutions.

1.6. Conceptual Framework

This concept describes principles in international law that advance the idea that an effective DSM is an important part of REI, without which integration would be unsuccessful. It also highlights that the DSM, as the guardian of the AfCFTA legal framework, helps to maintain the rule of law, and promote legal integration. Thus, it is indispensable, and plays an integral role in achieving effective REI in the AfCFTA. Several principles and theories support the importance of a robust DSM in the context of REI. They provide insight into why effective

³⁴ Akinkugbe O, 'What the African Continental Free Trade Area Agreement Protocol on Dispute Settlement Says About the Culture of African States to Dispute Resolution'; Gathii J, 'The Underappreciated Jurisprudence of Africa's Regional Judiciaries' *Oregon Review International Law*, 12, 2010.

mechanisms for resolving conflicts are crucial for the success and sustainability of integrated regions.

1.6.1. Legal Integration as a means of REI

According to Mancuse, legal integration aims at harmonizing national provisions by replacing them with identical texts for all contracting member states.³⁵ In order for REI to achieve successful realization, it is important for laws emanating from the treaties and protocols to be applied in a uniform and consistent manner.

According to Balassa, total economic integration can only be fulfilled through the harmonization of regional practices, economically, socially, and politically. It must also have an authority whose decisions are binding on the member states.³⁶ As such, authors such as Oppong propose that the court is a path to harmonization of the law.³⁷ This is because, according to Pitarakis and Tridmas, a reliable legal system, '*secures that no individual, in either private or public capacity, places itself above the law, protects agents from arbitrary decisions and reduces economic uncertainty.*'³⁸ Additionally, Marquis notes that inconsistencies in community law, would result in it being ignored as a whole. This would have a negative effect on REI.³⁹

Kawande gives an example of the European Court of Justice (EUCJ) to show the role that the regional dispute settlement body plays in legal integration. She emphasizes that REI would not have been as successful in Europe without the EUCJ, which acted as the custodian of the Treaty

³⁵ S Mancuse, 'Creating mixed jurisdictions: Legal Integration in the SADC, *Journal of Comparative Law*, 2011,148.

³⁶ B Balassa 'The theory of Economic Integration' George Allen &Unwin Ltd, London, 1962, 2.

³⁷ Oppong R, *Legal Aspects of Economic Integration in Africa*,1, Cambridge University Press, Cambridge, 2011, 114

³⁸ Pitarakis J and Tridmas G 'Joint Dynamics of legal and Economic Integration in the European Union' *European Journal of Law and Economics*,2003, 360.

³⁹ Marquis H, 'Legal Integration in the Common Market' *Journal of International and Comparative Law*,1978, 212.

of Rome.⁴⁰ Kelman and Schmidt also note its indispensable role as the driving force of economic integration.⁴¹

1.6.2. The principle of the rule of law

The principle of the rule of law is a fundamental concept in governance and legal systems, emphasizing that all individuals and institutions (including the state)⁴² are subject to, and accountable under the law. It has been best described to mean that the people, including the government, should be ruled by the law and obey it, and that the law should be such that people will be able to be guided by it.⁴³ This is because it plays an important role in ensuring that persons are accountable to the law, there is legal certainty, and that there is transparency and accountability in legal procedures.⁴⁴ The rule of law also plays a key role in establishing clear consequences of actions that violate the law.⁴⁵

In the context of the WTO, the International Law Association (ILA) issued a Declaration on the Rule of Law in International Trade.⁴⁶ The corresponding International Trade Law Committee (ITLC) established a number of principles arising from this declaration which constitute the rule of law in international trade law.⁴⁷ These include, firstly, members are to comply with the international trade law. In instances when the dispute settlement body has found that a member has acted inconsistently with its obligations, the member must bring itself into conformity with the law.⁴⁸ Secondly, transparency of procedures. This includes enhanced participation of interested parties. Thirdly, democratic participation in the decision-making progress. Fourthly, consistent interpretation.

⁴⁰ Kawende D, 'Legal Integration as a Means to REI: A Southern African Perspective' 13, *Indonesian Journal of International Law*, 2, 2016, 196-197.

⁴¹ Barley A and Mattli, 'Europe Before the court: A political Theory of legal integration' *International Organization*, 1993, 41.

⁴² United Nations and the Rule of Law 'What is the Rule of Law?' < <https://www.un.org/ruleoflaw/what-is-the-rule-of-law/> > on 22 March 2024.

⁴³ Walker G, *The Rule of Law: Foundation of Constitutional Democracy*, 1, Melbourne University Press, Melbourne, 1988.

⁴⁴ United Nations and the Rule of Law 'What is the Rule of Law?'

⁴⁵ GOV.UK, 'The Value of the Rule of Law to International Trade and Finance' 15 October 2013 < <https://www.gov.uk/government/speeches/the-value-of-the-rule-of-law-to-international-trade-and-finance> > on 22 March 2024.

⁴⁶ International Law Association, *Declaration on the Rule of Law in International Trade*, Resolution No. 2/2000.

⁴⁷ Committee of International Trade Law, International Law Association London Conference Report, 2000, 12 < https://www.ila-hq.org/en_GB/documents/conference-report-london-2000-10 > on 22 March 2024.

⁴⁸ *Ibid.*

Hahn also states that the rule of law means nothing if states who have agreed to be bound by an agreement do not abide by the law.⁴⁹ As such, members need to act in conformity with the law. If the dispute settlement mechanism is delegitimized, either by disregarding its rulings, or by any other means, the rule of law is replaced by what he terms as the ‘*law of the jungle*’.⁵⁰

1.7.Literature Review

Various authors have discussed the AfCFTA DSM. This includes an analysis of the dispute settlement procedure established by the Dispute Protocol. Akinkugbe notes that the DSM is designed to mirror the WTO DSB.⁵¹ This has been noted to be a departure from the design of other African Regional Courts, which emulate the adversarial design of the courts in the European Union.⁵²

Additionally, scholars such as Simo have raised concerns on the fact that the Dispute Protocol only extends its jurisdiction to State Parties.⁵³ This is because, as noted by various authors including Akinkugbe, states do not litigate against each other at the regional and international⁵⁴ level with regard to trade disputes.⁵⁵ Van der Borgh and Alavi equate this inactivity at the international level to extenuating factors such as high costs, lack of an effective trade policy infrastructure, lack of technical expertise, conflicting political interests, and the incapacity to

⁴⁹ Hahn M, ‘Challenges for the Rule of Law in the WTO’ 22 *Zeitschrift für Europarechtliche Studien* 3, 2019, 255.

⁵⁰ Hahn M, ‘Challenges for the Rule of Law in the WTO’, 256.

⁵¹ Akinkugbe Olabisi, ‘Dispute Settlement: African Continental Free Trade Area (AfCFTA)’ Max Planck Encyclopedia of International Procedural Law, Oxford University Press, 2021—<<http://dx.doi.org/10.2139/ssrn.3825805>> on 10 December 2023; Onyema E, ‘Re-imagining the Framework for Resolving Intra-African Commercial Disputes in the Context of the African Continental Free Trade Area Agreement’ 1 *World Trade Review*, 2019.

⁵² Alter K, ‘The New Terrain of International Law: Courts, Politics, Rights’, Northwestern University Roberta Buffett Center for International and Comparative Studies, Northwestern Law & Econ Research Paper No. 13-001, 2014, 3-8— <https://ssrn.com/abstract=2233080> on 10 December 2023.

⁵³ Simo R, ‘Tunisia/Morocco Scuffle at the WTO: A missed Opportunity to Establish a Record of Regional Interstate Dispute or a Chance to Contribute to Shaping WTO Jurisprudence’.

⁵⁴ Mosoti V, ‘Africa in the First Decade of WTO Dispute Settlement’ 9, *Journal of International Economic Law* 2, 2006, 427-453; Gathii, J, ‘The COMESA Court of Justice’ in Howse R, Ruiz-Fabri H, Ulfstein G, Zang M, *The Legitimacy of International Trade Courts and Tribunals*, (eds), Cambridge University Press, Cambridge, 2018, 314-348.

⁵⁵ Akinkugbe O, ‘What the African Continental Free Trade Area Agreement Protocol on Dispute Settlement Says About the Culture of African States to Dispute Resolution’; Gathii J, ‘The Underappreciated Jurisprudence of Africa’s Regional Judiciaries’ *Oregon Review International Law*, 12, 2010.

retaliate.⁵⁶ Simo sights that some of these factors also explain why this issue extends to regional courts. Additionally, scholars such as Maluwa also posit that African States prefer political solutions (negotiation and conciliation) to trade disputes rather than litigation i.e. ‘*African solutions to African problems*’.⁵⁷

In contrast, it has been vastly documented that various regional courts grant individuals, non-governmental organizations, and even business (in some instances) standing to raise their claims before the courts.⁵⁸ Even then, most of the disputes heard at the regional level are non-trade related.⁵⁹ Ebobrah, Onyejekwe and Ekhaton posit that they have become proponents of human rights instead of economic integration (the latter of which is their mandate).⁶⁰ Gathii and Simo argue that despite the non-litigation of trade disputes by courts, regional courts such as the COMESA Court of Justice and the EACJ have been successful at guaranteeing the prevalence of the rule of law established in their treaties.⁶¹

Authors have raised concerns that, by denying non-state parties standing in the DSM, the tribunal will face the daunting fate of having no cases in its docket to hear and determine.⁶² This

⁵⁶ Apecu J, ‘The Level of African Engagement at the World Trade Organization from 1995 to 2010,’ *International Development Policy* 10 June 2013 < <https://journals.openedition.org/poldev/1492> > on 10 December 2023, 52-53; Alavi A, ‘African Countries and the WTO’s Dispute Settlement Mechanism’ 25 *Development Policy Review* 1, 2007 27-29; Van der Borgh K, ‘Justice for All in the Dispute Settlement System of the World Trade Organization?’ 39 *Georgia Journal of International & Comparative Law* 3, 2011, 787–806.

