Challenges of international trade and investment in the 21st century

edited by
Zoltan Vig

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Cover: detail from Alexander Stielau: Cosco Yantian discharges on CTT Hamburg (www.flickr.com/photos/astielau)

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Table of contents

Thembi Pearl Madalane*

EU DCFTAs: carrot-and-stick

Abstract: Deep and Comprehensive Free Trade Agreements are described as the EU's new assertive approach in trade matters. They provide a far-reaching and progressive regulatory approximation to EU law in trade-related areas. Largely inspired by the WTO dispute settlement rules, specific features of DCFTA DSMs also include a procedure that obliges the arbitration panel to ask the Court of Justice of the European Union for a binding preliminary ruling when there is a dispute concerning the interpretation and application of EU legislation. The EU established DCFTAs with some Eastern European States in its neighbourhood, with prospects to apply for future EU membership. Notwithstanding the costs of its European neighbours in the east, the EU has pursued similar DCFTAs in North Africa, under its European Neighbourhood Policy. In the context of dispute settlement costs of EU DCFTAs, this paper considers the EUs pursuit of the DCFTAs in North Africa. The problem is that experience in Africa reveals a strong discontent and apathy towards a highly legalised and formal trade dispute system. Ratification of the African Continental Free Trade Area Agreement is argued to add a new dispute settlement system designed to resolve trade disputes in Africa, unlike many of the regional courts in Africa which are modelled on the CJEU. It is not clear how the EU DCFTAs may look to harmonise dispute settlement rules with Africa, either than through a carrot-and-stick approach.

Keywords: DCFTA, WTO DSM, AfCFTA, EU, North Africa

1. Introduction

States have aimed for economic development with the assistance of international instruments such as Free Trade Agreements (FTAs) to achieve this goal. As economies are more integrated and interconnected than ever before, international agreements have been involved to harmonise the

varying legal systems as well. Such a case is with the European Union (EU), in use of international legal agreements with other States, to forge closer (political and economic) ties with the EU. These are the EU Deep and Comprehensive Free Trade Agreements (EU DCFTAs) with partner States in its neighbourhood. These agreements with partner States have required an approximation to the EU's body of law. Its efforts, however, raise questions in context of varying legal systems and perspectives on integration. Difficulties and challenges have been noted of EU DCFTAs with partner States in Eastern Europe, whom the EU considers as with a 'European perspective'.

Despite difficulties with its European neighbours, the EU has pursued similar agreements with its African neighbours to the south. These States may be neighbours of Europe in the south but are however members of the African Union (AU), with a rather more African perspective. It is, after all, said that modern legal systems tend to increasingly use carrots than sticks. Without a disputation that documentary evidence of the idiom's origins has been scattered, it is nonetheless interesting and perhaps relevant to antithesize the idiom with the EU DCFTAs. As, the Carrot and Stick Approach is understood (in English language) as a traditional motivation theory that is based on the principles of reinforcement. Requiring a certain level of harmonisation of laws between the EU and the other partner States to the agreement, EU DCFTAs beg the question on the principles of reinforcement considering the potential differing perspectives of the parties.

Some respond that, in light of "carrot or stick", the best way to move the donkey is to put a carrot in front of it.[1] Others are sure

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that the correct version is rather "carrot and stick". That the best way to move the donkey is to put a carrot in front of it and jab it with a stick from behind as further reinforcement that it will move. In the context of the dispute settlement provisions of EU DCFTAs, this paper considers the EUs pursuit of similar DCFTAs in North Africa, under its European Neighbourhood Policy (ENP). The paper adds to the discourse on EUs pursuit of DCFTAs to Egypt, Tunisia and Morocco, with one such new cooperation arrangement that could involve harmonising regulations. The endeavour leaves wonder how the EU aims to promote harmonisation of rules with these North African States that have rather ratified the African Continental Free Trade Area Agreement (AfCFTA). The AfCFTA aims for a dispute settlement system with an 'African perspective' that contrasts with the rules-based "African Courts of Justice" regime mostly modelled on the Court of Justice of the European Union (CJEU). The consideration of differing perspectives puts to question the path to harmonisation of rules between partner States, whether led by carrots or rely on sticks.

