Hogan Lovells

Report on the African Continental Free Trade Agreement 2019

Implications for the continent

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Finally a solid base for Intra-African trade?

Member States of the African Union (AU) have a combined population of over 1.2 billion people and gross domestic product of more than US$ 3.4 trillion[1] – yet the continent accounts for less than 3% of world trade.[2] Within this, intra-African trade accounts for only 15% of the continent's total trade.[3] The African Continental Free Trade Area (AfCFTA) is an ambitious project to unite this group of countries, individuals and economies under a single market with freedom of movement of goods, services, capital and people.

The AfCFTA was officially launched at the 12th Extraordinary Summit of the AU on 7 July 2019. While a number of legal instruments and institutions have now progressed to the implementation phase, other key aspects of the treaty are still in development. This includes the negotiation of new provisions on investment, which will be of significant interest to both African and third party investors.

This report provides a comprehensive overview of the AfCFTA to date, explores potential benefits for companies, and considers opportunities – as well as challenges – on the horizon. It covers:

1. **An overview of the AfCFTA**, including the background to the treaty and the key changes it will bring about.
2. **The benefits for companies** across the themes of substantive protections, market access and dispute resolution, considering both trade and foreign direct investment.
3. **Conclusions** on the treaty so far and a view on what lies ahead.
4. **An introduction to our global team**, which advises across a broad range of practice areas on legal issues affecting business, trade and investment in the region.

1. Tralac, "African Continental Free Trade Area (AfCFTA) Legal Texts and Policy Documents" at <https://www.tralac.org/resources/by-region/cfta.html>
2. Afreximbank, "African Trade Report 2018", p. 15 <https://s3-eu-west-1.amazonaws.com/demo2.opus.ee/afrexim African-Trade-Report-2018.pdf>
3. Ibid.

Overview of the AfCFTA

Background to the treaty

The origins of the AfCFTA can be traced back to the 1980 Lagos Plan prepared by the Organisation of African Unity, which included plans for the formation of an African Common Market. This organisation was ultimately replaced by the African Union in 2002, whose third founding objective is to "*accelerate the political and socio-economic integration of the continent*". At the 2012 African Union Summit, Heads of State adopted a Decision on the Establishment of a Continental Free Trade Area by the indicative date of 2017, and negotiations were launched in June 2015.[4]

On 21 March 2018, 44 African Heads of State and Government of the 55 African Union Member States signed the consolidated AfCFTA text (the AfCFTA Agreement), including the AfCFTA Establishment Agreement and protocols on goods, trade, services and dispute resolution. A further 10 states have since signed the AfCFTA Agreement, bringing the total number of signatories to 54 – with only Eritrea remaining as at the date of publication. The AfCFTA came into effect on 30 May 2019 following its ratification by Sierra Leone and the Sahrawi Republic on 29 April 2019, which brought the number of ratifying states to 22.[5] Its official launch on 7 July 2019 signalled the beginning of the implementation phase, bringing into effect the Rules of Origin; the online negotiating forum; the monitoring and elimination of non-tariff barriers; a digital payments system; and the African Trade Observatory.

4. UNCTAD, "African Continental Free Trade Area: Policy and Negotiation Options for Trade in Goods", p. 1 at <https://unctad.org/en/PublicationsLibrary/webditc2016d7_en.pdf>
5. Tralac, "African Continental Free Trade Area (AfCFTA) Legal Texts and Policy Documents" at <https://www.tralac.org/resources/by-region/cfta.html>

What will change with the AfCFTA: new trade, investment and competition policy protocols

The AfCFTA Agreement is the first Free Trade Agreement (FTA) or international investment agreement covering the whole of the African continent. The impact of a single unified framework for trade and investment will be significant in a region with multiple existing regimes which divide African regions into blocs, and allow for highly differential terms of trade and investment on a bilateral basis between countries. Understanding the significance of the changes therefore requires an appreciation of the pre-existing state of affairs in African trade and investment agreements, as well as the new rules and institutions.

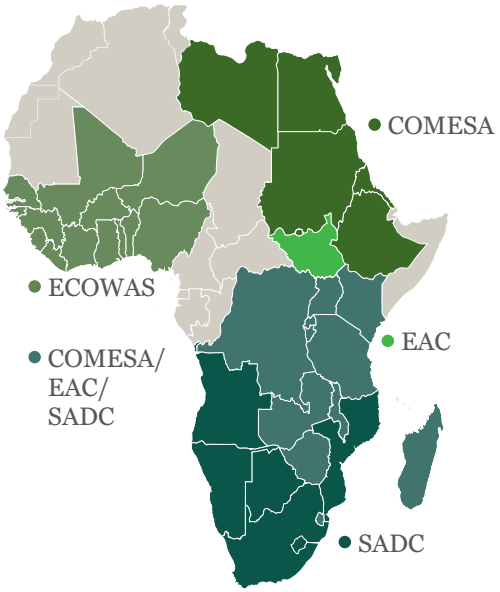
(i) The pre-existing framework for trade and investment

The AfCFTA Agreement seeks to harmonise trade across Africa against a backdrop of several existing regional FTAs, each providing for different rules and standards within segmented groups of African nations. Key regional FTAs currently in place include:

- the Treaty Establishing the Southern African Development Community (SADC);
- the Treaty for the Establishment of the East African Community (EAC);
- the Common Market for Eastern and Southern Africa (COMESA) Treaty; and
- the Economic Community of West African States (ECOWAS) Treaty.

The existing picture is further complicated by a huge number of Bilateral Investment Treaties (BITs) between states, both intra-African and with third party states. Regional agreements have also spurned treaties with third party blocs, for example between the Southern African Development Community and European Union. In parallel, investment protection in Africa occurs through a multi-layered and varied patchwork of legal provisions across the continent – made up of the investment protocols of treaties, supplemented by national laws and the Pan-African Investment Code (PAIC). The PAIC is a non-mandatory code, still in draft form, aimed at setting out guidelines for intra-African investment rules.

While economic integration via bilateral and regional agreements is in many ways a sign of progress, observers have raised concerns regarding the fragmentation of the continent's trading system into exclusive blocs, especially in the context of relatively low intra-regional trade. For this reason, the AfCFTA agreement is the next logical step in the continent's journey to economic integration.



Regional Economic Communities before AfCFTA

AfCFTA Members

(ii) The new rules and institutions of the AfCFTA

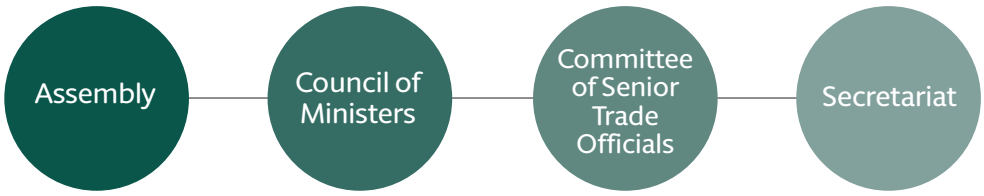
Once fully implemented, the AfCFTA will constitute a single market covering both trade and investment, liberalising both of these aspects across Africa. The AfCFTA Agreement aims to align policy, reduce costs, promote integration and realize sustainable and inclusive development across Africa. The legal texts are organised as follows:

A. The AfCFTA Establishment Agreement

This is the overarching treaty text which lays down the vision for a liberalised market for goods and services across the African continent. It also sets out the institutional arrangements for managing the AfCFTA, providing a framework for overall functioning of the free trade area.

The Establishment Agreement creates a strong institutional framework for the implementation, administration, facilitation, monitoring and evaluation of the full AfCFTA Agreement, including in respect of the detailed protocols which set out the substantive rules on trade and investment. This framework comprises (1) an Assembly as the highest decision-making body,[6] (2) a Council of Ministers to ensure the effective implementation and enforcement of the AfCFTA,[7] (3) a Committee of Senior Trade Officials to implement the decisions of the Council of Ministers,[8] and (4) a Secretariat (hosted by Ghana).[9] Having a strong institutional framework aims to ensure the effective functioning of the Agreement and that trade issues are dealt with in an efficient manner.

The Establishment Agreement Framework



Decision making in the AfCFTA on substantive issues will be made by consensus.[10] Generally, consensus decision-making is considered an effective way for all Member States to have a say in the administering and evolution of the AfCFTA. This would also ensure that trade and investment issues of interest to smaller or less powerful states would be put forward and addressed in the context of multilateral talks among African states. For producers, traders and investors in less powerful economies this means that issues affecting them may be put in the negotiating agenda more easily, which aims toincrease the effectiveness of the Agreement.