⁵⁷ Maluwa T ‘The Peaceful Settlement of Disputes among African States, 1963–1983: Some Conceptual Issues and Practical Trends’ 38 *International and Comparative Law Quarterly*, 1989, 308; Mbengue M ‘African perspectives on inter-state litigation’ in Natalie Klein (eds) *Litigating International Law Disputes: Weighing the Options*, Cambridge University Press, Cambridge, 2014, 169-170; Akinkugbe O, ‘What the African Continental Free Trade Area Agreement Protocol on Dispute Settlement Says About the Culture of African States to Dispute Resolution’.

⁵⁸ Onyejekwe C and Ekhaton E, ‘AfCFTA and Lex Mercatoria: Reconceptualizing International Trade Law in Africa’ 47 *Commonwealth Law Bulletin* 1, 2021, 19.

⁵⁹ Gathii J, ‘Evaluating Evaluating the Dispute Settlement Mechanism of the African Continental Free Trade Agreement’ *AfronomicsLaw* 10 April 2019 < <https://www.afronomicslaw.org/2019/04/10/evaluating-the-dispute-settlement-mechanism-of-the-african-continental-free-trade-agreement/> > on 12 October 2023.

⁶⁰ Ebobrah S, ‘Courts of Regional Economic Communities in Africa and Human Rights Law’ in Kadelbach S, Rensmann S and Rieter T (eds) *Judging International Human Rights: Courts of General Jurisdiction as Human Rights Courts*, 1, Springer Cham, Switzerland, 2019; Onyejekwe C and Ekhaton E, ‘AfCFTA and Lex Mercatoria: Reconceptualizing International Trade Law in Africa’, 18.

⁶¹ Gathii J, *The Performance of Africa's International Courts: Using International Litigation for Political, Legal, and Social Change*, eds, Oxford University Press, Oxford, 2020; Simo R, ‘Non-Exclusivity and an Ocean of Possibilities: The AfCFTA Jurisdictional Lex Specialis’ *Transnational Dispute Management*, 2023—< https://pureadmin.qub.ac.uk/ws/portalfiles/portal/284502095/SIMO_TDM.pdf > on 10 December 2023.

⁶² Simo R, ‘Tunisia/Morocco Scuffle at the WTO: A missed Opportunity to Establish a Record of Regional Interstate Dispute or a Chance to Contribute to Shaping WTO Jurisprudence’; Onyejekwe C and Ekhaton E, ‘AfCFTA and Lex Mercatoria: Reconceptualizing International Trade Law in Africa’ 47 *Commonwealth Law Bulletin* 1, 2021.

may be detrimental to the AfCFTA, given that, as Simo notes, the DSM is central to economic integration, as it is mandated to provide ‘security and predictability’ to the regional trading system.⁶³

Onyema proposes the inclusion of disputes between private parties into the jurisdiction of the DSM. However, this is done in the context of disputes arising between private parties.⁶⁴ This study differs from this, as it proposes that the jurisdiction should not only be expanded to include disputes between private parties, but also disputes between the state and private parties.

In light of the above, there has been no study that has evaluated whether the limitation of the DSM’s jurisdiction to inter-state trade disputes would impact its role in achieving REI. No study has also assessed the impact of such a limitation on effectiveness of the DSM, and whether expanding the DSM’s jurisdiction to include claims raised by private parties is a suitable solution.

1.7.1. Contribution

This study, as a whole, will contribute to understanding the AfCFTA DSM and its role in the overall regional trading system. It will also contribute to the studies which evaluate whether the DSM should extend its jurisdiction to include claims raised by non-state actors. While previous studies have only raised concerns on whether the DSM would be effective, this study goes on to assess whether the lack of extended jurisdiction will lead to the demise of the DSM, and hamper the overall goal of economic integration. This study also attempts to propose a solution to this problem. This will be based on a study of whether extending standing to non-state actors is a possible solution.

Finally, this study will complement works by scholars such as Gathii, Akinkugbe and Simo, which have highlighted importance the AfCFTA and the role of its corresponding DSM. The study will especially build on their arguments that have raised concern on the jurisdiction of the DSM, in light of the fact that African States do not take each other to regional and international courts, especially in cases related to trade disputes.

⁶³ Simo R, ‘Non-Exclusivity and an Ocean of Possibilities: The AfCFTA Jurisdictional Lex Specialis’, 2.

⁶⁴ Onyema E, ‘Re-imagining the Framework for Resolving Intra-African Commercial Disputes in the Context of the African Continental Free Trade Area Agreement’.

1.8.Methodology

This study consists of two major parts: the first part consists of an evaluation of whether the limitation of the AfCFTA's jurisdiction to inter-state trade disputes would impact its role in achieving REI. The second part, will assess whether this limitation while hamper the overall effectiveness of the DSM, and whether expanding the DSM's jurisdiction to claims raised by private parties is a suitable solution. This analysis will be based on the principles and theories set out in the conceptual framework.

The study will use a qualitative analysis using evidence from primary sources such as Agreement Establishing the AfCFTA, and the AfCFTA Dispute Protocol. This study will also use secondary sources, including books, journal articles, case law, and general studies. This study will use a deductive approach with the chapters, thus, establishing a premise, from which a claim can be derived.

1.9.Chapter Breakdown

Chapter one introduces the topic that I aim to address, as well as the problem statement. This includes a conceptual framework, hypothesis, literature review and methodology. Chapter two assesses the important role the DSM plays in achieving REI. Chapter three assesses whether limiting the jurisdiction of the DSM to inter-state trade disputes would limit the effectiveness of the DSM, in light of the current practices in the EAC and SADC. In Chapter four, I analyze the findings in Chapters 2 and 3 and put them into the context of the AfCFTA. Finally, Chapter five, concludes the study, by outlining its findings and providing a recommendation pursuant to these findings.

This is done by analyzing the provisions of the treaty and referring to secondary sources of law, as well as the practices of the RECS, specifically the EAC and SADC.

CHAPTER 2: IMPORTANCE OF THE AfCFTA DSM IN ACHIEVING THE OBJECTIVES OF THE AfCFTA

Introduction

This Chapter sets out to establish the importance of the DSM in achieving REI in Africa. This study is done with the aim of showing that REI cannot be achieved without an effective DSM. In order to establish this, this chapter will look at the various stages of REI, before moving to the history of REI in Africa. This is because, it is important to look at history in order to determine the future. Finally, it will expound on the roles of the dispute settlement bodies in promoting REI.

2.1. The Stages of REI

Economic integration has been defined as ‘*a close degree of economic intertwining that, by formal agreement of informal circumstances, the countries involved begin to surrender some degree of sovereignty and act as an economic unit*’.⁶⁵ Preferential/ Regional Economic Integration takes place when states agree to cooperate with each other by reducing trade barriers, developing common policies and a harmonized market.⁶⁶ Therefore, we can understand REI to mean a formal agreement in which states agree to cooperate economically, by reducing barriers to trade with the goal of creating a harmonized market so as to achieve trade liberalization.

There are typically four stages of REI. These include:⁶⁷

i. Free Trade Area (FTA):

This form of integration focuses on the elimination of tariffs and other barriers to trade in goods and services. Each country is, however, allowed to maintain its own external tariffs with countries that are not party to the agreement. For example, the AfCFTA.

⁶⁵ John T. Rourke, *International Politics on the World Stage*, Dushkin Publishing Group/Brown & Benchmark Publishers, Connecticut, 1995, p.569.

⁶⁶ Fergin E. ‘Tangled Up in a Spaghetti Bowl- Trade Effects of Overlapping Preferential Trade Agreements in Africa’ published Bachelor Thesis in Economics, Lund University, 2011, 3.

⁶⁷ Fergin E. ‘Tangled Up in a Spaghetti Bowl- Trade Effects of Overlapping Preferential Trade Agreements in Africa’, 4.

ii. Customs Union:

This is the second stage of REI. In addition to the elimination of internal tariffs, it establishes a common external tariff (CET) on imports from non-member countries. For example, the EAC.

iii. Common Market:

This is the third stage of REI. This is when member countries, in addition to establishing a customs union, allow the free movement of factors of production, such as labor and capital, across borders. It involves deeper economic integration. For example, the European Economic Area (EEA) is a common market arrangement among European Free Trade Association (EFTA) countries and the European Union (EU).

iv. Economic Union:

In an economic union, member countries harmonize economic policies, coordinate monetary and fiscal policies, and may adopt a common currency. It involves a higher degree of economic integration. For example, the Economic and Monetary Union (EMU) within the European Union, where countries use the Euro as a common currency.