2. EU DCFTAS

A brief background on EU DCFTAs is required, to serve as a basis for the questions that the paper seeks to probe.[2] In first understanding what the EU DCFTAs are, reference will first need to be made to the new generation of FTAs. That is on those agreements that seek to substantially liberalise all trade by addressing trade and investment in a "comprehensive" manner.[3] Subsequently, scholars have described the EU DCFTAs as the

[1] That is, what people say is the proper phrase "carrot on a stick" meaning an incentive - a carrot dangled in front of a donkey.
[2] That is, the context and purpose of the questions on whether EU DCFTAs dangle carrots towards harmonization with EU laws or suspiciously relying on a stick.
[3] That is in reference to a broad coverage of these instruments.

EU's new assertive approach in trade matters, extending on the ambitions of a new generation of FTAs.[4]

2.1. A new generation

Towards economic integration, traditional FTAs have served to coordinate trade policies. A new generation has served towards achieving greater economic integration to go beyond traditional FTAs. This new generation provides for comprehensive chapters on investment including provisions on ISDS.[5] In cognisance that there are broader areas restricting trade and investment beyond the traditional, we have seen this new generation seek to substantially liberalise all trade by addressing trade and investment in a "comprehensive" manner.[6]

The EU's new generation of agreements followed the North American Free Trade Agreement (NAFTA) that was described as "the most comprehensive regional trade agreement" of its time.[7] It had for long been the 'poster child' for comprehensive FTAs. The agreement ushered in a new generation of FTAs,

[4] Delimatsis (2021).

[5] The EUs so-called new generation FTAs negotiated after 2006 is the EUs "second generation" FTAs that are described as comprehensive FTAs that go beyond trade in goods, also covering services and potentially other aspects such as investment related issues. *See:* European Commission (2018a).

[6] The new generation of EU FTAs provide for 'comprehensive' chapters on investment. Although, international trade and investment instruments now refer to the term "comprehensive" in their titles, there seems to be no particular legal definition of the term in the agreements. Seemingly, a general, not necessarily legal understanding of the word 'comprehensive' is followed, in that it is 'including or dealing with all or nearly all elements or aspects of something', or 'covering completely or broadly'. In cognizance that there are broader areas restricting trade and investment beyond the traditional, we have seen new generation trade agreements such as EU FTAs seek to substantially liberalize all trade by addressing trade and investment in a "comprehensive" manner.

[7] *See:* United Nations Economic Commission for Latin America and the Caribbean (1996) 3.

with NAFTA somewhat of a prototype.[8] In many regards, the EU-South Korea FTA was considered historic as the first in the series of EUs new generation FTAs building on the prototype.[9] At the time of signing, it was the second largest FTA after NAFTA.[10] Later, the EU signed a new generation of FTAs with other States, including Canada that had participated in NAFTA in pursuance of regional economic integration.[11] The EU-Canada Comprehensive Economic and Trade Agreement (CETA) marked new milestones.[12] With lessons from NAFTA, this new generation of agreements are identified as overlapping the disciplines of both trade and investment. We see this in recent FTAs that the EU has concluded with partner States.

Overlapping disciplines, these trade agreements provide the same protection to foreign investors as investment agreements, with the main novelty being dispute resolution.[13] One such novelty is an Investment Court System (ICS) proposed to set up

[8] Although a trilateral agreement, it emanated from the initial plan of the US to make separate FTAs with Canada and Mexico with the main goals including the '*lifting the restrictions on trade, fostering the movement of goods and services across the borders*' by addressing other aspects such as investment. *See:* Víg (2019) 145-146. This comprehensive approach to trade is seen in the CETA (2016) and other new generation FTAs that have followed.

[9] Some scholars write that '*it is the most important trade agreement concluded by the European Union (EU) since the conclusion of the Marrakesh Agreement establishing the World Trade Organization (WTO) in 1994*.' *See:* Lasik and Brown (2013).

[10] The EU-South Korea, signed on 15 October 2009 (entered into force 2011) was the EU's first FTA in Asia and South Korea's first with one of the current three largest economies (ahead of the US and China).

[11] The EU-Canada Comprehensive Economic and Trade Agreement (CETA), signed: 30 October 2016.

