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Free Trade Regimes and Investor State Disputes: The Intersection Between ICSID and AfCFTA

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3 Introduction

- On 21 March, 2018, the Agreement establishing the African Continental Free Trade Area (AfCFTA Agreement) was signed; came into force on 30 May, 2019 and as at 6 May 2020, 30 countries have ratified it
- Unlike other free trade regimes, the AfCFTA is more of a comprehensive economic partnership as it covers trade in goods, trade in services, investment, intellectual property and competition (Art 6)

4 Introduction

- Although the Protocol on Trade in Goods, Protocol on Trade in Services and the Protocol on the Settlement of Disputes are already in force, the three other Protocols - Investment, Intellectual Property and Competition expected December 2020
- Nigeria has signed the AfCFTA Agreement although we are yet to ratify it, so we are a Third Party and not a State Party
- Arts 3 and 4 of the AfCFTA Agreement provide for the general and specific objectives including creation of a single market, progressive elimination of tariffs and non-tariff barriers to trade in goods and liberalization of trade in services

5 Introduction

- 46 of the 54-Member States of AU are State Parties to the AfCFTA Agreement; they are also Contracting Parties to the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, 1965.
- The Convention established the International Centre for the Settlement of Investment Disputes (ICSID)
- Most International Investment Agreements (IIAs) provide for dispute resolution under the ICSID Convention
- The focus of IIAs is generally investment promotion, protection and facilitation

6 Introduction

- Both the AfCFTA Agreement and ICSID Convention have dispute resolution mechanisms
- In this presentation, my mandate is to interrogate the following:
 - ✓ Trade and Investment Disputes
 - ✓ Any overlap or conflict between the disputes
 - ✓ Dispute resolution mechanisms in AfCFTA and ICSID
 - ✓ Will the focus on State-to-State Disputes in AfCFTA limit the skepticisms towards ICSID
 - ✓ With ICSID Caseload Statistics, will AfCFTA impact on the ICSID Caseloads?
 - ✓ Should African States consider withdrawing from ICSID in favour of AfCFTA Protocol on Dispute Resolution?

7 Free Trade Regimes/Areas

- A Free Trade Area (FTA) is a group of countries who have mutually agreed to limit or eliminate trade barriers, eg import tariffs or quotas.
- FTAs tend to promote free trade and the international division of labor, though the provisions of the agreement and the resulting scope of free trade is subject to politics and international relations.
- FTAs have benefits and costs, and corresponding proponents and opponents
- FTAs tend to increase the volume of international trade among member countries and allow them to increase their specialization in their respective comparative advantages.

8 Free Trade Regimes/Areas

- FTAs can be bilateral or multilateral eg EU-Canada Free Trade Association, EU-Japanese Free Trade Agreement, US-South Korea Free Trade Agreement, North American Free Trade (NAFTA), now United States-Mexico-Canada Agreement (USMCA) and Association of South Eastern Asian Nations
- Free trade is meant to eliminate unfair barriers to global commerce and raise the economy in developed and developing nations alike.
- But free trade can - and has - produced many negative effects, in particular deplorable working conditions, job loss, economic damage to some countries, and environmental damage globally

9 Free Trade Regimes / Areas

- Other than the AfCFTA, Nigeria is a member of the World Trade Organisation (WTO), and Economic Community of West African States (ECOWAS)
- Other Regional Economic Communities (RECs) in Africa include the Common Market for Eastern and Southern Africa (COMESA), the Southern African Development Community (SADC), the Arab Maghreb Union (AMU) and the Community of Sahel-Saharan States (CEN-SAD), the Economic Community of Central African States (ECCAS) and the Economic Community of Great Lakes Countries (ECGLC)

10 Trade and Investment Disputes

- What are the types of disputes covered in the AfCFTA and ICSID?
- At the moment in the absence of a Protocol on Investment, Competition and Intellectual Property, the AfCFTA is concerned with trade in goods and services and not investment
- The Joint Statement Initiative (JSI), launched by a group of WTO Members to develop a Multilateral Framework on Investment Facilitation (MFIF) could substantially alter the field of investment governance as it may impact on IIAs especially MFN, FET and Umbrella Clauses
- The USMCA has a chapter on Investment (Chapter 11 of NAFTA)
- However, WTO has the Trade-Related Aspects of Intellectual Property Rights (TRIPS) which we do not have yet under AfCFTA

|| Trade and Investment Disputes

- The provisions of the AfCFTA Protocol on Trade in Goods applies to trade in goods between the State Parties
- The AfCFTA Protocol on Trade in Services applies to measures by State Parties affecting trade in services.
- Trade in services include supply of service from the territory of one State Party into the territory of any other State Party; in the territory of one State Party to the service consumer of any other State Party; by a service supplier of one State Party through commercial presence in the territory of any other State Party, among others
- It is noteworthy that references are to State Parties and not the traders or producers or investors