Importantly, the Agreement reaffirms the WTO obligations on non-discrimination and market access both for goods[11] and services.[12] As a result, the AfCFTA should not undermine existing commitments and protections under the WTO framework. By contrast, the AfCFTA would extend WTO principles and protections to those AfCFTA Members that are not yet WTO Members,[13] thus virtually binding all African Union Members to the WTO disciplines. This in turn entails that there will be no differential treatment in the trade among the AfCFTA members and all importers and exporters will be able to rely on the same preferential rules.

6. Article 10 AfCFTA.
7. Article 11 AfCFTA.
8. Article 12 AfCFTA.
9. Article 13 AfCFTA.
10. Article 14 AfCFTA; see also Articles 5(k) and 10(2).
11. See AfCFTA, Article 5 on national treatment; Article 7 on import duties; Article 9 on general elimination of quantitative restrictions; Article 17 on anti-dumping and countervailing measures; Article 18 on global safeguard measures.
12. See Protocol on Trade in Services, Article 4 on most-favoured-nation treatment.
13. As of April 2019, the following African Union Members are not WTO Members: Algeria, Comoros, Equatorial Guinea, Eritrea, Ethiopia, Libya, Sahrawi Arab Democratic Republic, Sao Tome and Principle, Somalia, South Sudan and Sudan.

B. The trade protocols

The substantive trade rules are dealt with in the protocols to the Establishment Agreement.

- The Protocol on Trade in Goods sets out the general obligations and includes detailed rules in nine Annexes, as well as national schedules of tariff concessions. Overall, it aims at the elimination of tariff and non-tariff barriers, efficiency of customs procedures, trade facilitation and transit;
- The Protocol on Trade in Services sets out general obligations regarding the services sector, including additional Annexes and national schedules of commitments; and
- The Protocol on Rules and Procedures on the Settlement of Disputes sets out a mechanism for settling trade disputes, and provides for a specialised Dispute Settlement Body (DSB) to act as the forum.

The framework will ultimately also include detailed provisions on Intellectual Property (IP) rights and Competition Policy. These provisions are to be negotiated in a second phase (alongside the Investment Protocol, discussed below), beginning imminently, with an ultimate deadline of June 2020.

C. The investment protocol

The AfCFTA Agreement will also ultimately include an investment protocol, which is likely to include substantive investment protections and a separate set of rules for the resolution of investment disputes. On the basis of the timetable set down by the African Union for Phase II negotiations, we can hope to see a fully developed Investment Protocol by January 2021.

While this timeline leaves more than a year until the investment community is presented with the final instrument, more information on the terms of the Investment Protocol is expected soon, notably by means of a Terms of Reference document originally announced for spring 2019. However, even at this stage the Investment Protocol has been subject to much discussion, and prevailing trends in investment treaties and pre-existing African agreements provide a guide to what we can expect to see emerging from negotiations.

From a Foreign Direct Investment perspective, the AfCFTA Protocol will provide increased legal certainty to investments. Although there is speculation concerning its exact range, the AfCFTA Investment Protocol is likely to be influenced by existing legal texts and guidelines, including existing treaties adopted by African states and regional groups. In particular, the Pan-African Investment Code (PAIC) would be the natural starting point for drafting the Investment Protocol – its influential status was recently confirmed by Mr. Prudence Sebahizi of the African Union, who emphasized that "*PAIC will inspire the drafters and negotiators of the AfCFTA Investment Protocol*".[14] As explored further below, the PAIC is a relatively novel text which provides for significant state protections as well as protections for investors. This indicates that, in line with prevailing international trends, the Investment Protocol may diverge from the traditional investment protections and approaches to dispute resolution contained in earlier treaties.

14 Mr. Prudence Sebahizi is the Chief Technical Advisor & Head of CFTA Unit, Department of Trade and Industry, AU Commission. He made these remarks at the 12th Annual Forum of Developing Country Investment Negotiators – see Meeting Report, "Shifting International Investment Law Towards Sustainable Development", p. 8 at <https://www.iisd.org/sites/default/files/meterial/12th-annual-forum-report-en.pdf>

D. Competition policy protocol

One of the general objectives of the AfCFTA[15] is to enhance the competitiveness of the economies of Member States within the continent and the global market. Indeed, the Protocol on Trade in Services contains provisions relating to monopolies and anti-competitive business practices.[16] For the purposes of achieving this objective more generally, Article 4(c) of the AfCFTA Agreement states that Member States shall cooperate on competition policy (as well as on investment and intellectual property rights).

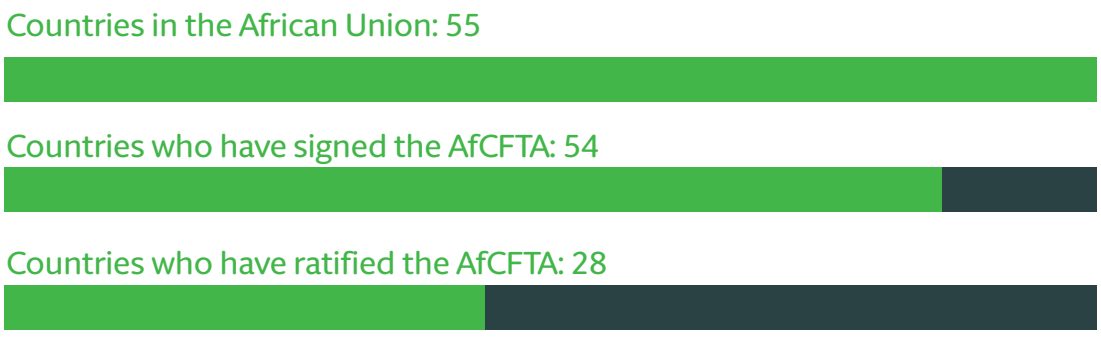
These issues are to be dealt with in Phase II negotiations,[17] through technical working groups, and details of what the Member States will agree on, and the scope of the Competition Policy Protocol, should become apparent once these get underway and issue terms of reference. The intention is to conclude negotiations and submit draft legal texts to the assembly for adoption by January 2021.[18]

Competition policy in Africa is developing rapidly, and Member States will have extensive materials to draw on, since many African countries have introduced or are in the process of introducing competition legislation. The signing of the treaty appears to have galvanised Ghana, for one, to progress its competition legislation. On 23 August 2019, a draft Competition Bill and its accompanying policy were set to be urgently considered by the Ghanaian Cabinet. Ghanaian Minister for Trade and Industry, Alan Kyerematen revealed that this was set to be aligned with the AfCFTA.[19]

Some African countries, such as South Africa and Kenya, have a well-developed competition law and active enforcement, and South Africa, having had competition legislation for some twenty years, also has an extensive body of case law.

In negotiating the Competition Policy Protocol, Member States will also be able to draw on the experience of regional economic communities, such as the Common Market for Eastern and Southern Africa (COMESA), whose Competition Commission has been in operation for approximately six years. While their focus began with merger control, they have since moved to considering anti-competitive practices within and affecting the COMESA Common Investment Area.

The interplay between national and regional bodies, for example between Kenya and COMESA in relation to competition jurisdiction, has caused some confusion and concern in the past. It is to be hoped that the AfCFTA will provide a continental framework for addressing this multi-layered landscape.



15 See Article 3 AfCFTA.

16 See Articles 11 and 12, Protocol on Trade in Services.

17 Article 7 AfCFTA.

18 See para. 13 of the Decision on the African Continental Free Trade Area, 32nd Ordinary Session of the Assembly, 10-11 February 2019 <https://au.int/sites/default/files/decisions/36461-assembly_au_dec_713_-_748_xxxii_e.pdf>

19 GhanaWeb "Competition Law being considered by cabinet – Trade Minister" at <https://www.ghanaweb.com/GhanaHomePage/business/Competition-Law-being-considered-by-cabinet-Trade-Minister-774735>

Benefits for companies

This section considers the likely benefits for companies across three key themes: substantive protections, market access, and dispute resolution and enforcement. Within each theme, we consider the first trade implications of the AfCFTA, and second the likely investment implications of the Investment Protocol.