[12] *Also see:* Víg (2019) 143-144. Víg enlightens that the original CETA was to be more of a traditional FTA which due to public pressure resulted in a more comprehensive agreement that *'surpasses traditional trade questions to deal with a diverse range of topics, such as investment…*'.

[13] *See:* Makarenko and Chernikova (2020).

a permanent body to decide investment disputes, making it unclear whether or not it will conflict with the jurisdiction of the CJEU.[14] The CJEU has jurisdiction in disputes concerning the interpretation and application of EU legislation. Nonetheless, contained in the CETA to replace the Investor-State Dispute Settlement System (ISDS) mechanism, a permanent court system has been the EU's new approach to the protection of investor rights.[15]

2.2. Deep Trade Agreements (DTAs)

A step further, with distinctive components, DCFTAs go beyond the 'new generation' FTAs and represent "a unique type of trade agreements".[16] Understood to be built on the merely "comprehensive" new generation of FTAs, DCFTAs aim to provide a 'far-reaching and progressive regulatory approximation' to the laws of the parties.[17] This refers to the

[14] *See:* Lévesque (2016) 17-18. Horváthy also pointed that the ICS introduced in CETA raised questions of incompatibility with EU law. At the time of writing, he noted that the ongoing procedure of Opinion 1/17 had not profoundly assessed the ISDS mechanism as a specific forum. *See:* Horváthy (2018) 134-136. On April 30, 2019, the court confirmed that CETA's ICS is compatible with EU law but provided that "the autonomy of the EU and its legal order is respected". *See:* Opinion 1/17 pursuant to art. 218(11) TFEU. However, this still may pose practical problems as there is no provision for the ICS to refer a question to the CJEU. Although it is also argued that ICS does not jeopardize the principle of autonomy of EU law and the CJEU's exclusive jurisdiction over the definitive interpretation of EU law. *See:* Szyszczak (2019).

[15] The CETA (2016) chap. 8.

[16] *See:* European Commission (2021a).

[17] To achieve the objective of deepening political association and economic integration between the EU and its associated partners, '*the DCFTAs provide far-reaching and progressive regulatory approximation to EU law in trade-related areas and foresee gradual reciprocal market opening. With these distinctive components they go beyond the 'new generation' FTAs and represent "a unique type of trade agreements*".' *See:* European Commission

"deep" nature of the DCFTAs. Or perhaps to speak of them as Deep Trade Agreements (DTAs) as we address the regulatory approximation of laws.

The aim of DTAs is understood to establish "economic integration" rights as well as include enforcement provisions that limit the discretion of importing States and the behaviour of exporters in these areas.[18] They are deemed as much more than tariff liberalisation agreements but as a meaningful liberalisation of trade[19] by providing a far-reaching and progressive regulatory approximation to EU law in trade-related areas. Accepting that not all trade and investment agreements are necessarily "deep",[20] those agreements that are, seek to codify regulatory alignment through binding commitments and a dispute settlement mechanism. In particular to the Dispute Settlement Mechanisms (DSMs) of the DTAs, they are largely inspired by the rules-based World Trade Organisation Dispute Settlement Understanding (WTO DSU). Going beyond FTAs, they are reported to be prompted by the failure of the World Trade Organisation (WTO) member countries to reach a 'comprehensive' agreement on trade liberalisation that would

(2021a). Also, towards 'predictable and enforceable trade rules'. *See:* the DCFTA (2016).

[18] Mattoo et al (2020) 3, write that DTAs aim at establishing five "economic integration" rights: free (or freer) movement of goods, services, capital, people, and ideas.

[19] In its position paper on the Trade Sustainability Impact Assessment in support of negotiations of DCFTAs, the EC describes DCFTAs as intended to provide for substantial liberalization of trade and investment conditions'. *See:* European Commission (2012).