12 Trade and Investment Disputes

- Art 20 of the AfCFTA provides that **"A Dispute Settlement Mechanism is hereby established and shall apply to the settlement of disputes arising between State Parties"**
- Art 1 of the Protocol on Dispute Settlement defines a 'dispute' as a disagreement between State Parties regarding the interpretation and/or application of the Agreement in relation to their rights and obligations
- Art 25(1) of the ICSID Convention provides thus:
 - **"The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.**

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13 Trade and Investment Disputes

- Whereas the ICSID Convention in sub-article (2) defines a 'national of another Contracting State', the Convention does not contain the definition of an 'investment'
- This can be found in the various IIAs especially Bilateral Investment Treaties (BITs)
- In Investment Law, the definition of 'investment' is perhaps the most controversial and critical - determines which foreign capital inflows will be covered by the IIA
- There are usually three options - enterprise-based - usually open-ended (Option 1); then asset-based and exhaustive list eg Canada (Option 2); lastly open-ended asset-based test (Option 3).
- Advisable to combine options 2 and 3 with the so-called **Salini Test** -

14Trade and Investment Disputes

- “In order to qualify as an investment under this Agreement, an asset must have the characteristics of an investment, such as the [substantial] commitment of capital or other resources, the expectation of gain or profit, the assumption of risk, and a significance for the Host State's development”
- Option 2 can be expanded to include such assets as intellectual property rights whether or not they are associated with an existing enterprise in the Host State.
- It is usual to exclude goodwill, portfolio investment, market share, rights of trade, claims to money derived solely from commercial contracts of sale of goods or services but can include claims to money or to any performance under contract having economic or financial value

15 Any Overlap or Conflict Between Trade and Investment Disputes

- This depends on many factors - the definition of investment in the IIA and the definition of goods and services in the AfCFTA
- In the Nigeria-Netherlands BIT of 1992, Art 2 used Option 3 to define 'investment' and it is open-ended; comprises of **every kind of asset** and includes intellectual property, rights granted under public law and title to money
- Ultimately whether there is conflict will depend on the Protocols on Investment, Intellectual Property and Competition
- At that point, issues of FET, MFN and Umbrella Clauses may arise

16Dispute Settlement Mechanisms - AfCFTA and ICSID

- The AfCFTA Agreement provides for State-State dispute settlement regime
- The mechanism modelled after the WTO DSU has five pathways -
 - Consultations
 - Good offices, Conciliation and Mediation
 - Establishment of Panel
 - Appellate Body
 - Arbitration

17 Dispute Settlement Mechanisms - AfCFTA and ICSID

- The ICSID regime provides for State-State dispute resolution - Art 64 provides thus:
Any dispute arising between Contracting States concerning the interpretation and application of this Convention which is not settled by negotiation shall be referred to the International Court of Justice by the application of any party to such disputes, unless the States concerned agreed to another method of settlement.
- It also provides for Investor-State Conciliation and Arbitration - Arts 28-35 and 36-55 respectively

18 Dispute Settlement Mechanisms - AfCFTA and ICSID

- The processes start with either a request for conciliation (Art 28) or arbitration (Art 36).
- The two processes are independent unlike the AfCFTA.
- Under ICSID, except otherwise agreed by the parties, neither party to the conciliation proceedings shall be entitled in any other proceeding to invoke or rely on any views expressed or statements or admissions of offers for settlement made by the other party in the proceedings (Art 35)
- According to the provisions of Art 53 of the ICSID Convention, the award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in the Convention; enforced like a final judgement of a court in the state (Art 54) and can be annulled under certain conditions (Art 52)

19 Dispute Settlement Mechanisms - AfCFTA and ICSID

- In the case of the AfCFTA, Art 6 of the Protocol on Dispute Settlement provides that where there is a dispute among State Parties, recourse should be had to consultations in the first instance with a view to finding an amicable resolution of the dispute
- Where this fails, either party can refer the dispute to the Dispute Settlement Board and request for the establishment of a Dispute Settlement Panel; decision of the Panel shall be final and binding
- A Standing Appellate Board shall be established by the DSB to hear appeals from the panels
- State Parties may at any time voluntarily opt for good offices, conciliation or mediation and without prejudice to rights of the State Parties in any other proceedings
- Parties can opt for arbitration in the first instance

20 Criticisms of ICSID Regime - the ISDS

Criticisms of ISDS include:

- Arbitrator - appointment, impartiality and independence - Trebble Hatting
- Potential impairment of the State's rights to regulate in the public interest
- Inability to correct factual and legal errors in awards
- Lack of transparency and issues of legitimacy
- Absence of consistency and coherence in the decisions of ad hoc tribunals
- Frivolous Claims
- Diversity