> According to the Economic Commission for Africa (UNECA), the AfCFTA has the potential to boost intra-African trade by 52.3% by eliminating import duties – and to double this trade if non-tariff barriers are also reduced.[20]

20. Tralac, "African Continental Free Trade Area (AfCFTA) Legal Texts and Policy Documents" at <https://www.tralac.org/resources/by-region/cfta.html>

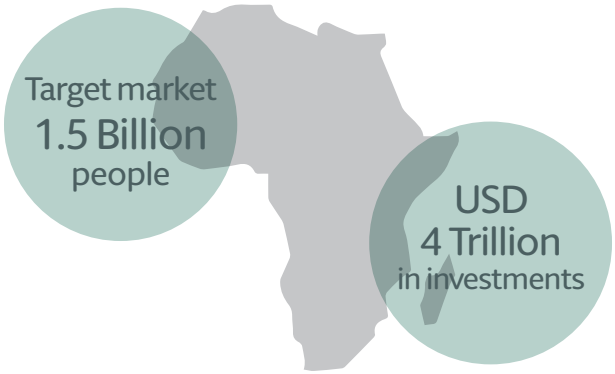
Substantive protections in trade

The AfCFTA is expected to have many benefits for intra-African trade through the fostering of economic development in Africa. The AfCFTA prioritises African trade through the granting of reciprocal preferences among its Members,[21] while at the same time ensuring that any trade preferences granted to third states (on the basis of the most-favoured-nation principle) do not obstruct the objectives of the Agreement.[22]

Although the process for implementing the Establishment Agreement and Trade Protocols is expected to begin soon, negotiations regarding the detailed rules are still underway – so companies will need to wait for certainty on the precise impact of the treaty on their business. However, there are already clear promised benefits in respect of trade in goods and services.

(i) Trade in Goods

With a target market exceeding 1.5 billion people and an estimated USD 4 trillion in investments and consumers spending,[23] the AfCFTA has a huge potential for African businesses through fostering intra-African trade in goods, improving real wages and reducing poverty rates. The Agreement constitutes a real opportunity for African businesses to benefit from integrated regional value chains and economies of scale.



- **Protections against discrimination:** The Protocol on Trade in Goods to the AfCFTA provides for the progressive elimination of tariff and non-tariff barriers[24] and includes substantive protections on non-discrimination (national treatment, most-favoured-nation treatment, special and differential treatment).[25] Preferential treatment for trade in goods among the Member States of the AfCFTA will be administered by common rules of origin on the basis of the agreement, while overall trade in goods will benefit from increased customs cooperation.[26]
- **Preserving higher levels of liberalisation:** At the same time, any higher levels of liberalisation already achieved between or among certain states on the basis of existing regional Free Trade Areas will be maintained in the trading relationships among those states.[27] This will ensure that trade liberalisation will not be diminished, but maintained and further improved.
- **Carve-outs for infant industries:** A notable element of the AfCFTA is the special reference and protection afforded to infant industries having strategic importance at national level. The Agreement allows its Members to impose measures in order to protect such infant industries on a non-discriminatory basis and for a specified period of time, provided they have taken reasonable steps to "overcome difficulties related to such infant industries".[28] This provision is an important step to allow African states to foster development of infant industries without running the risk of being confronted by other Members of the Agreement with discrimination allegations. Specific guidelines for infant industries will be developed as part of the Phase I negotiations of the AfCFTA, which are still in progress.[29] Companies operating in infant industries may therefore benefit from increased opportunities for trade within the African continent as well as from policies supporting and promoting such industries.

21. See Article 18 AfCFTA.
22. See Article 4, Protocol on Trade in Goods to the AfCFTA.
23. See International Trade Centre, A Business Guide to the African Continental Free Trade Area Agreement, September 2018, at p. 10
24. Articles 2, 7 and 10, Protocol on Trade in Goods.
25. Articles 4-6, Protocol on Trade in Goods.
26. Protocol on Trade in Goods, Part IV.
27. Article 8(2), Protocol on Trade in Goods.
28. Article 24, Protocol on Trade in Goods.
29. See Report on the African Continental Free Trade Area (AfCFTA) by H.E. Mahamadou Issoufou, President of the Republic of Niger and Leader on AfCFTA, Assembly/AU/4(XXXII), Assembly of the Union, Thirty-Second Ordinary Session, 10-11 February 2019, Annex 1, p. 1, available at <http://archives.au.int/bitstream/handle/123456789/2756/Assembly%20AU%204%20%28XXXII%29%20_E.pdf?sequence=2&isAllowed=y>

- **Transparency of laws and regulations:** Transparency is one of the main principles underpinning the AfCFTA.[30] Member States to the agreement must make publicly available all laws and regulations relating to trade matters covered by the AfCFTA, with protections accorded to confidential information.[31] Such level of transparency aims at allowing importers and exporters to be aware of any measures that might have an impact on their business and thus allow them to navigate in other African countries in a more assertive and informed manner. At the same time, the confidentiality of the information shared with public authorities would not be prejudiced, but protected.

(ii) Trade in Services

The AfCFTA also aims to progressively liberalise trade in services among its Members, enhance competitiveness of services and foster domestic and foreign investment.[32]

- **Key protections:** Similarly to the provisions governing trade in goods, the Protocol on Trade in Services includes several protections and principles on non-discrimination (including most-favoured-nation treatment, market access, national treatment).[33]
- **Sustainable development:** The AfCFTA sets out provisions concerning special and differential treatment for sectors critical to growth, social and sustainable development,[34] while emphasising the right of its Members to regulate in order to meet national policy objectives.[35] Mutual recognition of Members' standards and criteria for authorisation, licensing or certification of service suppliers is also ensured.[36] Notably, the Agreement ensures that protection is afforded only to service suppliers with a "real and continuous link with the economy of the state Part[ies]" through the inclusion of a denial of benefits clause allowing Parties to refuse protection in cases where such link is not present, or where service suppliers have "negligible or no business operations" in the territory of other State Parties.[37]
- **Transparency commitments:** The Protocol on Trade in Services also sets out the obligation of Members to publish all relevant measures and legislation affecting trade in services and reaffirms the protection of confidential information,[38] while measures of domestic regulation must be administered in a transparent and reasonable manner.[39]

The result of the combination of a single set of substantive rules for intra-African trade paired with transparency provisions will be greater legal certainty for producers and traders trying to navigate the applicable protections offered by the AfCFTA. Further, businesses should expect greater predictability as to the rules and principles governing liberalisation and specific protection to trade in goods and services offered through the AfCFTA. A coherent and strong institutional framework with legal reassurances is thus key to increasing intra-African trade and fostering closer economic and trade relations across Africa.

30. Article 5(e) AfCFTA.
31. Articles 16 and 17 AfCFTA.
32. Article 3, Protocol on Trade in Services.
33. Articles 4, 19 and 20, Protocol on Trade in Services.
34. Article 7, Protocol on Trade in Services.
35. Article 8, Protocol on Trade in Services.
36. Article 10, Protocol on Trade in Services.
37. Article 24, Protocol on Trade in Services.
38. Articles 5-6, Protocol on Trade in Services.
39. Article 9, Protocol on Trade in Services.

Substantive protections in investment: what is to come?

The picture for foreign direct investment is understandably less certain than for trade, as the Investment Protocol is yet to be drafted. However, as mentioned, existing agreements and current trends in investment treaties provide a guide to what we can expect from the Protocol. On this basis, two particular elements of the Protocol's substantive protections will draw particular attention: the scope of the protections offered by the Investment Protocol, and the striking of a balance between state interests and investor rights to protection.

(i) The Scope of the future Investment Protocol

The definitions of "investor" and "investment" in the AfCFTA Investment Protocol will significantly impact the scope of protections offered to investors. The Pan-African Investment Code is broad in its approach, defining an investor as "*any national, company or enterprise of a Member State or a national, company or enterprise from any other country that has invested or has made investments in a Member State*"[40] and an investment as a company or enterprise "*established, acquired or expanded*"[41] by an investor. If similar provisions were adopted into the AfCFTA Investment Protocol, non-African investors in qualifying African assets would also benefit from these protections. There would not be preferential treatment for African investors.