[20] For instance, Great Britain was considered to be opposed to deepening by accepting market integration but with behind the border issues remaining autonomous. *See:* European Commission, (2012). *Also see:* Stubbs (n.d.). Although, in 2018 it was reported to be headed towards the model of a Deep and Comprehensive Free Trade Agreement (DCFTA) embedded within a broader Association Agreement (AA). *See:* Emerson (2018).

include the ‘behind the border’ issues such as rules on foreign investment and investment protection.[21]

2.3. Extension of the EU Internal Market

Considerably more ambitious than the FTAs with States outside its neighbourhood, the EU has pursued these “deep” DCFTAs with emerging markets within its neighbourhood, to mutually open markets for goods and services based on predictable and enforceable trade rules.[22] Unlike traditional FTAs, EU DCFTAs allow access to the "four freedoms" of the EU Single Market as part of each country's EU Association Agreement (AA).[23] The

[21] Koeth (2014) 25. Prior to the Uruguay Round negotiations spanning from 1986 to 1993, the linkage between trade and investment received little attention in the framework of the General Agreement on Tariffs and Trade (GATTs). The original GATT had reached ‘behind the border’, although the extent of the prohibitions was not clear. The GATT prohibited investment measures that violated the principles of national treatment and the general elimination of quantitative restrictions, obligations which the Agreement on Trade-Related Investment Measures (TRIMs) negotiated during the Uruguay Round intended to clarify. In this sense, there was a call for a widening of GATT and the deepening in the context of behind-the-border disputes by going beyond traditional trade liberalization in talking of the rules and disciplines of the trading system. *See:* Narlikar et al. (2012). For its effectiveness as ‘the foundation of the trading system’, it is believed that the WTO needs to negotiate new rules and adopt reforms. However, WTO members have not reached consensus for a new comprehensive agreement on trade liberalization and rules, which supports the impetus of member states concluding comprehensive’ agreements to include the ‘behind the border’ issues that the WTO has failed to address. *See:* Cimino-Isaacs and Fefer (2021) 3, 37-38.

[22] DCFTA projects have been benchmarked against FTAs that the EU has signed in recent years with emerging markets outside its neighbourhood.

[23] These DCFTAs have been established with Georgia, Moldova, and Ukraine as part of each country's EU Association Agreement, allowing access to the EU Single Market. That is, comprising the 27 member states of the European Union (EU) as well as Iceland, Liechtenstein, and Norway through the Agreement on the European Economic Area, and Switzerland through sectoral treaties.

EU AAs have been the legal framework towards the ENP that aims at bringing Europe and its neighbours closer.[24]

2.3.1. The European Neighbourhood Policy

The ENP was initiated in 2004, as a means of the EU to connect countries to the east and south of the EU Member States' territories in mainland Europe, to the Union.[25] The policy offers these neighbours the opportunity to participate in various EU activities including economic cooperation. But, the one main objective and incentive, reportedly, is the potential extension of the EU Internal Market to neighbouring countries. It is understood that the goal of the Policy is to bring added value to both these neighbours and the EU by going beyond existing cooperation such as going beyond existing bilateral FTAs. The ENP offers support and financial assistance in exchange for the undertaking of reforms in line with European values.

With a clear difference between the States, the EU claims to offer tailor made partnerships through Partnership Priorities, Association Agendas and the likes, focusing on shared interests with each State. Specifically, the interest of this paper is in the DCFTAs that are the economic and trade pillars of the AAs. On a more challenging note, requiring these differing States to fulfil their negotiated commitments by making the necessary legal, regulatory, and administrative changes towards the harmonisation of their laws with the EU's laws. With this in mind, some scholars write that EU DCFTAs are necessary immediately with its members in the east.[26]

2.3.2. Georgia, Moldova and Ukraine

[24] A significant part of the EU AAs is devoted to the elimination of regulatory barriers to trade.
[25] European Neighborhood Policy (2021).
[26] Emerson (2011) 4.

As it is written that our most significant relationships are with those who are geographically closest to us, the EU established DCFTAs with Georgia, Moldova and Ukraine in its neighbourhood and as an "example of the integration of a Non-EEA-Member into the EU Single Market".[27] The European Parliament has also passed a resolution that Georgia, Moldova and Ukraine, as well as any other European country, have a European perspective and can apply for EU membership. Thus, formally recognizing the possibility of a future EU membership of these three States. Notwithstanding, scholars have noted the costs of DCFTAs for these three States, such as the difficulty in the harmonisation of domestic regulations with the EU *acquis* and implementation of EU standards that may not always be beneficial, such as the DCFTA standards on dispute settlement rules. All three EUs DCFTA States are members of the WTO. In their evaluation, separate attention is paid to the dispute settlement.[28] The DCFTAs' DSMs are without prejudice to possible dispute settlement under the WTO but prohibit the pursuit of dispute settlement under both systems at the same time. Specific features include a procedure that obliges the arbitration panel to ask the CJEU for a binding preliminary ruling when there is a dispute concerning the interpretation and application EU legislation.[29]