21 Criticisms of ISDS - Reforms Proposed

- a) No ISDS - omitting ISDS (eg in favour of domestic courts and/or SSDS)
- b) Standing ISDS Tribunal - Replacing the system of *ad hoc* arbitrations and party-appointed arbitrators with a standing court-like tribunal (including an appellate system) consisting of adjudicators with fixed terms - 're-politicising dispute settlement'
- c) Limited ISDS -
 - i. requiring investors to pursue local remedies (for 18 months or more) or to exhaust local remedies before turning to arbitration
 - ii. Limiting treaty provisions subject to ISDS and/or excluding certain policy areas from ISDS
 - iii. Setting a time limit for submitting ISDS claims (limitation period)
- d) Improved ISDS procedure eg enhancing the State role in ISDS - binding joint interpretations, non-disputing party participation, review of draft arbitral award, submission of counterclaims; enhancing the suitability and impartiality of arbitrators, etc

22 Criticisms of ISDS

- Since 1966 that ICSID came into being, membership has been increasing, now stands at 155 Contracting States with Djibouti becoming the 155th State on 9th June, 2020
- Despite the criticisms of ISDS, as at 30 June, 2019, 52 new cases were registered, 59 concluded and 306 administered
- As at 30 June, 2020, 40 new cases registered, 68 concluded and 303 administered

23 Criticisms of ISDS

- In 2019, countries concluded 22 IIAs and at least 34 IIA terminations entered into force of which 22 were unilateral terminations, six by consent, and four replacements
- According to the World Investment Report (2020, p113), states (including Nigeria) are now implementing the four reform proposals in respect of ISDS in their BITs

24 The Intersection Between AfCFTA and ICSID

- ICSID has no provisions on Consultations, and Good Offices, Panels and Appellate Body but provides for Conciliation and Arbitration
- The ICSID has no appellate system except annulment proceedings
- One major difference is that the AfCFTA Agreement provides for State-State disputes only while ICSID provides for both State-State Dispute and Investor-State Dispute
- Whereas the State-State under the AfCFTA Agreement relates to rights and obligations of State Parties under the Agreement, that of ICSID relates to legal disputes arising directly from an investment between States and Nationals of the other Contracting State.

25 The Intersection Between AfCFTA and ICSID

- Is there any intersection eg claims to money - trade or investment?
- There may be but when the remaining Protocols are in force, there may be unintended consequences especially in relation to FET, MFN and Umbrella Clauses but I am sure that investors will prefer ISDS to SSDS
- Are criticisms or skepticisms of ICSID resolved in the AfCFTA regime?
- Again, AfCFTA was not created to address the criticisms but for a different purpose - address disputes arising from the Agreement especially in relation to trade in goods and services between States.

26 The Impact of AfCFTA on ICSID Cases

- How will AfCFTA impact on ICSID Cases?
- The nature of disputes under AfCFTA are trade disputes but that of ICSID are investment disputes - may overlap
- In the Annual Report of ICSID 2020 and Caseloads of Statistics 2020, there are five new cases in Sub-Saharan Africa in 2020 (may now be six cases?)
- The global caseload for Africa in 15%
- What will happen when AfCFTA has a Protocol on Investment?
- Will it provide for State-State or Investor-State or reference to the International Court of Justice or Permanent Court of Arbitration or Regional Arbitral Bodies or African Regional Court as proposed in the Pan African Investment Code (PAIC) with fork-in-the-road provisions?

27 Should African countries withdraw from ICSID in favour of AfCFTA Protocol on Dispute Resolution?

- Can other African States behave like SA and refer disputes to domestic courts?
- What of the criticisms against ISDS?
- ISDS is being reformed?
- SA can do that because its courts are found to be efficient. Can we say that of other African countries?
- We urge African States to adopt the Model in the Nigeria-Morocco BIT and, if possible, provide for exhaustion of local remedies instead of withdrawal of ISDS

28 Concluding Remarks

- Clearly the objectives/focus of a FTA are different from that of a BIT
- Similarly the nature of trade in goods and services is different from that of investment
- One unique feature of an investment is passing the Salini Test - In order to qualify as an investment under this Agreement, an asset must have the characteristics of an investment, such as the [substantial] commitment of capital or other resources, the expectation of gain or profit, the assumption of risk, and a significance for the Host State's development"

29 Concluding Remarks

- Nigeria has 29 BITs, out of this number only 15 are in force
- Out of the 29, only 3 are reform-oriented and provide for rights to regulate in the public interest, etc
- Most of the BITs have a duration of 10 years in the first instance, they have expired and not in force but they have renewal/termination and survival (sunset) clauses.
- As we are ratifying the AfCFTA Agreement, we must review all the BITs to ensure that they do not have unintended consequences

30 Concluding Remarks

- I do not think that the Protocol on Dispute Resolution in the AfCTA will substantially affect ISDS nor will African States withdraw from ISDS
- What I can see is review of BITs to be reform-oriented and give the states the rights to regulate for public interest as in USMCA.
- There may be intersections between the Protocol and ISDS but the full extent will become obvious when we have the Protocols on Investment, Competition and Intellectual Property
- Thank you for your attention.
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