However, we can expect to see certain limits on the investments covered by the AfCFTA Investment Protocol. Recent regional agreements, for example the Morocco-Nigeria BIT, include a condition that the investment contributes to the host state's sustainable development[42]– and this may be replicated in the AfCFTA Investment Protocol. The Southern African Development Community has published a Model Bilateral Investment Treaty that links investment with sustainable development. The definition of investment is less explicitly qualified in the Pan-African Investment Code, but nevertheless provides a carve-out for investments "*in any sector sensitive to [a Member State's] development or which would have an adverse impact on its economy*".[43] Investors should therefore be conscious that sustainability may become a precursor to accessing the AfCFTA's substantive protections for investments – and its dispute resolution mechanisms.

(ii) The balance between investor protections and state interests

There is an increased trend in BITs and investment agreements towards pursuing a new balance between the rights of investors and state interests. This reflects a wider movement among states which reasserts their sovereignty over the regulation of business (including, for example, a strong push from South Africa against certain traditional investor protections in investment treaties).

This balancing trend will most likely impact on the AfCFTA Investment Protocol's substantive protections for third party investors. However, it is not clear exactly where the line will be drawn in the AfCFTA; the challenge is to produce a text that satisfies all. Undoubtedly, the final text will still include explicit rights of investors to protection; but is likely to contain provisions which also protect states' interests.

40. Draft Pan-African Investment Code, December 2016, Article 4(5)
41. Draft Pan-African Investment Code, December 2016, Article 4(4)
42. Reciprocal Investment Promotion and Protection Agreement between the Government of Morocco and the Government of the Federal Republic of Nigeria, 3 December 2016, Article 1
43. Draft Pan-African Investment Code, December 2016, Article 4(4)(v)

A. Investors' right to protection

Fairly classical investor protections such as non-discrimination and fair and equitable treatment provisions can be expected to emerge from the AfCFTA protocol; although they are likely to be subject to limits. Overall this will ensure that investors have a consistent set of rules regarding government treatment of investments across the AfCFTA, which will provide greater legal certainty in respect of the protections afforded to investments.

We expect to see a range of core protections which will apply to investors in a uniform way under the Investment Protocol, for example through protection against expropriation and provisions governing compensation. However, the exact form of certain protections is likely to vary from traditional provisions often seen in BITs. In particular:

- **"Non-discrimination"** provisions are a staple of international investment agreements and typically provide that domestic and foreign investors will be subject to the same treatment; or that foreign investors will receive equal treatment by benefitting from "most-favoured nation" clauses. However, it is possible that the AfCFTA Investment Protocol will incorporate exceptions to non-discrimination provisions, following the balancing trend referenced above. For example, under the Southern African Development Community Protocol, Member States can grant preferential treatment to domestic investments and investors to achieve development objectives.[44] A possibility is also to have preferential treatment for investors from Member States only, placing third-party investors on a different footing.
- **"Fair and equitable treatment"** is a central tenet of international investment law and one of the main standards for the protection of foreign investors. It typically includes protection against discrimination and arbitrary treatment, and protection of the investor's legitimate expectations, rights of due process and transparency. However, certain aspects of these provisions have become particularly controversial, for example their impact on states' abilities to introduce new regulations. A small number of BITs and the Southern African Development Community Protocol have gone as far as to remove the protection of fair and equitable treatment altogether, although this is considered quite radical. Adopting a more moderate approach, the Common Market for Eastern and Southern Africa Investment Agreement retains the standard of fair and equitable treatment,[45] but provides that states at different levels of development will not achieve the same standards at the same time[46] – and makes explicit states' rights to regulate.[47]

The impact on companies will be more uniform across the African continent, but potentially also a more limited scope for bringing claims on the basis of the violation of substantive investment protections. Investors and practitioners may already be familiar with some of these more novel provisions from experience with certain African regional agreements or other new international Free Trade Areas – for example the EU-Canada Comprehensive Economic and Trade Agreement (2016) or the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (2018). However, the precise standards adopted and practical consequences in relation to investment claims under the AfCFTA are still to be determined, and there will undoubtedly be significant debate around the issue in the coming months.

44. South African Development Community Protocol on Finance and Investment, 18 August 2006, Article 17(1)
45. Investment Agreement for the COMESA Common Investment Area, 23 May 2007, Article 14
46. Investment Agreement for the COMESA Common Investment Area, 23 May 2007, Article 14(3)
47. Investment Agreement for the COMESA Common Investment Area, 23 May 2007, Article 20(8)

B. Protection of state interests

State interests in the context of investment protections can be ensured through two different channels: the protection of state regulatory powers, and imposing obligations on investors as a requirement for protection. Elements of both of these approaches are likely to influence the Investment Protocol, and companies should be aware of the possible consequences of any new legal requirements for investment in AfCFTA Member States.

(i) State regulatory powers

State regulatory powers would typically include the explicit possibility for a Government to regulate key economic areas or pursue legitimate public policies such as the promotion of sustainable development, without breaching investment protection.

For example, the right to regulate to meet sustainable and other legitimate policy objectives has been recognised in intra-African BITs (e.g. Morocco – Nigeria) and BITs between African and non-African countries (e.g. Qatar – Rwanda), as well as regional agreements such as the Southern African Development Community Protocol. It would be surprising if the AfCFTA does not include something to this effect, especially due to the focus on sustainable development in the body of the AfCFTA.

However, the exact impact on investors will depend on the precise language used.

State regulatory powers will still be subject to concrete limits, in particular if their use violates the Protocol's substantive protections for investors. For example, while UNCTAD made a range of recommendations in 2016 to reform investment treaties, in particular to give states more room to regulate, it also warned policy makers to be cautious that providing such policy space does not "*inadvertently provide legal cover for investment protectionism or unjustified discrimination*".[48] This reminds states of the need to ensure that any "rebalancing" does not stray into eliminating foundational protections for investors, and is pursued in the context of clear and agreed public policy objectives.

(ii) Obligations on investors

Part of the trend towards balancing state and investor interests also includes imposing obligations on investors, which range from basic requirements such as compliance with national law and anti-corruption and bribery policy, to more advanced criteria such as social impact assessments and corporate governance standards. In line with recent developments in this area, the AfCFTA is likely to include some obligations on investors in respect of their investment activities.

The Economic Community of West African States Supplementary Act is relatively radical in this respect, including obligations for investors to contribute to development objectives, produce impact assessments, comply with hygiene, security, and health rules, and uphold human rights, good corporate governance and CSR.[49] The Pan-African Investment Code (PAIC) also includes wide-ranging investor obligations – and actually goes further by including a mechanism for states to bring counterclaims not only in respect of PAIC violations, but also violations of any other rules or principles of international law.[50] This could include the provisions of another international treaty protecting the environment, human rights and labour standards.

Overall, investors should be conscious of the potential for heightened legal standards under the Investment Protocol and therefore an increased need for robust compliance mechanisms, which may take into account a wide range of obligations under international law.

48. UNCTAD, "World Investment Report 2015: Reforming International Investment Governance", p. 128
49. Supplementary Act A/SA.s/12/08 Adopting Community Rules on Investment and the Modalities for their Implementation with ECOWAS, 19 December 2008, Articles 11, 12, 14, 15, 16
50. Draft Pan-African Investment Code, December 2016, Article 43(1)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Market access in trade

Market access generally refers to the conditions set for the entry of specific goods, services, and capital into target markets. The AfCFTA aims primarily at liberalising trade in goods and services by opening the markets of its Member States to one another. The implementation of the agreement will result in the removal of tariff barriers for trade in goods and also address several non-tariff barriers that are currently obstructing trade among African states. This will allow producers to benefit from economies of scale and access to cheaper raw materials and enable industrial production to be placed in different countries in Africa, thus strengthening value chains.

(i) Trade in goods

The Protocol on Trade in Goods to the AfCFTA provides for the progressive elimination of import duties or charges having equivalent effect on goods originating from another party to the Agreement.[51] The Schedules of concessions of the parties, which are still under negotiation, will be attached as Annex 1 to the Protocol and will form an integral part of the AfCFTA.

In their respective schedules of concessions, parties are required to indicate the products that will be subject to reduced or zero tariffs and those that will keep being subject to import duties. Each Member to the AfCFTA will have the obligation to apply the tariffs indicated in its schedule of commitments to the imports of goods originating in any other Member to the Agreement. The schedules of concessions will need to be in accordance with the tariff modalities that will be adopted by the Member States.