One may wonder whether the Parties would actually choose to resort to the DCFTAs DSM for settling their trade dispute instead of solving a dispute in already familiar WTO forum. But clearly, the obligation of the arbitration panel to ask the CJEU

[27] This order is also seemingly consistent with the EU stages of integration over the past decades. *See:* Víg (2019) 143 discussion on the EU stages of integration in the past seventy years.
[28] European Commission (2021a).
[29] This procedure aims to ensure a uniform interpretation and application of EU legislation without jeopardizing the exclusive jurisdiction of the CJEU to interpret EU law. *See:* European Commission (2021a) 16-17.

for a binding preliminary ruling,[30] limits the options as disputes usually involve interpretation of the governing documents.[31] So, towards the commitment of the EUs neighbours to harmonise their rules with those of the EU, is there a reward (a carrot)? The approximation of law is a unique obligation of membership in the EU. Although the rationale behind the ENP is to establish privileged relationships in a way that is distinct from EU membership, these neighbours are primarily developing countries that include some who seek to one day become either a Member State of the EU, or more closely integrated with the EU. As the European Parliament has also passed a resolution that European States have a European perspective and can apply for EU membership, it is not far-fetched to imagine the incentive as the possibility of a future EU membership of the East European States.[32]

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[30] When there is a dispute concerning the interpretation and application EU legislation.

[31] The prerogative of the CJEU to decide on the effect of WTO law within the EU is also demonstrated by the *Commission v. Hungary* case. *See eg:* Nagy (2021) 700-706. Nagy notes the contradictions of the CJEU judgement, in using WTO law as a tool of interpretation in a trade dispute that was not at all about trade. Moreover, despite Hungary arguing that the interpretation of WTO law is the exclusive remit of the WTO Dispute Settlement Body (DSB), the CJEU treated the GATS as part of the EU's internal law in spite of previously rejecting WTO law and remaining firm that WTO law has no direct effect. Nagy describes the decision as an expansion of "the EU's 'federal powers.'" Horváthy echoes that in addition to previous practice of the CJEU, the GATS rules applied in the *Commission v. Hungary* case can be considered as a norm which it intends to comply. *See:* Horváthy (2021) 300-325.

[32] Currently, these states benefit from detailed policy advice and EU funding aimed at supporting the DCFTA-related reforms. *See e.g.*, Regulation (EU) No 232/2014 of the European Parliament and of the Council of 11 March 2014 establishing a European Neighborhood Instrument. *Also see e.g.*, European Commission (2015). In June 2022, a resolution was adopted to "*grant EU candidate status to Ukraine and the Republic of Moldova "without dela*y". They should do the same with Georgia "*once its government has delivered*" *on the priorities indicated by the European Commission*." *See:* European Parliament (2022). Jointly with the European Commission, a DCFTA facility for small and medium enterprises (SMEs) was also launched in Moldova,

3. North Africa – EU DCFTAs

In the context of dispute settlement costs of EU DCFTAs, this paper questions the EU's pursuit of similar DCFTAs in North Africa, under its ENP, with one such new cooperation arrangement that could involve harmonising regulations as well. The problem is that experience in Africa reveals a strong discontent and apathy towards a highly legalised and formal trade dispute system. Moreso, possibly a lost incentive to align with European values, the EU makes no mention of the prospect of EU membership of its North African neighbours.

This paper adds to the discourse on EU's pursuit of DCFTAs to Egypt, Tunisia and Morocco. Particularly, in ratification of the African AfCFTA, argued to add a new dispute settlement system to the judicial mechanisms designed to resolve trade disputes in Africa.[33] Scholars are of the view that EU DCFTAs are necessary immediately with its members in the east but only necessary in the medium to long term with its neighbours in the south.[34] Although the negotiations are on hold, the DCFTAs with Egypt, Tunisia, Morocco are still pursued. In considering the merits of this paper, the provisions in AfCFTA may be considered a proxy for these agreements. The AfCFTA may not be a direct confirmation of the North African States' approach with the EU, but serves as an implied indication which the respective North African States have expressed through ratification of the AfCFTA agreement that entered into force on May 30, 2019.