2.2. History and Importance of REI in Africa

In the case of Africa, REI has been viewed as a very important factor of African independence and decolonization.⁶⁸ This is because, it is believed that political independence must go hand in hand with economic independence, so as to ensure a better life for the African people.⁶⁹ Economic Integration is not only important from a political perspective (the pan-african movement),⁷⁰ but it is also from the legal perspective through the theory of neo-liberal REI.⁷¹ This theory, as proposed by Oppong, emphasizes that removing barriers to trade (basically

⁶⁸ Nyajeka K. 'Overcoming the Challenges Facing the Implementation of the African Continental Free Trade Area: A Legal Perspective' published, L.L.M Thesis, University of Bern, 2019,26.

⁶⁹ United Nations Economic Commission for Africa. "Next Steps for the African Continental Free Trade Area" (2019) *Assessing REI in Africa (ARIA IX)* p. 39.

⁷⁰ Esedebe, P.O. "Origins and Meaning of Pan-Africanism" (1970) *Presence Africaine, Nouvelle Series No 73*, p. 126.

⁷¹ Oppong R,' *Legal Aspects of Economic Integration in Africa*, 7.

promoting free trade) between states is important for promoting economic growth.⁷² This is achieved through REI.

As such, the AU endeavored to create a united economic front. This is first observed in the formation of the African Economic Community, which envisioned an integrated African market. This agreement also included the added goal of the ‘*peaceful settlement of disputes between African States*’ and coordination between existing and future RECs.⁷³ Additionally, both the Abuja Treaty of 1991, and the Framework on Boosting Intra-African Trade (BIAT) of 2012, establish the need for a continental preferential agreement, to ease trade within Africa.⁷⁴

The AU, thus, established Agenda 2063, which is its developmental blueprint. It is a strategic framework for the socio-economic transformation of the African continent over a 50-year period, and was adopted by the AU in January 2015. The primary aim of Agenda 2063 is to achieve "The Africa We Want," a vision of an integrated, prosperous, and peaceful Africa. It recognizes the need for the continent to take charge of its development, fostering unity and collaboration among African nations. It establishes a number of themes including establishing an integrated continent which emphasizes the importance of infrastructure development, connectivity, and the removal of barriers to intra-Africa trade and movement.

In light of the above undertaken agreements, the African States endeavoured to promote REI through a number of stages, which would eventually lead to the formation of a customs union.⁷⁵ This is the linear model of the development of REI.⁷⁶ This envisions that REI begins with the formation of an FTA, leading up to the final stage of an economic union. As such, the AfCFTA is the first stage of achieving effective REI. The Agreement envisions that the AfCFTA is a member-driven transparent framework fueled by reciprocity with the goal of creating a common

⁷² Fofack, H. “A Competitive Africa: Economic Integration Could Make Africa a Global Player” (2018). *IMF Finance and Development Magazine*, p. 4. <https://www.imf.org/external/pubs/ft/fandd/2018/12/pdf/afcfta-economic-integration-in-africa-fofack.pdf>.

⁷³ Article 3 (f), *Treaty Establishing the African Economic Community (Abuja Treaty)*, 1991.

⁷⁴ Nyajeka K. ‘Overcoming the Challenges Facing the Implementation of the African Continental Free Trade Area: A Legal Perspective’, 5-8.

⁷⁵ Nyajeka K. ‘Overcoming the Challenges Facing the Implementation of the African Continental Free Trade Area: A Legal Perspective’, 18.

⁷⁶ Nyajeka K. ‘Overcoming the Challenges Facing the Implementation of the African Continental Free Trade Area: A Legal Perspective’, 9.

FTA. The Agreement and its subsequent protocols establish a number of rights and obligations that members must comply with to ensure that the objectives established are achieved.

The DSM is established to ensure such compliance, and is key to ensuring that the mandate of the AfCFTA is achieved. This is because it fulfills a number of roles. Firstly, the tribunal helps maintain the rule of law, thus ensuring compliance, and secondly, it promotes legal integration, thus aiding in avoiding the ‘spaghetti bowl’ problem caused by the proliferation of preferential trade agreements.

2.3. The Important Role of The Tribunals in Achieving REI

REI can only exist if there are institutions which exist to ensure the meaningful realization of the established objectives.⁷⁷ These not only include political institutions such as the Ministerial Conference, but also judicial institutions such as the Panels and the Appellate Body.

2.3.1. Maintaining the rule of law

It has been emphasized by authors such as Hugo Grotius that international law is of great importance in the liberalization of trade between countries.⁷⁸ Generally, courts and tribunals are the main custodians of the rule of law. This is because, they interpret the existing provisions and met out punishment to parties that fail to comply.⁷⁹ Ensuring compliance enables the region to achieve its goal. The case of the AfCFTA is not different. The Dispute Protocol mandates the DSM to ensure the peaceful settlement of disputes.⁸⁰ This is done through fulfilling its interpretive role,⁸¹ and issuing recommendations on bringing the measure into conformity with the Agreement.⁸² In ensuring compliance, the goal of REI is more likely to be achieved, given that State Parties observe and respect the rights and obligations enshrined in the agreement.

⁷⁷ Taylor C, ‘Dispute Resolution as a Catalyst for Economic Integrations and an Agent for Deeping Integration: NAFTA and MERCOSUR?’ 17 *Northwestern Journal of International Law and Business* 1,1997, p.850.

⁷⁸ Wu, H. *Trade Facilitation in the Multilateral Trading System* Routledge, 2019 , p. 7; Nyajeka K. ‘Overcoming the Challenges Facing the Implementation of the African Continental Free Trade Area: A Legal Perspective’ published, L.L.M Thesis, University of Bern, 2019,19.

⁷⁹ Waldron J, ‘The Rule of Law and the Role of Courts’ 10 *Cambridge University Press* 1, 2021, 91.

⁸⁰ Article 4(2), *AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes*.

⁸¹ Article 4, *AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes*.

⁸² Article 23, *AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes*.

This can, however, only be done if claims are brought to the DSM. This is unlikely in the case of the AfCFTA, given that states rarely litigate against each other.

2.3.2. The role of courts in promoting regional legal integration

The Agreement specifies that one of the goals of the AfCFTA is to overcome the challenges created by multiple and overlapping membership of RECs so as to further regional cooperation and integration.⁸³ These challenges include the Spaghetti Bowl Effect, which is caused by the proliferation of regional trade agreements.⁸⁴

2.3.2.1. The Spaghetti Bowl Effect

This term was first coined by Jagdish Bhagwati in 1995. He argues that the proliferation of preferential trade agreements between nations and regions in different directions, creates a confusing and convoluted mess.⁸⁵ Bhagwati, commonly uses the different rules of origin as an example to justify this theory.⁸⁶ This effect has been commonly referred to in scholarly literature on African trade and REI.⁸⁷

In the case of Africa, there is an increased number of RECs which are created with different goals of integration. For example, the EAC has been established as a Customs Union, COMESA is a Common Market, and the AfCFTA is a Free Trade Area. The goals of each REC are different. For example, in the case of the EAC, state parties have a common external tariff which applies to non-members, while in the AfCFTA, state parties are free to apply their own differing external tariffs to non-members. It is, thus, difficult to understand how countries who are members of both agreements can juggle these opposing obligations. As such, it has been argued that the spaghetti bowl effect is a major contributor to the problem of weak implementation of regional preferential agreements in Africa.⁸⁸ This is because, in order to

⁸³ Article 3(h), *Agreement Establishing the AfCFTA*.

⁸⁴ Magwape, M. "The AfCFTA and Trade Facilitation: Rearranging Continental Economic Integration" (2018) *Legal Issues of Economic Integration*, p.356.

⁸⁵ Bhagwati J, 'U.S. Trade Policy: The Infatuation with Free Trade Areas' in Bhagwati J and Krueger A (eds) *The Dangerous Drift to Preferential Agreements*, 1ed, American Enterprise Institute Press, 1995, 2-7.