Currently, the parties to the AfCFTA are under negotiations to agree on the modalities of trade to which their schedules of concessions will have to abide. These modalities concern issues such as how much intra-African trade will be subject to tariff liberalisation; whether liberalisation will be determined on the basis of the number of tariff lines subject to zero duties or of the actual trade over an agreed period of time; which version of the Harmonised System for the classification of goods will be used to apply liberalisation; which products will be excluded from trade liberalisation, either temporarily or permanently; as well as whether Members will be able to "concentrate" tariff exclusions on key sectors or products. Currently, negotiations are focused on the following areas:

51. Article 7, Protocol on Trade in Goods.

Tariff phase downs

Parties have agreed that tariff phase-downs will be made in equal instalments upon the entry into force of the Agreement, with a period of 5 years for the initial categories of goods stated for liberalisation, at the rate of 90% or 85%.[52] A group of 7 countries[53] has put forward an approach providing for more flexibility, whereby the agreement should allow for 85% liberalisation and the remaining 15% would be divided into a group of sensitive or excluded categories. By contrast, the other 48 states are in favour of an initial tariff cut of 90% of trade to zero and different approaches on the percentage of sensitive and excluded categories.[54]

Tariff levels

With respect to tariff levels, there is still disagreement as to which version of the Harmonised System (HS) will be applied for the classification of goods. The 2017 HS will be most likely agreed upon, while several Members have expressed their preference towards the HS at the 6-digit level.

Exclusions

In December 2018, the African Union Ministers of Trade (AMOT) agreed that products to be excluded from liberalisation will represent no more than 3% of tariff lines, accounting for no more than 10% of the value of imports from other African countries. The average of a 3-year reference period remains to be determined (2014 to 2016 or 2015 to 2017).[55] Further, sensitive products will be liberalised over 10 years for developing countries and over 13 years for the least developing countries, while a transitional period of 5 years or less may be used for countries requiring so.[56] During this period, tariffs on sensitive products may be maintained, as long as they are eliminated by the end of the phase-down period provided under the agreed modalities.[57] The designation of sensitive products and exclusion lists will be made on the basis of criteria on food security, national security, fiscal revenue, livelihood and industrialisation.[58]

Anti-concentration protections

During the December 2018 meeting, the AMOT also decided on the anti-concentration clause,[59] which would prohibit a Member from concentrating all its exclusions on particular products or sectors. The concern with respect to concentration practices is that a state could concentrate all its exclusions on certain sectors and thus effectively exclude all imports from its African counterparties form liberalisation.

While each of these issues will have a significant impact on the level of ambition and, effectively, actual liberalisation in intra-African trade in goods, the conclusion of the Agreement is the first step towards the elimination of import duties and is expected to contribute significantly to trading goods with reduced costs and time. The submission of the negotiated market access offers is expected by January 2020.[60]

52. See International Trade Centre, A Business guide to the African Continental Free Trade Area Agreement, September 2018, p. 13.
53. Djibouti, Ehtiopia, Madagascar, Malawi, Zambia and Zimbabwe.
54. See International Trade Centre, A Business guide to the African Continental Free Trade Area Agreement, September 2018, pp. 13-14.
55. See tralac, African Union Ministers of Trade conclusively reach consensus on all outstanding issues on AfCFTA modalities for tariff liberalization, 18 December 2018, available at: <https://www.tralac.org/news/article/13824-african-union-ministers-of-trade-conclusively-reach-consensus-on-all-outstanding-issues-on-afcfta-modalities-for-tariff-liberalization.html>
56. Ibid.
57. Ibid.
58. See Report on the African Continental Free Trade Area (AfCFTA) by H.E. Mahamadou Issoufou, President of the Republic of Niger and Leader on AfCFTA, Assembly/AU/4(XXXII), Assembly of the Union, Thirty-Second Ordinary Session, 10-11 February 2019, p. 2, available at: <http://archives.au.int/bitstream/handle/123456789/2756/Assembly%20AU%204%20%28XXXII%29%20_E.pdf?sequence=2&isAllowed=y>
59. See UNECA, African Union Ministers of Trade conclusively reach Consensus on all outstanding issues on AfCFTA modalities for tariff liberalization, 15 December 2018, available at: <https://www.uneca.org/stories/african-union-ministers-trade-conclusively-reach-consensus-all-outstanding-issues-afcfta>
60. Ibid.

(i) Trade in Services

As for trade in goods, market liberalisation in trade in services is determined on the basis of Member States' schedules of specific commitments, which indicate the sector-specific and cross-sectoral obligations that services and service suppliers by other Members will have to comply with. Such obligations may concern limitations or conditions of market access; conditions and qualifications on national treatment; potential additional commitments; and the time frame for the implementation of such additional commitments.

The Protocol on Trade in Services provides for successive rounds of negotiations for liberalisation of trade in services.[61] In practice this means that trade liberalisation for services will not occur at once, but will likely take several years to be completed. This approach was agreed as several Members lack the experience and capacity for comprehensive trade negotiations in all sectors at once.

In July 2018, members identified five high priority sectors to begin negotiations on: business services (including professional services), communication, financial services, tourism and transport services.[62]

Priority sectors:

However, Members that wish to proceed to the liberalisation of more sectors are free to do so.[63] These specific sectors have been selected because most of the recognised regional trade agreements include commitments therein, although the selection of those high priority sectors does not diminish the ambition of the AfCFTA Members to further liberalise more sectors. The parties to the Agreement are expected to submit for adoption their negotiated market access offers by January 2020 for those 5 priority sectors.[64]

In light of the protracted nature of this process, parties have agreed specific guidelines for trade negotiations – during the December 2018 AMOT meeting, the AMOT endorsed the Guidelines for development of Schedules of Specific Commitments and Regulatory Frameworks for Trade in Services.[65] The objective of these guidelines is to set out the procedures for the negotiation of specific commitments, regulatory cooperation frameworks and sectoral disciplines set out in the Protocol on Trade in Services of the AfCFTA.[66]

61. Article 18, Protocol on Trade in Services
62. See Report on the African Continental Free Trade Area (AfCFTA) by H.E. Mahamadou Issoufou, President of the Republic of Niger and Leader on AfCFTA, Assembly/AU/4(XXXII), Assembly of the Union, Thirty-Second Ordinary Session, 10-11 February 2019, Annex 2, p. 2, available at: <http://archives.au.int/bitstream/handle/123456789/2756/Assembly%20AU%204%20%28XXXII%29%20_E.pdf?sequence=2&isAllowed=y>
63. See Report on the African Continental Free Trade Area (AfCFTA) by H.E. Mahamadou Issoufou, President of the Republic of Niger and Leader on AfCFTA, Assembly/AU/4(XXXII), Assembly of the Union, Thirty-Second Ordinary Session, 10-11 February 2019, Annex 2, p. 2, available at: <http://archives.au.int/bitstream/handle/123456789/2756/Assembly%20AU%204%20%28XXXII%29%20_E.pdf?sequence=2&isAllowed=y>
64. See tralac, Updates from the 7th African Ministers of Trade Meeting (12-13 December 2018), 23 January 2019, available at: <https://www.tralac.org/blog/article/13854-updates-from-the-7th-african-ministers-of-trade-meeting-12-13-december-2018.html>
65. See tralac, African Union Ministers of Trade conclusively reach consensus on all outstanding issues on AfCFTA modalities for tariff liberalization, 18 December 2018, available at: <https://www.tralac.org/news/article/13824-african-union-ministers-of-trade-conclusively-reach-consensus-on-all-outstanding-issues-on-afcfta-modalities-for-tariff-liberalization.html>
66. See Report on the African Continental Free Trade Area (AfCFTA) by H.E. Mahamadou Issoufou, President of the Republic of Niger and Leader on AfCFTA, Assembly/AU/4(XXXII), Assembly of the Union, Thirty-Second Ordinary Session, 10-11 February 2019, Annex 2, p. 1, available at: <http://archives.au.int/bitstream/handle/123456789/2756/Assembly%20AU%204%20%28XXXII%29%20_E.pdf?sequence=2&isAllowed=y>
67. Ibid.