Georgia, and Ukraine to provide financial assistance from the EU budget for 10 years. *See:* European Commission (2018b). As potential EU candidates, these states would also receive funding to support additional reforms. *See:* European Commission (2021b).

[33] Akinkugbe (2020).

[34] Emerson (2011) 4.

3.1. An African perspective

Showing support for the global investment regime, African States became parties to a number of international investment agreements including both Bilateral Investment Treaties (BITs) and the investment chapters of FTAs. However, economic integration in Africa has also long been a discussion.[35] At the continental level, it is the AU that is mandated by its Member States to enhance economic integration, decided in 2008 to initiate the work on a comprehensive investment code for Africa. Containing innovating features, the Pan-African Investment Code (PAIC) is the first comprehensive investment treaty model in Africa, adopted in March 2016.[36] Developing on that, today the consolidation of the African economic integration will hinge upon the AfCFTA as the world's largest free trade agreement since the formation of the WTO.[37] The AfCFTA is more than a traditional FTA and more like a comprehensive agreement.[38] It is a flagship project of the AU with an overall mandate to create a single continental market.[39]

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[35] The *AU* has designated the *regional economic communities* as the building blocks towards achieving an *African* Economic Community. *See:* United Nations (1993). Regional integration in Africa has a long history, from the South African Customs Union (SACU) in 1910 and the East African Community (EAC) in 1919. Regional economic communities have since been formed across the continent from these earlier initiatives. *See:* Hartzenberg (2011). Overall, the AU considers Africa's integration Agenda as enshrined in the Abuja Treaty (1991). *See:* African Union (2022).

[36] *See:* Mbengue and Schacherer (2017).

[37] Mbengue and Schacherer (2017). *Also see:* African Union (2022).

[38] *See:* the AfCFTA (2018), art. 6, "*This Agreement shall cover trade in goods, trade in services, investment, intellectual property rights and competition policy*". *Also see:* Ofodile (2019).

[39] The AfCFTA (2018). In January 2018, the Protocol to the Treaty Relating to the Free Movement of Persons, Right of Residence and Right of Establishment, opened for signature and ratification. *See:* Protocol on Free Movement of Persons, Right of Residence and Right of Establishment.

Through better harmonisation and coordination of trade liberalisation, it will also expand intra-African trade. The agreement, however, supports the African perspective that is despondent of rules-based dispute settlement. Notwithstanding that regional courts regime in Africa ("African Courts of Justice") are mostly modelled on the CJEU. African Governments do not litigate on multilateral nor regional levels, despite its formal court systems and agreements suggesting the contrary.[40] This is also to be considered in light of national, regional and continental policies of African States. Shying away from international arbitration, many African States have expressed discontent with formal dispute settlement systems. Some, such as South Africa have gone to reflect their perspectives in their national policies, such as consent to international arbitration 'subject to the exhaustion of domestic remedies.'[41] Although with consistent general views across the continent, South Africa is the only country in Africa that has openly and formally rejected international investment arbitration.[42] 'On the road to greater Intra-Africa trade', importance has been placed on both ISDS and State-to-State dispute settlement.[43] Increasingly seen as an alternative to ISDS, State-State dispute settlement mechanism has been noted to be gaining popularity in both BITs and FTAs. Accordingly, discontent with the WTO-styled dispute settlement system has also regionally been expressed by the likes of Southern African Development Community (SADC) Member States. In 2014, the SADC Summit adopted a new Protocol limiting the Tribunal's jurisdiction to State-State disputes which South Africa also

[40] Erasmus (2022) 1-2.
[41] Section 15(5), The South African Promotion of Investment Act, 2015.
[42] Section 15(5), The South African Promotion of Investment Act, 2015. *Also see:* Ofodile (2019).
[43] African Union, *Training on the Settlement of Disputes: The African Continental Free Trade Area* (2019).

withdrew its signature from.[44] In August 2016, SADC member States negotiated in line with their decision to remove the ISDS from the amended annex of the Southern African Development Community Finance and Investment Protocol (SADC FIP).[45]

3.2. AfCFTA Dispute Settlement Mechanism

Dispute settlement systems are vital in international economic integration not only settling disputes between the State parties in upholding a rules-based regime but also in developing relevant legal system that will guide the single market economy objective of the trade agreements such as AfCFTA.[46] Following the African trend as discussed, the AfCFTA Dispute Resolution Protocol also stipulates a State-to-State dispute mechanism. The AfCFTA DSM lies against regional and national attitudes towards dispute settlement. In particular, the culture against formal settlement of economic integration disputes and an attitude against ISDS.