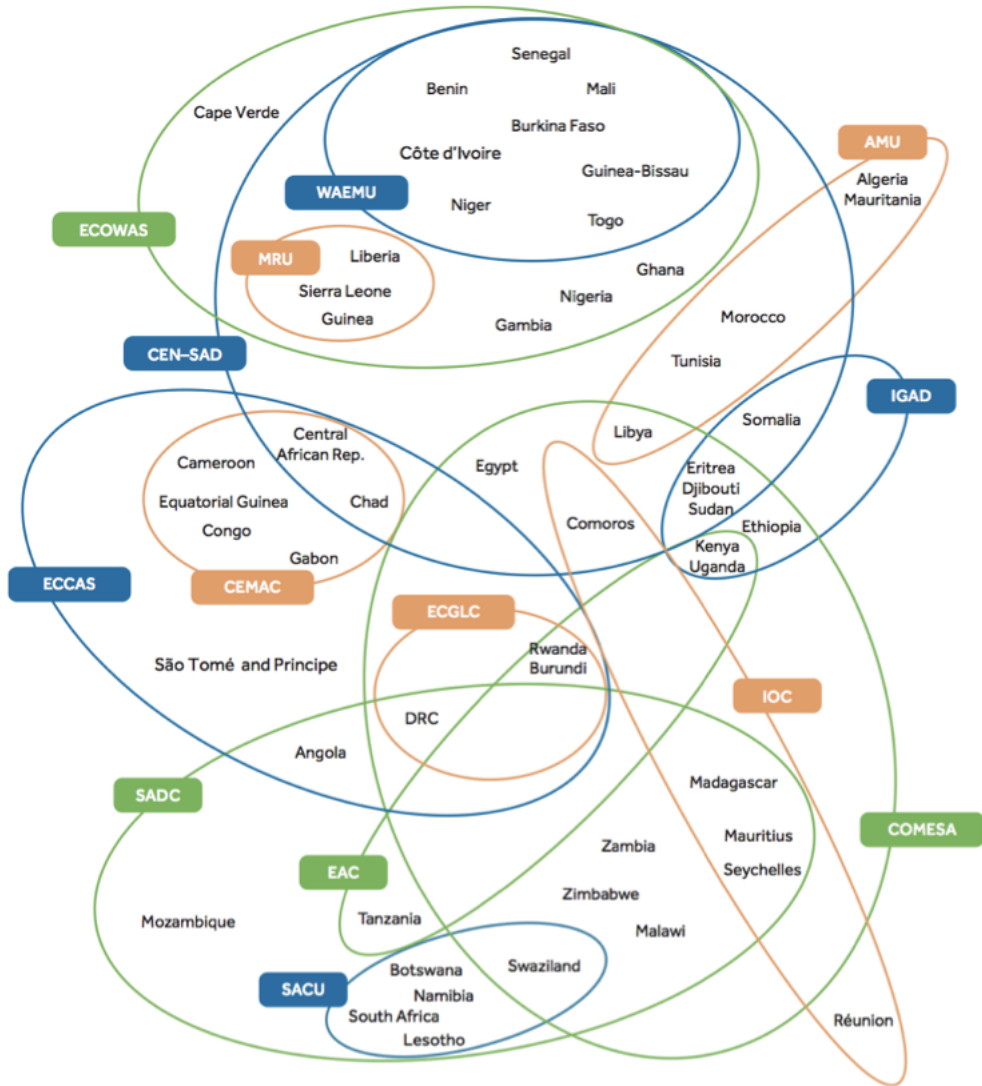
⁸⁶ *ibid*.

⁸⁷ Fergin E. 'Tangled Up in a Spaghetti Bowl- Trade Effects of Overlapping Preferential Trade Agreements in Africa'.

⁸⁸ Yang, Yongzheng and Gupta, Sanjeev (2005), "Regional Trade Agreements in Africa: Past Performance and the Way Forward", *IMF Working Paper* (WP/05/36).

fulfill one obligation, a party must violate its obligations in another agreement. This is the Spaghetti Bowl Effect.

Figure 1.4 The 'spaghetti bowl' effect of multiple REC memberships in Africa



Source: ACBF (2016)

Source: South Africa Institute of International Affairs- Dialogue 'A Development Regionalism' Approach to the African Continental Free Trade Areas

2.3.2.2. The Spaghetti Bowl Effect and REI

The AfCFTA observes a top-down approach to economic integration, in which it calls upon State Parties to adopt the provisions of the Agreement and its subsequent protocols into domestic law. Thus, the realization of the goals of the Agreement is state-driven.⁸⁹ The Agreement does not place the responsibility on RECs to harmonize their policies, so as to further integration.⁹⁰ This is problematic, given that most State Parties of the AfCFTA are party to at least one more REC, which may have provisions that are differing from the AfCFTA legal framework. RECs work to further their own objectives. In instances where their objectives differ with the AfCFTA, there may be legal fragmentation. This is detrimental to REI.

2.3.2.3. The Role of the DSM

The DSM plays a special role in relation to this. That is, the promotion of legal integration. This is because, it has been mandated to preserve existing rights and obligations established in the provisions of the Agreement and clarify existing provisions of the Agreement.⁹¹ This includes clarifying the scope of provisions such as the principles established in Article 5 of the Agreement. This unique role places the DSM in a position to promote legal integration. It does this by developing jurisprudence on the meaning of enigmas such as the term building blocs and clarifying the relationship between the AfCFTA and the RECs through its interpretation of these provisions while performing its role in dispute resolution.⁹² The DSM has been designed to anticipate and provide solutions to resolve the conflict of laws and conflict of norms.⁹³ Thus, by acting as a bulwark to the spaghetti bowl effect, it promotes REI.

⁸⁹ Article 5(a), *Agreement Establishing the AfCFTA*.

⁹⁰ Nyajeka K. 'Overcoming the Challenges Facing the Implementation of the African Continental Free Trade Area: A Legal Perspective', 21-22.

⁹¹ Article 4, *AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes*.

⁹² Akinkugbe O, 'What the African Continental Free Trade Area Agreement Protocol on Dispute Settlement Says About the Culture of African States to Dispute Resolution'.

⁹³ Riesenfeld, S.A. "Legal Systems of REI" *The American Journal of Comparative Law*, 1974, p. 420; Oppong R, ' *Legal Aspects of Economic Integration in Africa*', 31.

2.4. Conclusion

As stated by Taylor Cherie, the best dispute settlement mechanism is that which ‘*contributes most to the achievement of the agreement’s objective*’.⁹⁴ The resolution of trade disputes is necessary in ensuring certainty on the legality of a state’s trade measures. This lawfulness is not only necessary for the state parties, but also the private actors within the states.⁹⁵ Erasmus also posits, that they ‘*clarify what constitutes acceptable State Party behaviour, when exceptions will be permissible, and how trade remedies and safeguards are to be administered*’.⁹⁶ All of which are important in ensuring that the objectives of the agreement are fulfilled. For economic integration to be achieved, an agreement must be clear and predictable.⁹⁷ In this case, this is achieved by the DSM. As such, the DSM must be functioning and effective to ensure that the AfCFTA achieves its goal of REI and promoting a singular unified market.



⁹⁴ Taylor C, ‘Dispute Resolution as a Catalyst for Economic Integrations and an Agent for Deeping Integration: NAFTA and MERCOSUR?’, 851.

⁹⁵ Erasmus G, ‘But How do They Settle Their Trade Disputes if They Never Litigate Against Each Other?’ tralacBlog, 10 February 2022 < <https://www.tralac.org/blog/article/15502-but-how-do-they-settle-their-trade-disputes-if-they-never-litigate-against-each-other.html> > on 23 January 2024.

⁹⁶ *ibid.*

⁹⁷ *ibid.*

CHAPTER 3: THE DIFFERENT ROADS TAKEN BY THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY TRIBUNAL AND THE EAST AFRICAN COURT OF JUSTICE: IS LIMITING JURISDICTION TO STATE PARTIES ONLY SUITABLE FOR EFFECTIVE REI?

3.1. Introduction

It has been noted that African countries tend to litigate against each other in cases of border disputes.⁹⁸ However, they shy away from this method of dispute resolution, in trade disputes.⁹⁹ Erasmus hypothesizes that African Governments tend to shy away from litigating against each other due to a perceived notion that the state's trade measures are an area through which it exercises its sovereignty, thus, declaring a trade-dispute against another state, is regarded as offensive action.¹⁰⁰

This chapter will look into the practices of the SADC and EAC dispute settlement bodies to determine whether including claims raised by non-state actors in the jurisdiction of these organs would aid in ensuring that state parties make use of the existing trade dispute settlement mechanisms. The EAC and SADC have been recognized as one of the largest economic blocs in Africa.¹⁰¹ They are also recognized as RECs in the AfCFTA Agreement. As such, it is important to study their dispute settlement mechanisms in order to understand the best course of action for the AfCFTA DSM. In this chapter, I aim to look at the dispute settlement mechanisms of both economic blocs, compare the factors that led to the prevailing situation in both RECs. This study is important because the best practices of the RECs are binding on the AU and, in extension, the AfCFTA. This is expounded in the following section.

3.1.1. The Best Practices in the Recs and the AfCFTA

The 1980 Lagos Plan of Action for the Development of Africa, and the Abuja Treaty, both recommended the creation of RECs as a basis for REI, with the goal of ensuring REI and

⁹⁸ *ibid.*

⁹⁹ *ibid.*

¹⁰⁰ *ibid.*

¹⁰¹ Mshomba R, 'REI in Africa' in Mshomba R (eds) *Economic Integration in Africa: the East African Community in a Comparative Perspective*, 1, Cambridge University Press, Cambridge, 2017,23.

progressing to continental integration.¹⁰² As such, it is not a surprise that the AfCFTA Agreement established that the RECs' best practices are binding on the African Union. Given that the AfCFTA is an initiative of the AU, it is, by extension, bound by these best practices.