The guidelines contain the following key provisions:

- The starting point for these negotiations will be GATS-plus commitments based on reciprocity for those states that are WTO Members. For the non-WTO Members, the starting point will be the autonomous liberalisation at the national level, based on reciprocity.[67]
- The AfCFTA schedule will be formatted in a manner similar to the GATS, including both horizontal and sector-specific commitments and inscribing limitations on market access; limitations on national treatment; and any additional commitments made by the parties.[68]
- There will be no a priori exclusion of any sector or mode of supply and the Members of the Agreement will follow the positive list approach.[69]
- Each state will need to commit to a minimum threshold of sectors and sub-sectors, but such minimum threshold has been referred to the Negotiating Forum and Specialised Technical Offer meeting for further discussion.[70]

Despite the gradual liberalisation of trade in services in the AfCFTA, the Agreement is expected to significantly boost intra-Africa services trade. The current level of intra-African trade in services remain low, with Africa's services exports having decreased by 1% between 2016 and 2017, while global services exports increased by 7% at the same period of time.[71] It is therefore expected that the Agreement will act as a catalysing force for unblocking the potential of African states. Service suppliers in Africa should expect enhanced market access conditions in the future and increased legal certainty with respect to the conditions allowing them to provide their services in other African countries.

68. See Report on the African Continental Free Trade Area (AfCFTA) by H.E. Mahamadou Issoufou, President of the Republic of Niger and Leader on AfCFTA, Assembly/AU/4(XXXII), Assembly of the Union, Thirty-Second Ordinary Session, 10-11 February 2019, Annex 2, p. 6, available at: <http://archives.au.int/bitstream/handle/123456789/2756/Assembly%20AU%204%20%28XXXII%29%20_E.pdf?sequence=2&isAllowed=y>
69. Ibid, p. 3.
70. See tralac, African Union Ministers of Trade conclusively reach consensus on all outstanding issues on AfCFTA modalities for tariff liberalization, 18 December 2018, available at: <https://www.tralac.org/news/article/13824-african-union-ministers-of-trade-conclusively-reach-consensus-on-all-outstanding-issues-on-afcfta-modalities-for-tariff-liberalization.html>
71. The African Continental Free Trade Area: A tralac guide, Trade Law Centre (tralac), February 2019

Market access in investment

Market access is less complex for investment than for trade, as it does not generally entail the highly specialised differentiation between forms of investment that is seen in the regulation of trade for goods and services. Pre-establishment protections, sometimes termed 'investment liberalisation provisions', are the primary aspect of market access in investment treaties. These protections extend substantive investor protections (such as national treatment clauses) to the pre-establishment phase of an investment. This prevents a host state from requiring government approval, imposing performance requirements or placing sector caps on foreign direct investment in a way which differs from the treatment of third state or domestic investors. Pre-establishment protections tend to come with restrictions, such as a schedule excluding certain industries – but their inclusion in Bilateral Investment Treaties (BITs) and regional agreements is still controversial, and there are significant variations in the approach taken in existing agreements, particularly in emerging markets.

Protections

NAFTA provides the archetypal example of pre-establishment protections, explicitly mandating the extension of national treatment to the "establishment" of investments and defining "investor" as including a party that "seeks to make" an investment.[72] This approach has been followed in some agreements involving African parties. The Common Market for Eastern and Southern Africa Investment Agreement adopts the same language with respect to national treatment but uses a more limited definition of investor, thereby extending other protections such as fair and equitable treatment only to those 'making' an investment.[73] The Rwanda – US BIT (2008) goes further in adopting the NAFTA approach with a definition of investor including a party that 'attempts to make' an investment.[74]

Exclusions

However, in its commentary to the Southern African Development Community (SADC) Model BIT, the SADC recommends against the inclusion of pre-establishment protections, noting that they can entail "a significant loss of control over one's economy".[75] Various African states have recently resisted the inclusion of these rights in BITs and added an "admittance clause" stating that investors be only subject to domestic law when seeking access to markets (for example Nigeria – Morocco (2016) [76] and Rwanda – UAE (2017)[77]. The Pan-African Investment Code has gone further by also explicitly excluding the pre-establishment phase from the definitions of investment and investor[78].

Pre-establishment obligations

Beyond pre-establishment protections for investors, the Nigeria-Morocco BIT[79] and several other intra-African agreements also provide for pre-establishment obligations on investors, in particular the completion of social and environmental impact assessments. This links back to the recent focus on balancing state and investor benefits.

Given the Southern African Development Community (SADC) recommendations and robust approach of the Pan-African Investment Code, it is possible that the AfCFTA Investment Code will exclude pre-establishment protections altogether, and may include pre-establishment obligations such as impact assessment. A more conservative approach would include some protections, but add limits – for example by adding a specific schedule of limited pre-establishment commitments (as recommended in the SADC Model BIT[80]), or by bringing investors in scope only once they have taken a concrete action to make an investment (see for example the TPP Investment Agreement[81]).

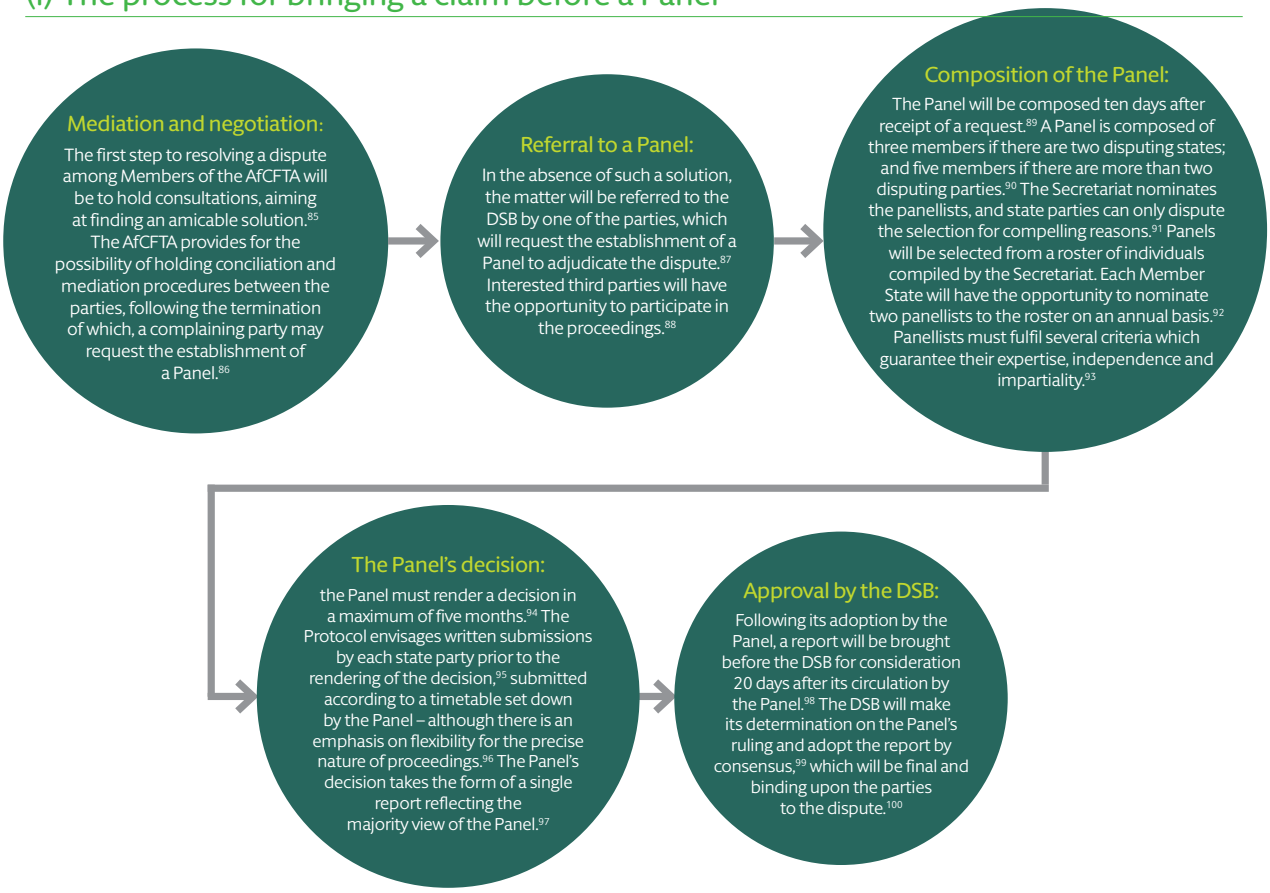
72. North American Free Trade Agreement, 1 January 1994, Article 1139
73. Investment Agreement for the COMESA Common Investment Area, 23 May 2007, Article 4(4)
74. Treaty between the Government of the United States of America and the Government of the Republic of Rwanda concerning the Encouragement and Reciprocal Protection of Investment, 19 February 2008, Article 1
75. SADC Model Bilateral Investment Treaty Template with Commentary, July 2012, p. 15
76. Reciprocal Investment Promotion and Protection Agreement between the Government of Morocco and the Government of the Federal Republic of Nigeria, 3 December 2016, Article 3
77. Agreement between the Republic of Rwanda and the United Arab Emirates on the Promotion and Reciprocal Protection of Investments, 1 November 2017, Article 3(1)
78. Draft Pan-African Investment Code, December 2016, Article 4(4)
79. Reciprocal Investment Promotion and Protection Agreement between the Government of Morocco and the Government of the Federal Republic of Nigeria, 3 December 2016, Article 14
80. SADC Model Bilateral Investment Treaty Template with Commentary, July 2012, p.16
81. Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), 8 March 2018, Investment Chapter 9-4, footnote 12