Although the responses to ISDS have however been varied, African States have, in the recent years, raised concerns about the traditional ISDS. Prior to AfCFTA, South Africa had,

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[44]The Protocol (2018) art. 33. SADC member states recently amended the Annex 1 to the Protocol Finance and Investment to, inter alia, remove ISDS by international arbitration, and rather require the use of domestic courts and tribunals. *Also see:* SADC (2019).

[45] SADC Investment Protocol (2006), amended Annex 1.

[46] The AfCFTA (2018) the preamble notes "*Having regard to the aspirations of Agenda 2063 for a continental market with the free movement of persons, capital, goods and services, which are crucial for deepening economic integration, and promoting agricultural development, food security, industrialization and structural economic transformation*." Furthermore, The AfCFTA (2018) art. 3(a) stipulates that the general objectives are to "*Create a single market for goods, services, facilitated by movement of persons in order to deepen the economic integration of the African continent and in accordance with the Pan African Vision of "An integrated, prosperous and peaceful Africa" enshrined in Agenda 2063*."

together with other African States from the SADC region, argued for the exclusion of the ISDS from the PAIC. In consideration of criticism, a number of other African States were however in support of ISDS. Thus, granting a middle ground, the ISDS provisions under the PAIC include a number of reform provisions.[47] The PAIC allowing states to exercise discretion in implementing ISDS, has influenced the drafting of subsequent bilateral and regional investment instruments in Africa. The North African states that are pursued by the EU, have rather recently ratified the AfCFTA, argued to add a new dispute settlement system that is designed to resolve trade disputes in Africa. Akin to the United States–Mexico–Canada Agreement (USMCA) also referred to as the "New NAFTA", excluding ISDS between US and Canada,[48] AfCFTA DSM also excludes the private sector as actors. There are no provisions for resolving disputes between states and private parties.[49] Art. 20 of the AfCFTA establishes the DSM that is administered in

[47] Qumba (2021) 18.

[48] The USMCA (2020) replacing the North American Free Trade Agreement (NAFTA), which had been in effect since January 1, 1994. *See:* Villarreal (2021). Canada has not agreed to the ISDS mechanism. Even the US, once the world's leading proponent of ISDS, has largely eliminated ISDS from the "New NAFTA" as the scope of ISDS is reduced considerably. And by July 2023, ISDS will be altogether terminated between the United States and Canada. As Canada has not agreed to ISDS, investors may still raise claims under NAFTA Chapter XI with respect to legacy investments up to three years after NAFTA's termination (*i.e.*, 2020 to 2023).

[49] The AfCFTA (2018) art. 3 (1), the AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes (the Dispute Protocol) states on the Scope of Application that 'This Protocol shall apply to disputes arising between State Parties concerning their rights and obligations under the provisions of the Agreement.'. Another possibility for investors is the AfTFCA Investment Protocol which is still being negotiated under Phase II of AfTFCA. The AfCFTA Negotiations are scheduled in phases which can generally be divided into three phases: Phase I – Trade in Goods and Services, Phase II – Intellectual Property Rights (IPR), Investment and Competition Policy, Phase III – E-commerce. AfCFTA Phase II Negotiations also aim to arrive at harmonization. *See:* Habte (2020) 6.

accordance with a dedicated Protocol, the '*Protocol on Rules and Procedures on the Settlement of Disputes*'.[50] This Protocol on Dispute Settlement has been noted as an important feature of the AfCFTA.[51] The view is that in addition to the AfCFTA Protocol on Rules and Procedures on the Settlement of Disputes, the AfCFTA Investment Protocol that is currently being negotiated can be predicted by the PAIC.[52] This may offer a possible option for investors, offering AfTFCA a middle ground. However, problems with a rules-based system remain, whether with or without a middle ground. Although the dispute settlement mechanism of the AfCFTA aims to provide for a rules-based continental trading regime towards '… predictability to the regional trading system,'[53] it is not consistent in practice.[54] African states have also expressed discontent of WTO-styled DSM.[55] In practice, disputes involving African states have not even gone beyond the consultation phase of the WTO-DSM.[56]