The term best practices has not been interpreted by any dispute settlement body. However, the AU has referred to it in various contexts. It seemingly means building on the '*successes, experiences, and best practices*' of, in this case, the RECs.¹⁰³ In its 2019 report, the AU noted that '*some best practices are worth emulating, with a view to fostering REI and cooperation*'.¹⁰⁴ The report provided examples of the RECs and the best practices recommended. For example, the use of variable geometry in the context of the ECOWAS monetary union has been promoted as a best practice. No example was given in the context of dispute settlement. Even then, given the context provided, the view of promoting best practices is fostering REI and cooperation. Therefore, in the context of dispute settlement, best practice would mean practices that enable the DSM to ensure compliance with the provisions of the respective treaties, with the view of promoting continental integration. In this case, the proposed best practice is giving legal and natural persons standing in the DSM. An analysis of the enabling framework of the EACJ and the SADC tribunal are essential to prove this.

3.2. The Case of the Southern African Development Community Tribunal

The SADC tribunal was established in 2005 as a subregional court, in Windhoek, Namibia.¹⁰⁵ This took place five years after the Summit had approved the Protocol for the Tribunal. Its mandate was to interpret and apply the provisions of the establishing treaty, the Declaration and Treaty of the Southern African Development Community, so as to adjudicate disputes between states, and between legal or natural persons and states.¹⁰⁶ In order to ensure the hierarchy of dispute resolution, no legal or natural person could bring an action to the tribunal unless they had exhausted all natural remedies in the national level, or could not proceed in the domestic

¹⁰²The African Union, Regional Economic Communities < <https://au.int/en/organs/recs> > on 12 February 2024.

¹⁰³ African Union, Agenda 2063; Background Note < https://au.int/sites/default/files/documents/33126-doc-01_background_note.pdf > on 12 February 2024.

¹⁰⁴ African Union, *2019 African REI Report: Towards and Integrated Prosperous and Peaceful Africa, Voices for the RECs*, 2019, xviii.

¹⁰⁵ Nathan L, The Disbanding of the SADC Tribunal: A Cautionary Tale, 35 *The Johns Hopkins University Press* 4, 2013, 873.

¹⁰⁶ Articles 14 & 15, Protocol on the Tribunal and Rules Thereof, SADC, 2000.

forum.¹⁰⁷ The tribunal was effective from 2005 until it was faced with a series of cases raised against the Zimbabwean Government in the years 2007 to 2010, which caused a shift in the jurisdiction of the tribunal.¹⁰⁸ These cases began with the case of *Mike Campbell (Pvt) Ltd v Republic of Zimbabwe*.¹⁰⁹ This case was the catalyst that led to the shift of the jurisdiction of the SADC tribunal from including legal and natural persons, to excluding these parties from accessing the tribunal. It is important to understand what led to this change, so as to understand the effects of the shift in question.

3.2.1. The Tribunal vs. Zimbabwe in the Case of *Mike Campbell (Pvt) Ltd v Republic of Zimbabwe*¹¹⁰

3.2.1.1. Background of the Case

This case was preceded by the ongoing land struggle between the people of Zimbabwe and the Zimbabwean white farmers. In the year 2000, Zimbabwean war veterans issued a crusade against white farmers, in which they forcefully occupied their land and farms.¹¹¹ The government seemingly supported these invasions. This is because, it issued a constitutional amendment which supported a program of compulsory land expropriation. Constitutional amendment No. 17, enabled the government to confiscate agricultural land for resettlement and other purposes.¹¹² In doing this, the government also excluded the judiciary from having jurisdiction to hear and determine cases on these actions. It also perpetrated violence through state-sponsored militia.¹¹³

¹⁰⁷ Article 15, Protocol on the Tribunal and Rules Thereof, SADC, 2000.

¹⁰⁸ Nathan L, The Disbanding of the SADC Tribunal: A Cautionary Tale, 874.

¹⁰⁹ *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe* [2008], SADCT 2/2007.

¹¹⁰ *ibid.*

¹¹¹ Nathan L, The Disbanding of the SADC Tribunal: A Cautionary Tale, 35 *The Johns Hopkins University Press* 4, 2013, 874-876.

¹¹² Constitution of Zimbabwe Amendment Act No. 17, 2005.

¹¹³ International Crisis Group (ICG), Zimbabwe: Time for international Action, 5 Briefing (2001).

3.2.1.2. Case Proceedings

In response, the farmers issued a petition to the SADC Tribunal, on the basis of the government's confiscation of their land. In its ruling, the tribunal determined that the amendment had violated the provisions of the SADC treaty. This is because it infringed on the farmer's right of access to the courts and the right to a fair hearing.¹¹⁴ The tribunal also found that the amendment amounted to indirect discrimination on the basis of race, as it only targeted white farmers. It then ruled that the government was to remunerate the farmers for the expropriated land, and also take steps to ensure that the remaining land was protected from such expropriation and occupation.

Pursuant to this, President Robert Mugabe disregarded the ruling and is reported to have given the following statement:

*'Some farmers went to the SADC Tribunal in Namibia, but that's nonsense, absolute nonsense, no one will follow that ... We have courts here in this country that can determine the rights of people. Our land issues are not subject to the SADC Tribunal.'*¹¹⁵

It is also reported that pursuant to the decision, some of the applicants were beaten and tortured.¹¹⁶ This pushed them to resort to the tribunal more than once seeking a ruling that the government was in contempt of its orders.¹¹⁷ However, the government also disregarded these subsequent decisions, deeming them to be an *'intolerable interference in the country's domestic affairs.'*¹¹⁸

3.2.1.3. The Aftermath of the Case

The Tribunal referred Zimbabwe's inaction to the summit for review, but it declined to act. Additionally, Patrick Chinamasa, the Zimbabwean Minister of Justice, triumphantly lobbied

¹¹⁴ *Mike Campbell (Pvt) Ltd and Others v Republic of Zimbabwe.*

¹¹⁵ Chinaka C 'Mugabe Says Zimbabwe Lands Seizures Will Continue' Mail & Guardian, 28 February 2009 <https://mg.co.za/article/2009-02-28-mugabe-says-zimbabwe-land-seizures-will-continue/> on 11 February 2024.

¹¹⁶ Nathan L, *The Disbanding of the SADC Tribunal: A Cautionary Tale.*, 876.

¹¹⁷ *ibid.*

¹¹⁸ *ibid.*

the members of the summit to support the Zimbabwean Government in its crusade against the tribunal. As such, the summit ruled that the tribunal was to be suspended for six months in 2010, pending a review of its jurisdiction.¹¹⁹ The review was carried out by an independent party, Lorend Bartels from the University of Cambridge.¹²⁰ He affirmed the tribunal's jurisdiction and its decisions against Zimbabwe.¹²¹ Even then, the summit maintained the moratorium on the tribunal, until the Tribunal Protocol had been reviewed and approved by the Heads of State.¹²²

Pursuant to the review, the summit adopted a new protocol in August 2014, which limited the tribunal's jurisdiction to inter-state disputes.¹²³ This effectively barred non-state actors from accessing the tribunal. Today, the tribunal has been reduced to an advisory role.¹²⁴ This is majorly because of its limited jurisdiction, and the fact that states shy away from litigating against each other. As such, no disputes have been referred to it, thus leading to its 'slow death'.¹²⁵ Consequently, the tribunal has failed to fulfill its role of ensuring compliance with the establishing treaty and subsequent protocols. This has, thus, hampered SADC's goal of REI. This is in contrast with the EAC Treaty, which still allows legal and natural persons to refer matters to the EACJ for determination.

3.3. The East African Court of Justice

The Treaty Establishing the East African Community, establishes the East African Court of Justice (EACJ).¹²⁶ According to Article 23(1) of the same treaty, the EACJ has the power to

¹¹⁹ Zvayi C, 'Southern African Development Community Tribunal Suspended', Pan African News Wire, 17 August 2010, <http://panafricannews.blogspot.com/2010/08/south-african-development-community.html> on 11 February 2024.

¹²⁰ KJW, SADC Law Binding: Independent Review Ratifies Land Grab Decision, Zimbabwean, 13 Apr. 2011, <https://www.cfuzim.com/sadc-law-binding/> on 11 February 2024.

¹²¹ KJW, SADC Law Binding: Independent Review Ratifies Land Grab Decision, Zimbabwean, 13 Apr. 2011, <https://www.cfuzim.com/sadc-law-binding/> on 11 February 2024.

¹²² SADC, Communiqué, Extraordinary Summit [of] Heads of State and Government of the Southern Africa Development Community, Windhoek (20 May 2011).

¹²³ Shivamba A, 'The Demise of a Legitimate Southern African Regional Court' Southern Africa Litigation Centre, SALC Policy Brief No. 6 of 2019, 2019, 3 <https://www.southernafricalitigationcentre.org/wp-content/uploads/2019/11/The-Demise-of-a-Legitimate-Southern-African-Regional-Court.pdf> on 11 February 2024.