Dispute resolution and enforceability in trade

The AfCFTA provides for a robust dispute settlement mechanism for resolving disputes among its Members (State-to-State) that is structured along the WTO model.[82] This mechanism primarily aims at ensuring security and predictability to the regional trading system, and is provided for in the Protocol on Rules and Procedures on the Settlement of Disputes.[83]

The mechanism comprises a Dispute Settlement Body (DSB), which will administer dispute settlement and will have the authority to establish Dispute Settlement Panels (Panels) and an Appellate Body, adopt Panel and Appellate Body reports, maintain surveillance of implementation of rulings and recommendations of Panels and the Appellate Body, and authorise the suspension of concessions and other obligations under the Agreement.[84]

(i) The process for bringing a claim before a Panel



82. See the Protocol on Rules and Procedures on the Settlement of Disputes.
83. Article 4(1) of the Protocol on Rules and Procedures on the Settlement of Disputes
84. Ibid.
85. Article 6 of the Protocol on Rules and Procedures on the Settlement of Disputes
86. Article 8 of the Protocol on Rules and Procedures on the Settlement of Disputes
87. Article 9 of the Protocol on Rules and Procedures on the Settlement of Disputes
88. Article 13 of the Protocol on Rules and Procedures on the Settlement of Disputes
89. Article 10(8) of the Protocol on Rules and Procedures on the Settlement of Disputes
90. Article 10(9) of the Protocol on Rules and Procedures on the Settlement of Disputes
91. Article 10(6) of the Protocol on Rules and Procedures on the Settlement of Disputes
92. Article 10 of the Protocol on Rules and Procedures on the Settlement of Disputes
93. Ibid.
94. Article 15(4) of the Protocol on Rules and Procedures on the Settlement of Disputes
95. Article 15(3) of the Protocol on Rules and Procedures on the Settlement of Disputes
96. Article 15(1) of the Protocol on Rules and Procedures on the Settlement of Disputes
97. Article 15(9) of the Protocol on Rules and Procedures on the Settlement of Disputes
98. Article 19 of the Protocol on Rules and Procedures on the Settlement of Disputes
99. Article 19(4) of the Protocol on Rules and Procedures on the Settlement of Disputes
100. Articles 6 – 7 of the Protocol on Rules and Procedures on the Settlement of Disputes

(ii) The appeals process

A party to a dispute may notify to the Dispute Settlement Body (DSB) its intention to appeal a Panel report within 60 days from its circulation.[101] An appeal must be lodged with the DSB within 30 days from the date of communication of the decision to appeal by the party concerned.[102]

The Appellate Body is composed of 7 persons, 3 of whom will serve on any one case.[103] Its members will be appointed by the DSB for a term of 4 years.[104] Appellate Body proceedings must not exceed 60 days from the date of formal notification of a party's decision to appeal a Panel's ruling, until the Appellate Body circulates its report.[105] Appeals are limited only to legal issues and the legal interpretations of the Panel,[106] and proceedings must not exceed 90 days.[107]

(iii) Remedies

The remedies available in proceedings under the Dispute Settlement Protocol consist in rectification – i.e., the party that has adopted measures inconsistent with the AfCFTA must bring these measures in conformity with the Agreement, in accordance with the Panel's and/or Appellate Body's recommendations, as adopted by the DSB.[108] The AfCFTA provides for a procedure for the surveillance of the implementation of the DBS's recommendations.

A. Timelines for implementation

The party subject to the remedy must inform the DSB of its intention to implement the DSB's recommendations within 30 days from the adoption of a report by the Panel of the Appellate Body.[109] If a party cannot comply immediately with such recommendations, it will be given a reasonable period of time to comply, which will be (1) proposed by the party concerned and approved by the DSB; or (2) 45 days from the date of adoption of the report and the DSB's recommendations, if approval is not granted; or (3) in the absence of an agreement, determined through binding arbitration within 90 days after the date of adoption of the recommendations and rulings.[110]

B. Consequences of non-compliance

If the recommendations and rulings are not fully implemented within a reasonable period of time, the aggrieved Party will be entitled to compensation and suspension of concessions or other obligations, on a temporary basis.[111] Upon a Party's failure to bring the measure at issue into compliance with the DSB recommendations and rulings, it may enter into negotiations with the other Party with the aim to agree on a mutually acceptable compensation. If no satisfactory compensation is agreed upon within 20 days, the aggrieved Party will be able to request authorisation from the DSB to suspend concessions or other obligations under the AfCFTA to the other Party,[112] which must be equivalent to the level of impairment suffered by the Party concerned.[113]

The matter may be referred to arbitration if the Party concerned objects to the level of concessions proposed by the DSB, which will have to be completed within 60 days from the appointment of the arbitrator.[114]

101. Article 19(4) of the Protocol on Rules and Procedures on the Settlement of Disputes
102. Article 19(6) of the Protocol on Rules and Procedures on the Settlement of Disputes
103. Article 20(2) of the Protocol on Rules and Procedures on the Settlement of Disputes
104. Ibid.
105. Article 21(2) of the Protocol on Rules and Procedures on the Settlement of Disputes
106. Article 21(3) of the Protocol on Rules and Procedures on the Settlement of Disputes
107. Article 22(3) of the Protocol on Rules and Procedures on the Settlement of Disputes
108. Articles 23-24 of the Protocol on Rules and Procedures on the Settlement of Disputes
109. Article 24(2) of the Protocol on Rules and Procedures on the Settlement of Disputes
110. Article 24(3) of the Protocol on Rules and Procedures on the Settlement of Disputes
111. Article 25 of the Protocol on Rules and Procedures on the Settlement of Disputes
112. Article 25(4) of the Protocol on Rules and Procedures on the Settlement of Disputes
113. Article 25(7) of the Protocol on Rules and Procedures on the Settlement of Disputes
114. Article 25(8) of the Protocol on Rules and Procedures on the Settlement of Disputes

Dispute resolution and enforceability in investment

International arbitration mechanisms still play a central role in the settlement of investor-state disputes in Africa, and arbitration is still the go-to in investment agreements (subject to certain notable exceptions, for example the EU-Canada Comprehensive Economic and Trade Agreement).

Against this background, African Bilateral Investment Treaties (BITs) and regional agreements increasingly exclude or recommend against arbitration, or impose restrictions on parties' ability to arbitrate. This approach may impact the AfCFTA Investment Protocol's approach to dispute resolution.

(i) To arbitrate or not to arbitrate

African BITs often provide for investor-state arbitration. As at May 2017, there were 135 International Centre for Settlement of Investment Disputes (ICSID) cases involving an African state, of which 45% were disputes arising out of BITs, and 21% were commenced by an African investor.[115] In this context, both Morocco and South Africa have terminated a number of BITs in recent years, in an attempt to limit future liability in an increasingly active environment for investor-state arbitration.[116] The Southern African Development Community Model BIT now explicitly recommends against providing for investor-state arbitration in BITs.[117]

Some regional African investment agreements still reflect the standard position of permitting dispute resolution via investor-state arbitration (for example the Common Market for Eastern and Southern Africa Investment Agreement). However, recent agreements have tended towards a more restrictive approach – for example, the Economic Community of West African States (ECOWAS) Supplementary Act on Investment provides for recourse only to national mechanisms or arbitration before the ECOWAS Court of Justice[118]. In light of recent actions by South Africa, Tanzania and the Southern African Development Community to prevent recourse to international arbitration, some commentators have gone as far to say that it is unlikely that the AfCFTA will include a mechanism giving investors access to go to international arbitration under conventional international tribunals.