Indeed, many of the regional courts in Africa are still modelled on the CJEU.[57] Considered as the world's largest free trade agreement since the formation of the WTO,[58] AfCFTA is however not the first time that an African trade dispute

[50] The AfCFTA (2018) art. 20; the Dispute Protocol.
[51] Akinkugbe (2020).
[52] The Pan-African Investment Code (2017).
[53] The AfCFTA (2018) art. 4 (1); the Dispute Protocol.
[54] The AfCFTA (2018) art. 4 (1); the Dispute Protocol; Also *see:* Akinkugbe (2020).
[55] Akinkugbe (2020).
[56] Akinkugbe (2019). As it is known, consultation between parties in dispute is obligatory and the first of the multiple phases of the WTO dispute settlement process. It is when the parties cannot find a solution to their dispute that the Dispute Settlement Body receives a request from a complaining party, to establish a panel to hear the dispute. *See:* Víg (2019) 140.
[57] *E.g.*, the EAC, COMESA and ECOWA. *See:* Osiemo (2014).
[58] UNECA (2019).

mechanism has been modelled after the WTO.[59] Yet, there is no history of active litigation among African States over trade issues and no examples of such litigation between the Member States of the RECs, also despite the existence of African Courts of Justice. Even with key WTO improvements by AfCFTA,[60] it is still not clear how a commitment to a judicial settlement of disputes can be explained. Contrary, with the EUs procedure that aims to ensure a uniform interpretation and application of EU legislation without jeopardising the exclusive jurisdiction of the CJEU, it is thus difficult to predict how the EU DCFTAs with North African states look to harmonise dispute settlement rules.

4. Conclusion

The EU new generation FTAs have served towards achieving greater economic integration to go beyond traditional FTAs. Going beyond the 'new generation' FTAs, DCFTAs provide a ‘far-reaching and progressive regulatory approximation’ to the laws of the parties. Requiring a certain level harmonisation of rules between the EU and the other partner states to the agreement, it is an opportunity for Non-EEA-Members to demonstrate a European perspective for the consideration of EU membership in future. This possibility of a future EU membership of its neighbours in the east has been recognised.

[59] The Tripartite Free Trade Area Agreement (signed on10 June 2015 in Egypt) between three regional economic communities in Africa – COMESA, EAC and SADC – preceded the AfCFTA (signed in March 2018, three years after the TFTA). The TFTA is based on the WTO model given that “*the TFTA Parties are WTO Members and that the TFTA will eventually have to be consistent with the WTO norms as a result*.” *See:* Trademark Southern Africa (2018), addressing the drafting of trade agreements in the context of the negotiating process leading to the establishment of the TFTA. *Also see:* Siziba, (2018).

[60] There are differences in terms of procedures, membership, and jurisdiction. *See:* Erasmus (2021) *Also see:* African Business (2020).

However, there is no mention of its Non-EEA-Members in the south, that are on the African continent. Yet the EU has still pursued DCFTAs with its African neighbours, south of Europe.

It is probably safer to say that the EUs neighbours in North Africa do not have that 'European perspective'. The North African states pursued by the EU, have rather expressed alignment with the AU and African perspectives, in ratification of the AfCFTA that is argued to add a new dispute settlement system designed to resolve trade disputes in Africa. The pursuit of EU DCFTAs with its neighbours in Africa thus beg the question on the principles of reinforcement considering the potential differing perspectives of the parties.

With difficulties of harmonisation of rules by states in the east that are viewed to be with a 'European perspective', one can only wonder how the EU looks to motivate its neighbours in North Africa with an 'African perspective'. With DCFTA negotiations on hold with North Africa, we can only hope that the EU has not run out of carrots to motivate its neighbours. Unless it is indeed a scenario of the carrot-and-stick approach. Well, this is the most commonly understood use of the carrot and stick idiom, referring to a policy of offering a combination of reward and punishment to induce cooperation.

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