¹²⁴ Simo R, 'A Future Court without Cases? On the Question of Standing in the AfCFTA Dispute Settlement Mechanism'.

¹²⁵ Simo R, 'A Future Court without Cases? On the Question of Standing in the AfCFTA Dispute Settlement Mechanism'.

¹²⁶ Article 9(1)(e), *Treaty Establishing the East African Community*, 30 November 1999, 2144 UNTS I-37437.

ensure compliance by interpreting and applying the treaty.¹²⁷ Its jurisdiction extends to state parties, non-state parties (i.e. legal and natural persons), the Community and its employees, to lay claims to be heard.¹²⁸ Additionally, the EAC has arbitral¹²⁹ and advisory jurisdiction.¹³⁰ Its rulings are implemented by member states at the national level.¹³¹ In performing its role, it is governed by the principles of the community which are provided for in Articles 6 and 7 of the treaty. These provisions establish fundamental principles which govern the achievement of the objectives of the community.¹³² They include; good governance,¹³³ social justice,¹³⁴ principle of subsidiarity,¹³⁵ and principle of complementarity.¹³⁶

The EACJ is a perfect example of how non-state parties can aid in achieving the goal of the economic community. This is attained through Article 30 of the EAC Treaty. It provides that legal and natural persons can refer matters to the court if there is reason to believe that the Partner States of which they are residents have acted in a manner that violates the treaty.¹³⁷ It should be noted that this study does not propose the EACJ legal framework as a perfect model. Rather, I am specifically relying on Article 30 of the EAC treaty as a proposed model to be used by the AfCFTA DSM.

The EACJ has heard a relatively large number of cases. Most of which have been referred to it by legal and natural persons pursuant to Article 30 of the EAC Treaty. We note that a legal person includes corporate entities,¹³⁸ and law societies.¹³⁹ In the instance of the EACJ, the

¹²⁷ Mbila A and Shikoli E, 'Jurisdictional Overlaps in Trade and Investment Disputes Settlement in the EAC: Reflections on the East African Court of Justice's 'Constrained Jurisdiction'' 2 *African Journal of Commercial Law* 1, 2023, 35.

¹²⁸ Chidede T and Gitinywa L, 'Dispute Settlement in the East African Community (EAC)' tralacBlog, 01 October 2018 <. <https://www.tralac.org/blog/article/13528-dispute-settlement-in-the-east-african-community-eac.html#:~:text=The%20EAC%20Court%20adjudicates%20disputes,%2D21%20of%20EAC%20Treaty>> on 23rd January 2023.

¹²⁹ Article 32, *Treaty Establishing the East African Community*, 30 November 1999, 2144 UNTS I-37437.

¹³⁰ Article 36, *ibid*.

¹³¹ Chidede T and Gitinywa L, 'Dispute Settlement in the East African Community (EAC)'.

¹³² Article 6, *ibid*.

¹³³ Article 6(d), *ibid*.

¹³⁴ Article 6(c), *ibid*.

¹³⁵ Article 7(d), *ibid*.

¹³⁶ Article 7(g), *ibid*.

¹³⁷ Article 30, *ibid*.

¹³⁸ *Independent Medical Unit vs. Attorney General of Kenya & 4 Others*, 2011, Ref. No. 3 of 2010, 6

¹³⁹ *East Africa Law Society & 4 Others v. Attorney General of Kenya & 3 Others*, 2008, Ref. No. 3 of 2007, 7

persons must be a resident of an EAC Partner State.¹⁴⁰ It is also observed that a party need not exhaust local remedies in order to access the court.¹⁴¹ This has enabled non-state actors to access the EACJ. This empowers the institution to fulfill its goal of ensuring compliance,¹⁴² thus enabling it to fulfill its goal of ensuring an effective Customs Union. This is seen, for example, in the case of *Christopher Ayieko & Another v Attorney General of the Republic of Kenya & Another*.¹⁴³

3.3.1. The Importance of Including Legal and Natural Persons as seen in the case of *Christopher Ayieko & Another v Attorney General of the Republic of Kenya & Another*

3.3.1.1. Background to the Case

Prior to this case, Kenya had been in a bilateral agreement with the United States, through the African Opportunity and Growth Act (AGOA) in the year 2000.¹⁴⁴ AGOA scheduled to cease acting in 2025. Leading up to this, the former president of the United States, commenced negotiations with Kenya for a bilateral free trade agreement.¹⁴⁵ These negotiations took place outside of the EAC. There was a lot of discourse on this, leading up to the current case in question. It should be noted that the decision on the case was made after the United States and Kenya had opted to launch the United States – Kenya Strategic Trade and Investment Partnership (STIP) in 14th July 2022, as a temporary replacement. The partnership aims to attract investors, enhance the sustainable growth of the economy, and support African REI.¹⁴⁶

¹⁴⁰ *Manariyo Desire v. Attorney General of Burundi*, 2018, Appeal No.1 of 2017, 34

¹⁴¹ *ibid.*

¹⁴² *East Africa Law Society & 4 Others v. Attorney General of Kenya & 3 Others*, 2008, Ref. No. 3 of 2007.

¹⁴³ *Christopher Ayieko & Another v Attorney General of the Republic of Kenya & Another*.

¹⁴⁴ Khandwala M, ‘The East African Court of Justice delivers a landmark judgement on Kenya’s bilateral negotiation with the United States without involving EAC Partner States’ *tralacBlog*, 26 April 2023 < <https://www.tralac.org/blog/article/15989-the-east-african-court-of-justice-delivers-a-landmark-judgement-on-kenya-s-bilateral-negotiation-with-the-united-states-without-involving-eac-partner-states.html> > on 11 February 12, 2024.

¹⁴⁵ Nauman E, ‘The U.S.-Kenya Free Trade Area (FTA): insights into the bilateral trade relationship and early progress on setting terms for an FTA’ *tralacBlog*, 17 June 2020 < <https://www.tralac.org/publications/article/14663-the-united-states-kenya-free-trade-area-fta-insights-into-the-bilateral-trade-relationship-and-early-progress-on-setting-terms-for-an-fta.html> > on 11 February 2024.

¹⁴⁶ Office of the United States Trade Representative, ‘United States and Kenya to Hold Second Negotiating Round under the Strategic Trade and Investment Partnership’ 3 October 2023 < <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2023/october/united-states-and-kenya-hold-second-negotiating-round-under-strategic-trade-and-investment> > on 20 March 2024.

In order to achieve this, it aims to address matters on agriculture, small enterprises, service regulation, and anti-corruption.¹⁴⁷

3.3.1.2. Case Proceedings

The applicants, two Kenyan advocates, referred the case to the EACJ, claiming that the ongoing negotiations were not in accordance with the EAC Customs Protocol and the Common Market Protocol. The EACJ delved into a number of matters arising in the case, including Kenya's argument of state sovereignty. The government argued that it was within its right as a sovereign nation to initiate agreements with other states as long as the terms of the agreement were complimentary to the EAC treaty. However, the EACJ stated that they were to notify members of the EAC on the proposed agreement and give them an opportunity to have a say on the matter. It further found that by entering into and negotiating an FTA with the United States, Kenya violated its obligation to the EAC, specifically the principles of rule of law, transparency, and cooperation for mutual benefit guaranteed under Articles 6 and 7 of the EAC Treaty. In doing this, it also violated Article 37 of the Common Markets Protocol and Article 37 of the Customs Union Protocol. Thus, the proposed FTA was declared illegal, null and void.

3.3.1.3. Aftermath of the Case

This ruling enabled the EACJ to uphold the core principles of the EAC. It also helped ensure compliance with the provisions of the subsequent protocols. Thus, furthering the overall goal of the EAC, progressive REI. It is noted that although this ruling came too late, it still furthers the goal of the community, given that Kenya, and other Partner States, must follow the requirements of notification of a proposed agreement and allowing members to chime in, as established in this ruling. This could not have been achieved if individuals were barred from accessing the court.

3.4. Conclusion

This chapter shows that states do not typically litigate against each other. According to Erasmus, it is 'unlikely' for governments to bring forward trade related claims to the DSM on behalf of

¹⁴⁷ Reinsch W and Bongongo J, 'The US- Kenya STIP in Light of Other Approaches to Trade with Africa' Centre for Strategic and International Studies, 27 July 2023 < <https://www.csis.org/analysis/us-kenya-stip-light-other-approaches-trade-africa> > on 20 March 2024.

private parties ‘any time soon’.¹⁴⁸ This can lead to inutility of the dispute settlement body. History has shown this through the case of the demise of the SADC tribunal. However, allowing legal and natural persons to access the DSM would enable the AfCFTA to ensure that the provisions of the Agreement are upheld. This is exemplified in the case of the EACJ which has heard landmark cases that have endorsed the integrity of the EAC. These case have been brought to it by private parties. Given this track record, it is beneficial for the AfCFTA DSM to expand its jurisdiction to include claims raised by legal and natural persons so as to ensure that the objectives of the Trade Agreement are achieved.



¹⁴⁸ Erasmus G, ‘But How do They Settle Their Trade Disputes if They Never Litigate Against Each Other?’.