Several recent investment agreements provide a more balanced approach to Investor State Dispute Settlement (ISDS). The Pan-African Investment Code may influence the AfCFTA approach in this respect – it limits arbitration only to African Alternative Dispute Resolution venues under United National Commission on International Trade Law (UNCITRAL) rules.[119] This reflects a movement towards the "Africanisation" of arbitration. The recent Nigeria-Morocco BIT also provides for a "dispute prevention" mechanism, which is relatively novel and a mandatory precursor to arbitration. It involves an assessment by a Joint Committee of any dispute arising under the treaty, and if the Committee fails to resolve the dispute within 6 months, it will go to international arbitration following the exhaustion of local remedies.[120] Depending on the nature of any limits on ISDS in the AfCFTA Investment Protocol, investors will need to be conscious of any new limits or mandatory precursors to initiating arbitration.

> "As at May 2017, there were 135 ICSID cases involving an African state, of which 45% were disputes arising out of BITs, and 21% were commenced by an African investor."

115. ICSID Caseload Statistics, May 2017, at <https://icsid.worldbank.org/en/Documents/resources/ICSID%20Web%20Stats%20Africa%20 (English)%20June%202017.pdf>
116. United Nations Economic Commission for Africa, '*Investment Policies and Bilateral Investment Treaties in Africa*', February 2016, page 26 <https://www.uneca.org/sites/default/files/PublicationFiles/eng_investment_landscaping_study.pdf>
117. SADC Model Bilateral Investment Treaty Template with Commentary, July 2012, Article 29
118. Supplementary Act A/SA.s/12/08 Adopting Community Rules on Investment and the Modalities for their Implementation with ECOWAS, 19 December 2008, Article 33
119. Article 1(d), ibid.
120. Draft Pan-African Investment Code, December 2016, Article 26, 27

(ii) Harmonisation of Investor State Dispute Settlement (ISDS)

A sustainable solution for investment dispute settlement will also require harmonisation between dispute resolution mechanisms adopted in existing intra-African BITs and regional agreements. The African Union will likely be influenced by the recent experience of the European Union, where BITs have been upheld by arbitral tribunals at the same time as being held invalid by the ECJ in the Achmea decision. The impact of Achmea highlights the importance of a clear, up-front approach to harmonisation, although it acts more as a warning than a template for a solution.

Successfully taking the AfCFTA protocol beyond the guideline status of the Pan-African Investment Code will require a robust and clear approach to harmonisation. Article 19 of the AfCFTA indicates that the treaty provisions are intended to override conflicting terms in existing alternatives, although it is not clear whether this approach will extend to the Investment Protocol. The African Union will need to tread carefully, as several Member States have recently taken strong positions on investor-state arbitration.

(iii) Enforceability of awards

The dispute resolution mechanism chosen by AfCFTA for its Investment Protocol has the potential to determine how easily investors can enforce awards rendered under any Investor State Dispute Settlement provisions.

- **The International Centre for Settlement of Investment Disputes (ICSID) Convention:** If the Investment Protocol does allow for traditional international arbitration under ICSID rules, the award will be automatically enforceable against ICSID Convention signatories. Of the 52 states that have signed the AfCFTA, 38 are signatories of the ICSID Convention.[121] The Common Market for Eastern and Southern Africa (COMESA) actually made it a condition of the Investment Agreement that parties accede to the ICSID convention as soon as possible, to maximise the availability of Investor State Dispute Settlement with a strong enforcement mechanism.[122] This may provide a pathway for the AfCFTA Investment Protocol, if it permits ICSID arbitration.
- **The New York Convention:** In the case of arbitral awards not covered by the ICSID Convention, the fallback position for enforcement is the New York Convention (to which 34 AfCFTA signatories have acceded)[123], which provides a more limited mechanism permitting domestic courts to refuse enforcement on certain grounds. However, despite certain limitations in scope, the New York Convention is a robust and very well-established means of enforcement. Other regional enforcement regimes also exist, such as that established by the OHADA Uniform Act on Arbitration.
- **Alternative mechanisms:** Reliance on these existing agreements for enforcement may not be possible in the case of certain forms of Investor State Dispute Settlement which do not involve arbitration in the traditional sense – and the mechanism for the Investment Protocol is, as discussed, currently unknown. The AfCFTA Investor State Dispute Settlement mechanism could, for example, involve a purpose-built institution subject to its own enforceability regime. For example, the COMESA Investment Agreement provides for Investor State Dispute Settlement before the Common Market for Eastern and Southern Africa (COMESA) Court of Justice[124] and also explicitly provides that Member States must adopt domestic rules required to render any final awards enforceable.[125] However, in the absence of an alternative mechanism, such an approach may leave investors dependent on the use of local laws for enforcement.

121. ICSID Database of Member States, at <https://icsid.worldbank.org/en/Pages/about/Database-of-Member-States.aspx>
122. Investment Agreement for the COMESA Common Investment Area, 23 May 2007, Article 6
123. New York Convention List of Signatories, at <http://www.newyorkconvention.org/countries>
124. Investment Agreement for the COMESA Common Investment Area, 23 May 2007, Article 28(1)(b)
125. Ibid., Article 29

- **Execution:** It is also worth noting that any mechanism for enforcement can be subject to constraints on execution, either from within the treaty itself or via domestic law – the Nigeria-Morocco BIT, for example, explicitly carves out a list of protected state assets which may not be subject to execution of enforcement.[126]
- Overall, the area of enforcement is highly contingent on the choice of mechanism for dispute resolution. If a traditional international arbitration approach is followed, then enforcement is likely to be relatively uncontroversial in the context of relatively strong coverage among African Union Member States by well-established international conventions. In this scenario, investors will need to be mindful of the signatory status of the state against which they bring a claim. If, on the other hand, an investment court system is sought, the strength of the enforcement regime will depend significantly on Member States' support for the mechanism and willingness to enshrine its status in domestic law.

126. Reciprocal Investment Promotion and Protection Agreement between the Government of Morocco and the Government of the Federal Republic of Nigeria, 3 December 2016, Article 27(2)(e)

Conclusions and next steps

The AfCFTA is expected to contribute significantly to trade liberalisation both for goods and for services across Africa and thus foster and further develop the economic relations among African states, which will benefit from integrated value chains, cheaper raw materials and economies of scale. While negotiations on the exact concessions by Member States are still ongoing, the Agreement already presents a great opportunity for its Members, as shown through the robust institutional framework and the dispute settlement mechanism. More importantly, the AfCFTA is built on the basis of the WTO Agreements and incorporates the basic rules and principles of the multilateral trading system, thus expanding equivalent protection to those states that are not yet WTO Members. In essence, the AfCFTA is a modern agreement that will provide significant levels of legal certainty to traders, while improving transparency and allowing for a more predictable trading environment in Africa.

At this stage, the investment protection implications of the AfCFTA are unknown – but we can draw a few conclusions regarding the likely approach of negotiators. Following in the footsteps of recent Bilateral Investment Treaties (BITs) and regional agreements, and in light of a prevailing trend towards balancing investor and state obligations, we can expect to see a compromise between encouraging investment by creating a stable legal and economic environment, while also reflecting Member States' concerns regarding the impact of traditional investment protections. This could be reflected in carve-outs to substantive investment protections, obligations on investors, or overt recognition of states' rights to regulate. It is also not yet clear whether we will see Investor State Dispute Settlement in its traditional form of international arbitration, or another institutional setup – perhaps leaning towards African dispute resolution institutions.

Overall, there is still plenty of work to be done. The state parties need to put in place the institutional arrangements envisaged in the AfCFTA Establishment Agreement. In tandem, negotiators still need to agree on key aspects of the AfCFTA, namely the parties' market access offers (i.e., import tariff commitments) and the parties' specific commitments in trade in services. In parallel, the Phase II negotiations covering IP, competition and investment will begin, with the outstanding aspects to be resolved by the target deadline of June 2020. Some have cautioned that the goal is a long term one, which will require patience and a sustained commitment to removing both tariff barriers as well as "invisible" non-tariff barriers. But ultimately, this ambitious program has the potential to create one of the largest free trade areas in the world.

Achieving this goal will undoubtedly require a significant investment from African Union Member States – but if successful, the impact on Africa and the rest of the world will be huge.

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