CHAPTER 4: ANALYZING THE AfCFTA TRIBUNAL IN LIGHT OF THE BEST PRACTICES OF THE RECS

4.1. Introduction

This chapter is aimed at analyzing the AfCFTA DSM in light of the findings in Chapters 2 and 3 of this study. Chapter 2 was geared towards understanding the role that the DSM plays in achieving REI, while chapter 3 was aimed at determining whether excluding private parties from accessing the DSM would limit the role it plays in REI. This is in light of the fact that the jurisdiction of the DSM is limited to disputes between State Parties.

Article 20 of the Agreement establishes the AfCFTA DSM, with the jurisdiction to hear and determine inter-state trade disputes. It has been recognized as a major element for ensuring security and predictability in the AfCFTA trading system.¹⁴⁹ This is because it aims to ensure that the rights and obligations of State Parties under the Agreement are observed and protected. It also brings clarity to the meaning of existing provisions of the Agreement.¹⁵⁰ This is achieved by developing jurisprudence on the constituent provisions of the Agreement.¹⁵¹

As per Article 3 of the Dispute Protocol, this jurisdiction is limited to disputes arising between State Parties. Consequently, this excludes disputes between private parties, and between state parties and private parties, from its jurisdiction. This is detrimental to the goal of the AfCFTA of achieving effective REI. This is because the DSM is instrumental in ensuring compliance, as well as ensuring legal integration among the RECs.

As was noted in chapter 2, legal integration is important to ensuring economic integration, as well as preventing the spaghetti bowl effect. This is because the DSM plays an important role in interpreting the provisions of the Agreement. In interpreting these provisions, it determines the meaning of complex terms such as 'building blocs', which then creates an understanding of enigmas such as the relationship between RECs and the AfCFTA. Additionally, as noted in chapter 3, the current practice in the EAC and the SADC show that excluding claims raised by

¹⁴⁹ Article 4, *Protocol on Rules and Procedures on the Settlement of Disputes*.

¹⁵⁰ Article 4, *Protocol on Rules and Procedures on the Settlement of Disputes*.

¹⁵¹ Akinkugbe O, 'What the African Continental Free Trade Area Agreement Protocol on Dispute Settlement Says About the Culture of African States to Dispute Resolution' *Afronomics Law*, 19 April 2019 <<https://www.afonomicslaw.org/2019/04/09/what-the-african-continental-free-trade-agreement-protocol-on-dispute-settlement-says-about-the-culture-of-african-states-to-dispute-resolution>> on 12 October 2023.

legal and natural persons from the jurisdiction of the DSM would reduce it to inutility. This is because States rarely litigate against each other in trade related disputes. As such, private parties work to fill this gap by bringing matters to the DSM. Through these claims, the DSM can fulfill its interpretive role, thus contributing to REI. Both chapter findings are expounded below and put in the context of the AfCFTA DSM.

4.2. Role of the DSM in Achieving REI

In chapter 2, it was established that dispute settlement mechanisms are essential for economic integration to be achieved.¹⁵² This is because these institutions ensure that parties are compliant with the treaty. They also aid in achieving legal integration.

With regard to ensuring compliance, the DSM is the guardian of the Agreement and its subsequent protocols. This is because, it adjudicates on disputes arising from the Agreement,¹⁵³ and ensures that State Parties are compliant. It is necessary for State Parties to comply with their obligations, so as to ensure that the AfCFTA achieves its objectives.

With regard to achieving legal integration, the DSM plays a special role in overcoming the spaghetti bowl effect. This is a complication that arises from overlapping membership of states in various RECs.¹⁵⁴ It has also been argued that the spaghetti bowl effect is a major contributor to the problem of poor implementation of regional preferential agreements in Africa.¹⁵⁵ This is because different African RECs have different goals of integration, which could result in opposing obligations. Thus, in order to comply with one treaty, a party will have to violate its obligations in another treaty. For instance, in providing its own external tariff for non-State Parties as provided in the AfCFTA, a State that is also party to the EAC would be in violation of its CET obligation in this customs union. As such, it will be difficult to achieve REI.

However, the DSM aids in understanding the relationship between the AfCFTA and the various RECs. This is because it has been accorded the important role of clarifying the provisions of

¹⁵² Taylor, C. “Dispute Resolution as a Catalyst for Economic Integrations and an Agent for Deepening Integration: NAFTA and MERCOSUR?”, 850.

¹⁵³ Article 4, *AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes*.

¹⁵⁴ Magwape, M. “The AfCFTA and Trade Facilitation: Rearranging Continental Economic Integration” (2018) *Legal Issues of Economic Integration*, p.356.

¹⁵⁵ Yang Y and Gupta S, “Regional Trade Agreements in Africa: Past Performance and the Way Forward”.

the Agreement.¹⁵⁶ Thus, it can clarify the scope of provisions that aid in promoting legal integration, such as the principles established in Article 5 of the Agreement. Consequently, by establishing the meaning of enigmas such as the term building blocs, it establishes a common understanding of the relationship between the RECs and the AfCFTA. In doing this, the DSM minimizes the impact of the spaghetti bowl effect, thus, aiding in achieving economic integration.

In light of this, it is noted that the AfCFTA DSM is an important part of REI. This is because it aids in ensuring that members comply with the provisions of the Agreement. Additionally, in fulfilling its interpretive role, it achieves its objective of furthering regional legal integration. In doing this, it contributes to effective REI.

However, this can only be achieved if claims are brought to the DSM. This is unlikely, given that the AfCFTA excludes legal and natural persons from accessing it. This is detrimental to the functioning of the DSM, as seen from the practices of the EACJ and the SADC tribunal.



4.3. Best Practices as Seen from the RECs Dispute Settlement Mechanisms

At the Regional level, the African Regional Courts adjudicate on disputes arising from their respective Agreements and Treaties.¹⁵⁷ A number of regional judicial bodies, for example, the East African Court of Justice (EACJ),¹⁵⁸ COMESA Court of Justice,¹⁵⁹ and ECOWAS Court of Justice,¹⁶⁰ were initially established to primarily adjudicate on disputes arising from the establishing treaties. They have the jurisdiction to not only adjudicate on disputes instituted between State Parties, but also cases involving private parties (legal and natural persons).¹⁶¹ This broadens the courts' jurisdiction, by allowing non-state actors access to these courts.¹⁶²

¹⁵⁶ Article 4, *AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes*.

¹⁵⁷ International Justice Resource Centre, *Courts and Tribunals of Regional Economic Communities* - <<https://ijrcenter.org/regional-communities/>> on 12 October 2023.

¹⁵⁸ Article 30, *Treaty for the Establishment of the East African Community*, 30 November 1999.

¹⁵⁹ Article 26, *Treaty Establishing the Common Market for the Eastern and Southern Africa*, 5 November 1993.

¹⁶⁰ Article 4, *Supplementary Protocol Amending The Preamble And Articles 1, 2, 9 And 30 Of Protocol A/P.1/7/91 Relating To The Community Court Of Justice And Article 4 Paragraph 1* (19 January 2005) A/Sp.1/01/05.

¹⁶¹ International Justice Resource Centre, *Courts and Tribunals of Regional Economic Communities*'.

¹⁶² Tsighe M, 'Can the Dipute Settlement Mechanism of the Crown Jewel of the African Continental free Trade Area?' *AfronomicsLaw* 8 April 2019 <<https://www.afonomicslaw.org/2019/04/08/can-the-dispute-settlement-mechanism-be-a-crown-jewel-of-the-african-continental-free-trade-area/>> on 12 October 2023.

It has been noted that the regional courts have never recorded any case in which both of the parties of the case are states (i.e. states instituting proceedings against each other).¹⁶³ Rather, cases heard in these regional courts are usually instituted by private parties against the member state.¹⁶⁴ This is because, African governments, seemingly, strongly prefer informal dispute settlement mechanisms, specifically dialogue and negotiations, over litigation (*African Solutions to African problems*).¹⁶⁵ These courts have been able to retain function by allowing non-state actors access to them. If their jurisdiction were to be limited to disputes between states, the courts would not function.

In Chapter 3, this study analyzed the state of the EACJ and the SADC tribunal. The basis of this analysis was that the EACJ allows individuals to access the court, while the SADC tribunal's jurisdiction is limited to the adjudication of disputes between state parties only. This distinction was crucial given that the EACJ has been recorded having numerous claims brought to it, while the SADC tribunal has not recorded any claims. This is because, in the case of the EACJ, Article 30 of the treaty allows legal and natural persons to refer claims to the court for determination. Additionally, most of the cases brought forward to it have been instituted by legal or natural persons. Due to this difference, the respective dispute settlement bodies have faced different fates. The SADC tribunal has been described as facing a slow demise, given that no cases have been referred to it after its jurisdiction was amended to exclude private parties. In contrast, the EACJ's jurisdiction, which includes references from legal and natural persons, has enabled the EAC to achieve its goals, thus furthering REI. A good example of this is in the case of *Christopher Ayieko & Another v Attorney General of the Republic of Kenya & Another*, which enabled the EAC to uphold the community's objectives and principles which are established in Articles 6 and 7 of the Treaty.

Based on this, it is clear that for the AfCFTA to achieve its goal of creating a single continental market, the DSM needs to be functional and effective. This can only be possible, if it has claims

¹⁶³ Simo R, 'A Future Court without Cases? On the Question of Standing in the AfCFTA Dispute Settlement Mechanism' AfonomicsLaw 19 August 2019 < <https://www.afonomicslaw.org/2019/08/19/a-future-court-without-cases-on-the-question-of-standing-in-the-afcfta-dispute-settlement-mechanism> > on 4 November 2023.

¹⁶⁴ Tsighe M, 'Can the Dipute Settlement Mechanism of the Crown Jewel of the African Continental free Trade Area?'

¹⁶⁵ Simo R, 'Tunisia/Morocco Scuffle at the WTO: A missed Opportunity to Establish a Record of Regional Interstate Dispute or a Chance to Contribute to Shaping WTO Jurisprudence'

referred to it. Practices in the RECs show that in most instances, legal and natural persons are the parties which refer a dispute to a dispute settlement body. As such, for the AfCFTA to fulfill its role of REI in Africa, its jurisdiction should not only be limited to inter-state disputes, but should also include claims raised by private parties.

One may argue that, given that the RECs are building blocs of the AfCFTA, the fact that the Regional Courts allow individuals standing would sufficiently address the concern raised in this study. However, this is simply not the case, for a number of reasons.

Firstly, the RECs exist separately from the AfCFTA. Historically, the RECs have developed separately and have different roles and structures.¹⁶⁶ The Regional Courts are limited to adjudicate on disputes arising from the violation of a provision of their respective establishing treaties. Thus, there is an increased risk of conflicting jurisprudence.¹⁶⁷ This will lead to increased fragmentation in the African Continent.¹⁶⁸ Thus, being in contradiction with the AfCFTA's goal of effective Regional Economic Integration (hereinafter REI). Additionally, jurisprudence in Regional Courts cannot be applied in the AfCFTA DSM. This is because, the DSM's jurisdiction does not extend to matters arising from the provisions of the RECs' treaties. Thirdly, the jurisprudence developed will not be compatible with the subject matter of the DSM, as established by the Agreement and the Dispute Protocol, which is adjudication of trade disputes. Although RECs allow individuals access, the issues commonly¹⁶⁹ addressed are those related to human rights. This is because, although the Regional Courts were formed with the intention of addressing matters arising from trade disputes, they have expanded their jurisdiction to include the adjudication of human rights violations. If it is left to the RECs, the AfCFTA would fail to fulfill its goal of continental trade integration, which is furthered by litigation of trade disputes (also known as economic integration disputes).¹⁷⁰ The DSM has an

¹⁶⁶ 'Regional Economic Communities (RECs)' The African Union < <https://au.int/en/organs/reccs> > on 18 November 2023.

¹⁶⁷ Ajibo C, 'Regional Economic Communities as the Building Blocs of African Continental Free Trade Area Agreement: Challenges and Way Forward' 4 February 2019 < <https://www.afronomicslaw.org/2019/02/04/regional-economic-communities-as-the-building-blocs-of-african-continental-free-trade-area-agreement-challenges-and-way-forward> > on 18 November 2023.

¹⁶⁸ Ajibo C, 'Regional Economic Communities as the Building Blocs of African Continental Free Trade Area Agreement: Challenges and Way Forward'.

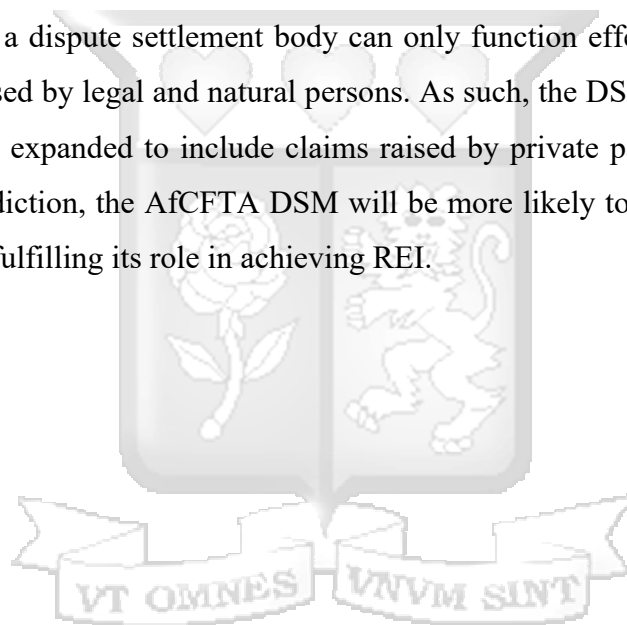
¹⁶⁹ There are some exceptions, for example the EACJ has addressed a few disputes including the case of *British American (U) Tobacco Limited v Attorney General of Uganda*, First Instance Division, Reference No. 7 of 2017.

¹⁷⁰ Akinkugbe O, 'What the African Continental Free Trade Area Protocol on Dispute Settlement Says About the Culture of African States to Dispute Resolution'.

opportunity to address trade disputes, a role the RECs have failed to fulfill. Although these claims can be expounded individually, I will end this discussion here, as it is not the aim of this study.

4.4. Conclusion

The findings in Chapter 2 and 3 show that the AfCFTA DSM plays an important role in achieving REI. This is because, in fulfilling its role of dispute settlement, it ensures compliance and clarifies the provisions of the Agreement. This helps further the objectives of the AfCFTA. However, this is only possible if claims are referred to it. At the moment, the AfCFTA DSM only has jurisdiction to hear and determine matters referred to it by state parties. This may be detrimental to the DSM. This is because, a study of the practices of the EACJ and the SADC tribunal, show that a dispute settlement body can only function effectively, if its jurisdiction includes claims raised by legal and natural persons. As such, the DSM can only fulfill its role, if its jurisdiction is expanded to include claims raised by private parties. This is because, in expanding its jurisdiction, the AfCFTA DSM will be more likely to have disputes referred to it, thus effectively fulfilling its role in achieving REI.



CHAPTER 5: CONCLUSION

5.1. Introduction

This study is aimed at looking at the AfCFTA DSM and the role it plays in REI. Article 20 of the Agreement allows only state parties to refer matters to the DSM. This is detrimental to the DSM and the overall goal of the AfCFTA, which is REI. This is in light of the fact that African States do not litigate against each other. In order to prove this, the study analyzed the general role the DSM plays in REI, as well as the best practices of the EACJ and the SADC Tribunal to determine whether limiting the DSM's jurisdiction to exclude non-state actors would hamper the DSM and REI, generally.

5.2. Conclusion

The study found that the DSM is instrumental in ensuring regional legal integration, which is instrumental in achieving REI. It is also instrumental in ensuring that parties comply with their obligations, thus furthering REI. Given the important role the DSM plays in REI, it needs to be able to hear cases to properly perform its role. This is only possible if matters are referred to it. However, African States rarely refer trade disputes to the adjudicative body. The best practices among the RECs' regional courts, specifically the EACJ and the SADC Tribunal, have shown that regional trade agreements that only allow State Parties to refer a dispute to the enforcement mechanism, have witnessed a scarcity of cases, and have been said to be facing a '*slow death*'. The EACJ has witnessed a vibrancy of cases due to the fact that its jurisdiction includes legal and natural persons. These findings show that if its jurisdiction is left as is, the DSM could face a fate of inutility, thus, hampering REI.

In light of this, the study, therefore, proposes that the DSM's jurisdiction should be expanded to include claims raised by legal and natural persons.

5.2. Recommendation

This study proposes an amendment of Article 20 of the AfCFTA Agreement and Article 3 of the Dispute Protocol to include disputes raised by legal and natural persons. It is noted that this recommendation could be difficult to achieve, given the complex procedural requirements. However, it is necessary for this to be done, so that the AfCFTA can achieve its goal of establishing a unified market between African countries. Additionally, the Agreement has

envisioned such a circumstance and has provided an amendment procedure. It is established in Article 29 of the Agreement, which provides that any State Party can submit proposals for amendment of the Agreement to the depository.¹⁷¹ This process includes a time period of 60 days in which other State Parties can comment on the proposal.¹⁷² The proposal reaches its final level at the Assembly, which can choose whether or not to adopt the amendment.¹⁷³ As per Article 14, this decision is on the basis of consensus.¹⁷⁴ Upon adoption, it will come into force after it has received its 22nd ratification. This is pursuant to Article 23 of the Agreement.¹⁷⁵ In passing this amendment, the assembly will bring the goal of the AfCFTA into fruition, thus, realizing the objectives of the treaty of establishing an effective free trade area.



¹⁷¹ Article 29, *Agreement Establishing the AfCFTA*.

¹⁷² Article 29(3), *Agreement Establishing the AfCFTA*.

¹⁷³ Article 29(6), *Agreement Establishing the AfCFTA*.

¹⁷⁴ Article 14, *Agreement Establishing the AfCFTA*.

¹⁷⁵ Article 23, *Agreement Establishing the AfCFTA*.

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